(30)

No. 05-381
Title: Weyerhaeuser Company, Petitioner
v.
Ross-Simmons Hardwood Lumber Company, Inc.
Docketed: September 26, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-35669, 03-35984)
Decision Date: May 31, 2005
Rehearing Denied: July 8, 2005

**Questions Presented**

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

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|---|---|
| Aug 24 2006 | Brief amicus curiae of United States filed. |
| Aug 24 2006 | Brief amici curiae of Law Professors filed. |
| Aug 24 2006 | Joint appendix filed. (Joint appendix in two volumes). |
| Aug 24 2006 | Brief of petitioner Weyerhaeuser Company filed. |
| Aug 24 2006 | Brief amici curiae of Business Roundtable and National Association of Manufacturers filed. |
| Aug 24 2006 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Aug 24 2006 | Brief amicus curiae of Timberland Owners and Managers filed. |
| Aug 24 2006 | Brief amici curiae of Economists filed. |
| Aug 24 2006 | Brief amici curiae of AT&T Inc., BellSouth Corporation, et al. filed. |
| Aug 24 2006 | Brief amici curiae of Chamber Commerce of the United States of America, et al. filed. |
| Sep 15 2006 | Extension of time within which to file the respondent's brief on the merits to and including October 12, 2006. |
| Sep 29 2006 | SET FOR ARGUMENT ON Tuesday, November 28 2006. |
| Oct 4 2006 | CIRCULATED. |
| Oct 11 2006 | Record received from U.S.C.A. for 9th Circuit. (1 envelope) |
| Oct 12 2006 | Brief amici curiae of Forest Industry Participants filed. (Distributed) |
| Oct 12 2006 | Brief amicus curiae of American Antitrust Institute filed. (Distributed) |
| Oct 12 2006 | Brief of respondent Ross-Simmons Hardwood Lumber Company, Inc. filed. (Distributed) |
| Oct 12 2006 | Brief amici curiae of California, et al. filed. (Distributed) |
| Oct 30 2006 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Nov 28 2006 | Argued. For petitioner: Andrew J. Pincus, Washington, D.C.; and Kannon K. Shanmugam, Assistant to the Solicitor General, Department of Justice (for United States, as amicus curiae.) For respondent: Michael E. Haglund, Portland, Ore. |
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30 **File Date: Sept 23 2005**

**No. 05-381**

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

## RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that Weyerhaeuser Company ("Weyerhaeuser") is a publicly owned company that does not have a parent corporation. No publicly owned company owns 10% or more of its stock. However, based on its Schedule 13G as filed with the Securities and Exchange Commission on February 14, 2005, Capital Research and Management Company is deemed to be the beneficial owner of 13% of Weyerhaeuser's common stock as a result of acting as an investment adviser to various investment companies registered under the Investment Company Act of 1940.

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*FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965) ..... 13, 28

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*United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) ..... 13, 28

*United States* v. *Griffith*, 334 U.S. 100 (1948) ..... 13, 28

*United States* v. *Patten*, 226 U.S. 525 (1913) ..... 28

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**Miscellaneous:**

P. Areeda & H. Hovenkamp, ANTITRUST LAW (2d ed. 2002) ..... 18, 29

T. Barnett, Deputy Assistant Attorney General, Antitrust Division, *Antitrust Enforcement Priorities: A Year in Review* (November 19, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206455.pdf. ..... 22

R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991) ..... 16, 29

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S. Calkins, *Comments on Presentation of Steven C. Salop*, 56 ANTITRUST L.J. 65 (1987) ..... 29

F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986) ..... 7, 24

F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) ..... 21

P. Hammer & W. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949 (2004) ..... 29

J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) ..... 29

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J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and*

**TABLE OF AUTHORITIES -- Continued**

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*Predatory Bidding?*, 72 ANTITRUST L.J. 625 (2005) ..... 18, 29

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F. Miller, *Health Insurance Purchasing Alliances: Monopsony Threat or Procompetitive Rx for Health Sector Ills?*, 79 CORNELL L. REV. 1546 (1994) ..... 29

Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Petitioner, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682) ..... 7

R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005) ..... 12, 27, 29

R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct* (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf ..... 7, 19, 21, 22

R. Posner & F. Easterbrook, ANTITRUST (2d ed. 1982) ..... 29

S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005) ..... 18, 22, 25, 29

Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Anti-trust Enforcement in the Agricultural Marketplace (October 30, 2003), *available at*

**TABLE OF AUTHORITIES -- Continued**

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http://www.usdoj.gov/atr/public/testimony/201430.pdf ..... 12, 15, 16

R. Zerbe, *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717 (2005) ..... 18, 29

Weyerhaeuser Company ("Weyerhaeuser") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 411 F.3d 1030. The order of the court of appeals denying petitioner's rehearing petition (App., *infra*, 48a) is unreported. The order of the district court denying petitioner's motion for judgment as a matter of law (App., *infra*, 28a-46a) is unreported. The order of the district court entering final judgment (App., *infra*, 47a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on May 31, 2005, and a timely petition for rehearing was denied on July 8, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * *."

## STATEMENT

This case involves a claim of predatory *buying*, in which the plaintiff alleges that the defendant violated Section 2 of the Sherman Act by paying too much for raw materials with the goal of forcing competitors out of business by raising their costs. In upholding a judgment for the plaintiff, the Ninth Circuit ruled that liability may be imposed in a predatory buying case if a jury concludes that the defendant purchased more raw materials "than it needed" or paid a higher price for them "than necessary," so as to prevent competitors

from obtaining those materials "at a fair price." The court of appeals refused to apply the standard that this Court has set out to govern predatory *selling* cases, where the plaintiff cannot prevail unless it proves (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). It did so even though this Court's decisions in other antitrust contexts, and settled economic theory, draw no distinction between "buy-side" and "sell-side" claims.

The Ninth Circuit's holding is one of exceptional practical and doctrinal importance. *Brooke Group* rests upon this Court's recognition that "[p]rice is the 'central nervous system of the economy'" (*National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (citation omitted)) and that legal standards that chill ordinary price competition are therefore anathema to the Sherman Act. The Ninth Circuit's standard inevitably will have that precise adverse effect on price competition among buyers.

Businesses cannot know how to comply with a subjective standard that hinges liability on whether a jury believes that prices paid for materials are "necessary" or "fair." As a consequence, the decision below will generate pervasive confusion about what bidding and buying practices are permissible; will encourage baseless litigation; and will *diminish* buy-side competition by any firm that is subject to suit in the Ninth Circuit – which, under the Sherman Act's liberal venue provisions, includes *all* companies doing business nationwide – because firms will expect juries to be unable to distinguish between aggressive bidding and predation. The Ninth Circuit's decision thus will cause economic dislocation on a national scale: its rule potentially subjects *every* procurement decision by *every* business with market power in *any* industry to an antitrust challenge, undermining the ability of businesses to conduct their day-to-day operations.

By the same token, it hurts sellers of all inputs by crippling vigorous price competition for their wares.

In sum, the Ninth Circuit erred both in failing to apply *Brooke Group* and by adopting an extraordinarily vague standard that is inconsistent with the decisions of this Court and of other courts of appeals, which have emphasized the importance of objective standards in determining antitrust liability. Further review is warranted.

1. This case involves an allegation of predatory buying in the market for alder sawlogs in the Pacific Northwest. There are three principal participants in this market: timberland owners who supply the logs; production facilities, including lumber sawmills, that buy and process the logs into finished lumber; and purchasers who buy hardwood lumber from production facilities. App., *infra*, 2a-3a. The plaintiff, respondent here, was a sawmill operator that went out of business in 2001.[1] The defendant, petitioner Weyerhaeuser, also operates sawmills in the Pacific Northwest. Plaintiff has conceded the quality and efficiency of Weyerhaeuser's facilities; its state-of-the-art equipment and operations allow it to hold down costs and increase lumber yield. ER 284-293, 299-300, 338-339. From 1996 to 2001, the alleged predation period, Weyerhaeuser acquired approximately 65% of the alder sawlogs available for processing in the Pacific Northwest and sold all of the alder lumber it could produce. ER 173, 210, 300. Nine hardwood sawmills in the Pacific Northwest closed during this period, but four others opened and others expanded their operations. ER 96, 443, 444.

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[1] Plaintiff blamed rising log prices for its failure, although there was evidence that it suffered from substandard equipment, inefficient operations, increased natural gas prices, poor management, and inadequate capital reinvestment. See ER 137, 257, 261, 266 269-270, 285-287, 321-324, 625, 634-635.

There are many owners of standing timber in the Pacific Northwest, including the state and federal governments, at least seventeen private companies, and numerous individuals. These timberland owners sell their logs through oral bids, sealed written bids, and supply agreements. They all seek the highest possible price on each sale, frequently "shop[ping] th[eir] wood around the circuit" more than once to increase the bidding. Owners also may withhold their timber from sale – by leaving their trees uncut – in hopes of selling their logs later at a higher price. ER 123, 141, 166, 218-221, 242-243, 247-248, 367-368.

2. In this case, the plaintiff alleged that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing or attempting to monopolize the alder sawlog market in the Pacific Northwest. In particular, the plaintiff's theory was that Weyerhaeuser overpaid for alder sawlogs, and occasionally stockpiled those it purchased, with the aim of driving competing sawmills out of business; once free of competition, the claim continued, Weyerhaeuser planned to recoup its overpayments by reducing future prices paid to log suppliers.[2] The plaintiff supported its allegation with evidence that sawlog prices increased though the price of finished lumber decreased during the predation period, that

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[2] The plaintiff alleged several other anticompetitive acts, but the court of appeals based its decision upholding the verdict for plaintiff entirely on evidence that could be taken to show "that Weyerhaeuser engaged in anticompetitive conduct by overbidding for sawlogs." App., *infra*, 18a. The plaintiff also asserted that Weyerhaeuser monopolized the output market for finished alder lumber, but the jury rejected that claim because alder competes with other hardwoods and there accordingly is no relevant market for finished alder lumber in the United States. ER 581-582. Weyerhaeuser plainly lacks monopoly power as a seller in the highly competitive market for hardwood lumber: it produces approximately 3% of the product sold in the North American hardwood lumber market. ER 405.

Weyerhaeuser had a dominant share of the market for alder sawlogs, and that Weyerhaeuser suffered declining profits due to the high prices it paid for raw materials. App., *infra*, 17a-18a. The plaintiff did not allege, however, that Weyerhaeuser paid so much for sawlogs that it sold its finished lumber at a loss, and it is undisputed that both Weyerhaeuser and its hardwoods division operated at a profit throughout the alleged predation period.

At the close of trial, the district court instructed the jury as follows:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.

App., *infra*, 7a n.8. The jury returned a verdict for plaintiff, awarding $26,256,406 in damages. This amount was trebled to $78,769,218. *Id.* at 4a.

3. The court of appeals affirmed. App., *infra*, 1a-27a. Weyerhaeuser argued that the jury instruction was wrong and the verdict insupportable because the plaintiff had not been required to satisfy (and could not have satisfied) the requirements of *Brooke Group* by showing (1) that Weyerhaeuser paid so much for logs that its price for finished lumber did not cover its costs and (2) that Weyerhaeuser had a dangerous probability of recouping the losses it incurred during the period of predation. The Ninth Circuit acknowledged that, "to establish liability under *Brooke Group*, a plaintiff ha[s] to show that its competitor operated at a loss and was likely to recoup its losses." *Id.* at 7a. But the court held that standard inapplicable in this case because "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a.

In reaching this conclusion, the Ninth Circuit reasoned that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." App., *infra*, 8a. But, the court continued, "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 8a-9a; see also *id.* at 10a. Because the court of appeals accordingly held that "*Brooke Group* does not govern in this case," it ruled that the district court "did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." *Id.* at 13a.

The court added that the instructions given – which told the jury to determine whether Weyerhaeuser purchased more logs than "necessary," paid a higher price than "needed," and prevented plaintiff from obtaining logs at a "fair" price" – "provided sufficient guidance regarding how to determine whether conduct was anticompetitive." App., *infra*, at 14a. The court went on to affirm the verdict under this instruction because it found evidence that Weyerhaeuser engaged in predatory conduct, had an intent to monopolize, and had a dangerous probability of achieving monopoly power in the relevant market. *Id.* at 12a-25a.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision presents a question of great practical and doctrinal importance. The court of appeals held that a business accused of predatory buying may be held liable for trebled antitrust damages if the jury believes that the defendant purchased more inputs than it "needed" or paid a higher price for those inputs than was "necessary," so as to prevent rivals from obtaining inputs "at a fair price." This is

the sort of liability standard that Judge Easterbrook has equated with "[t]hrowing [a] marshmallow at a jury." F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 978 (1986). Under the Ninth Circuit's wholly subjective rule, it is impossible for businesses to know what pricing decisions conform with the law; firms accordingly will be forced to curb aggressive – and desirable – competitive bidding for fear of triggering unwarranted liability; and baseless litigation will be encouraged.

As might be expected, the decision below is a striking departure from this Court's holdings. Then-Judge Breyer has demonstrated the practical impossibility "of determining what is a 'reasonable' or 'competitive' price" (*Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984)); in light of that concern, this Court in a series of decisions culminating in *Brooke Group* decisively rejected a "reasonableness" standard of antitrust liability in the context of alleged anticompetitive pricing in favor of rules that are objective, predictable, and consistent with the goal of encouraging aggressive competition. The Justice Department has endorsed this approach, seeking "to apply standards of single firm conduct that are transparent, objective and administrable, so that antitrust laws do not unduly interfere with the competition they are meant to protect." R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct*, at 6 (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/ speeches/202724.pdf.

Against this background, the Ninth Circuit's repudiation of the *Brooke Group* standard in cases alleging predatory buying resurrects an antitrust dinosaur that this Court's decisions should have rendered extinct. The court of appeals announced a rule that requires businesses to ensure that their rivals are able to obtain necessary inputs at a "fair price." But as the United States recently put it in a brief to this Court, the Sherman Act "is not a license for federal courts to create codes of desirable business conduct." No. 02-682,

*Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, Br. for the United States and the Federal Trade Commission as Amici Curiae, at 9. Because the decision below establishes an unintelligible and unadministrable standard, interferes with legitimate business practices and thereby *reduces* competition, conflicts with decisions of other courts of appeals (*e.g.*, *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 515 (5th Cir. 1990)), and throws the law into a state of confusion, further review plainly is warranted. Indeed, the Ninth Circuit's holding constitutes such a sharp departure from controlling antitrust principles that this Court may wish to consider summary reversal of the decision below.

### A. All Allegations Of Predatory Pricing Behavior Must Be Evaluated Under Rigorous, Objective Standards

#### 1. *The Standard Articulated in* Brooke Group *Rests on the View that Objective Rules Are Necessary To Distinguish Predatory from Competitive Pricing*

a. To appreciate the magnitude of the Ninth Circuit's error – and its destructive impact on competition – it is helpful to start with the principles identified by this Court in reviewing allegations of predatory pricing behavior. To begin with, it "is settled law" that an offense under Section 2 of the Sherman Act "requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Communications, Inc.* v. *Trinko, LLP*, 540 U.S. 398, 407 (2004). Thus, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Ibid.*; see *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.).

Of particular relevance here, the Court has viewed with great skepticism allegations that the requisite anticompetitive conduct took the form of a predatory pricing scheme, in which the defendant assertedly sacrificed available profits in an effort to drive competitors out of business. As the Court has explained in the context of predatory pricing by sellers, such a scheme "is by nature speculative" because the defendant must "forgo profits that free competition would offer." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). For such predatory conduct to be "rational," the defendant

> must have a reasonable anticipation of recovering, in the form of later monopoly profits, more than the losses suffered. * * * [T]he success of such a scheme is inherently uncertain: the short-term loss is definite, but the long-term gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits.

*Id.* at 588-589. "For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." *Id.* at 589.

The Court also has recognized that unique considerations apply to legal standards for identifying anticompetitive pricing. Because of the critical role of price in our market system – as "the 'central nervous system of the economy'" – the Court has taken extraordinary care to fashion those standards to avoid chilling ordinary price competition. Pointing to this Court's decisions, then-Judge Breyer noted the "judicial recognition of the practical difficulties of determining what is a 'reasonable' or 'competitive' price." *Kartell*, 749 F.2d at 927-28. And the Court in *Matsushita* adopted a stringent liability standard because hard-charging pricing conduct that inefficient rivals label predatory "often is the very essence of

competition. Thus, mistaken inferences in [such] cases * * * are especially costly, because they chill the very conduct the antitrust laws are designed to protect." 475 U.S. at 594. Courts "'must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'" *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)); see also *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986) (emphasizing that "[c]laims of threatened injury from predatory pricing must * * * be evaluated with care" for the reasons identified in *Matsushita*).

Thus, "[t]here is * * * a general agreement that the antitrust courts' major task" in the context of standards for identifying unlawful pricing "is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting behavior." *Barry Wright*, 724 F.2d at 232 (Breyer, J.). And in doing so, it is emphatically *not* the goal of the antitrust laws to insulate inefficient competitors from the effects of hard competition. See *ibid.*

b. In response to these two fundamental principles, the Court in *Brooke Group* articulated its two-part test for assessing assertions of predatory pricing behavior by sellers. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. * * * As a general matter, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." 509 U.S. at 222.

If below-cost pricing is established,

> [t]he second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. * * * Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.

*Id.* at 224. Absent such proof that the alleged predator "would likely" recoup its losses, "the plaintiff's case has failed." *Id.* at 226.

*Brooke Group* thus rests on the insight that schemes of price predation are rare, speculative, and self-deterring because they require the predator to suffer a loss now in hopes of obtaining uncertain benefits later. By the same token, the rule of *Brooke Group* is supported by the reality that it is very difficult to distinguish predation from tough competition and that "false positive" findings of liability will deter the very sort of aggressive competition that the antitrust laws were designed to encourage. *Brooke Group* responded to these concerns by insisting that antitrust plaintiffs who allege predation satisfy rigorous and objective standards of proof.

### 2. *Objective Rules Like Those Applied in* Brooke Group *Should Govern Allegations of Predatory Buying*

There is no doubt that Weyerhaeuser would prevail if the *Brooke Group* test applied here; the plaintiff made no attempt to prove, and could not have proved, either that the prices charged by Weyerhaeuser failed to cover its costs or that there was a "dangerous probability" the company could re-

coup its allegedly excessive payments for raw materials.[3] But the Ninth Circuit held such proof unnecessary here because it believed that predatory buying, as distinct from predatory selling, should be exempted as a matter of law from the *Brooke Group* requirements. This is so, the court reasoned, because "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." App., *infra*, 8a-9a. Therefore, the court held, "the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases" because mistaken inferences of liability on the "buy side" are unlikely to chill desirable competitive conduct. *Id.* at 11a.

On the face of it, this is a most peculiar holding. Other courts have recognized that monopsony pricing – which, as the Ninth Circuit itself explained, is "[m]onopoly power exercised on the buy-side of the market" (App., *infra*, 6a) – "is analytically the same as monopoly or cartel pricing and so treated by the law." *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.), *rev'd on other grounds*, 522 U.S. 3 (1997). The Department of Justice's Antitrust Division agrees that "[m]onopsony is the mirror image of monopoly." Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Antitrust Enforcement in the Agricultural Marketplace, at 3 (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testi

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[3] Although there is some disagreement about the appropriate measure of costs when determining whether a predatory scheme (on either the sell or the buy side) resulted in the defendant selling its product below cost (see *United States* v. *AMR Corp.*, 335 F.3d 1109, 1118-19 (10th Cir. 2003)), Weyerhaeuser and its hardwoods division unquestionably sold its products at a profit throughout the period of the alleged predation under any standard.

mony/201430.pdf. "[M]ost antitrust scholars" likewise have concluded that "asymmetric treatment of monopoly and monopsony has no basis in economic analysis." R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 590-91 (2005).

And this Court has many times examined allegedly anticompetitive uses of buying power without ever intimating that different rules apply depending upon whether buy- or sell-side conduct was involved.[4] We are not aware of another appellate decision that draws this distinction.

It therefore is not surprising that the Ninth Circuit's analysis departs from the principles announced by this Court in several related – and fundamental – respects. Indeed, each of the lower court's reasons for refusing to apply *Brooke Group* is squarely inconsistent with decisions of this Court and other courts of appeals.

**a. The antitrust laws seek to assure that sellers benefit from aggressive competition by buyers.** The Ninth Circuit opined that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases" because "consumers benefit from lower prices and * * * cutting prices often fosters competition" (App., *infra*, 8a); in contrast, the court continued, there is no such necessary competitive benefit from aggressive bidding on the buy side and therefore no need for a "high liability standard" in monopsony cases. *Id.*

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[4] See, *e.g.*, *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 593-94 (1965); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959); *FTC* v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 393, 395 (1953); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-04 (1946); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 178, 216, 219-20 (1940).

at 9a-11a.[5] In this, however, the Ninth Circuit plainly was wrong because the court wholly disregarded the interest of *sellers* in aggressive and unconstrained buy-side competition. From the seller's perspective, the "low" liability standard applied by the Ninth Circuit here threatens to discourage just as much desirable competitive behavior on the buying side – the willingness of buyers to compete hard to acquire goods – as the low standard eschewed by the Court in *Brooke Group* would have discouraged in the predatory selling context.

In its leading decision in this area, the Court held:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

*Mandeville Island Farms*, 334 U.S. at 236; see also, *e.g.*, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (1940).

Indeed, "[t]he passage of the Sherman Act was strongly influenced by injuries inflicted upon business firms; they were among the most obvious victims of the trusts. * * * The opportunity to sell at competitive prices has been protected as zealously as the opportunity to buy at competitive prices." W. Jones, *Concerted Refusals To Deal and the Producer Interest In Antitrust*, 50 OHIO ST. L.J. 73, 88, 89 (1989). The Antitrust Division agrees: "While we often speak of consumers as the targeted beneficiary of antitrust enforcement, suppliers also benefit, by having healthy incentives to provide the best products and services they can, with

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[5] The Ninth Circuit cited no authority of this (or any other) Court in support of this observation.

the expectation that they will be able to do so free from anti-competitive interference." Pate Testimony, *supra*, at 5.

Raising prices on the buy side therefore fosters desirable competition just as much as does lowering prices on the sell side. After all, as then-Judge Breyer put it, a buyer's "competitive instinct is to bid up price," and "[a]ntitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold." *Kartell*, 749 F.2d at 925. Thus, just as price cuts by sellers generally are desirable, competition by buyers that increases the price paid to suppliers "is almost certainly moving price in the 'right' direction." *Barry Wright*, 724 F.2d at 234 (Breyer, J.). Independent action to bid up the price paid to sellers accordingly should be encouraged because it is the sort of conduct that "appears always or almost always to enhance competition." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 479 (1992).

The rationale that underlay the Ninth Circuit's decision in this case therefore was wrong: on the buy as well as the sell side, "the costs of an erroneous finding of liability are high." *Brooke Group*, 509 U.S. at 226. The mechanism by which a firm engages in predatory buying – increasing prices paid to sellers – "'is the same mechanism by which a [bidding] firm stimulates competition,'" which means that "'mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Ibid.* (quoting *Cargill*, 479 U.S. at 122 n.17) (ellipses in original).

Other courts of appeals recognize that fundamental point. Indeed, in a factual setting that is identical in principle to the one here, the Fifth Circuit dismissed an allegation of buy-side predation because the plaintiff failed to prove that the price paid for materials was so high that it prevented the defendant from making a profit. In *In re Beef Industry Antitrust Litig.*, 907 F.2d at 515, the plaintiffs alleged, among other things, that a beef packer "attempted to drive its competitors

out of the fed cattle procurement market by paying a higher price for fed cattle than the market suggested." The Fifth Circuit held that this claim failed because the plaintiffs

> presented no evidence that [the defendant] ever paid a predatory price (in this case, *a price higher than that which would allow the packer to make a profit*) for fed cattle. Thus, the cattlemen's allegation of predatory activity by [the defendant] in the cattle procurement market was not supported.

*Ibid.* (emphasis added). The decision below cannot be reconciled with the Fifth Circuit's holding.

Moreover, the Ninth Circuit's reasoning is incorrect even on its own flawed terms, because the court disregarded the ways in which buy-side competition that increases prices for sellers actually *does* benefit consumers. After all, it is generally accepted that consumers are likely to be harmed in the long run when the price paid to suppliers *decreases* because that diminishes the suppliers' incentive to provide goods; "a monopsonistic depression of price is as bad as a monopolistic increase in price." *Ball Mem. Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).[6] And the converse is equally true: competition that raises prices *for* sellers helps the ultimate purchaser by en-

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[6] See R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 299 n. 17 (1991); Pate Testimony, *supra*, at 5 ("If a buyer obtains market power * * *, and thereby is able to depress prices for the inputs it purchases below competitive levels, then producers of those inputs will have depressed incentives to produce, which will result in too few resources utilized to produce the inputs compared to what would be available in a competitive market. This is likely to harm both suppliers and consumers."); see also *Telecor Communications, Inc.* v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1135-36 (10th Cir. 2002), (suppressing buy-side competition leads to reduced production and quality, and higher prices for consumers), *cert. denied*, 538 U.S. 1031 (2003).

couraging innovation and increased production *by* sellers. See generally *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985). It is a fundamental tenet of our economic system that prices fall and consumers benefit when the most efficient producers are able to obtain all the inputs they need. See *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958) ("[the Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources"). The court of appeals accordingly was wrong in its view that the aggressive bidding in this case did not benefit consumers.[7]

The Ninth Circuit also wholly ignored the procompetitive (or, at worst, innocuous) explanations for what a plaintiff may label excessive, or excessively costly, purchases on the buy side. As Professor Salop has explained, "increased purchases could be driven by an increase in demand for the firm's product or a new business plan that involves market share growth," or by "the firm adopting a new production process that uses the input more intensively," or "could reflect changes in inventory policy, such as where the firm chooses to hold more inventories to reduce the likelihood of

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[7] The Ninth Circuit acknowledged that rising prices sometimes encourage new producers to enter the market, but dismissed that possibility in this case because "[t]he nature of the input supply at issue here does not readily allow for market expansion." App., *infra*, 11a. But this reasoning misses the point. For one thing, the jury was not asked to make any finding on the matter. For another, even assuming that the Ninth Circuit's characterization of the alder log market was correct as a factual matter (we note that the court relied for its observation on an article by plaintiff's expert rather than the facts in the record in this case), the court disregarded the possibility that higher prices led timber owners to market logs that they otherwise would have withheld from sale, or led to increased production of competing hardwoods that could be substituted for alder.

shortages or to hedge against future input price increases." S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669, 682-83 (2005) (footnotes omitted);[8] see IIIA P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 768a4, at 143 (2d ed. 2002). The court below thus disregarded the "central message of the Sherman Act," which is "that a business must find new customers and higher profits through internal expansion – that is, by competing successfully." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985).

**b. Predatory buying schemes are irrational unless there is a dangerous probability that the predator will recoup its losses.** At the same time, the Ninth Circuit ignored another basic insight that undergirds the *Brooke Group* test. "[S]ince the losses" from a predatory scheme "accrue before the gains, they must be 'repaid' with interest" for the scheme to succeed. *Matsushita*, 475 U.S. at 592. This economic reality tends to make predation "self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly" to the defendant. *Id.* at 595. For this reason, "it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and the disincentives to engage in such a strategy are accordingly numerous." *Cargill*, 479 U.S. at 121 n.17 (citation and internal quotation marks omitted).

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[8] We note that Professor Salop acted as a consultant to Weyerhaeuser in this case. On the other hand, two articles relied upon by the Ninth Circuit were written by, respectively, a paid consultant and an expert witness for plaintiffs in this case. See App., *infra*, 9a n.14 (citing J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 655 (2005), and R. Zerbe, *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 724 (2005)).

That is why *Brooke Group* required that a plaintiff alleging a scheme of predation demonstrate a dangerous probability that the defendant will recoup its losses. Indeed, as Former Assistant Attorney General Pate explained, "[t]he second part of the [*Brooke Group*] standard is especially important because there are a variety of situations in which it can readily be determined that an alleged predator has no prospect of future monopoly pricing." Pate, *Common Law Approach*, *supra*, at 21; see also *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (Easterbrook, J.). Proof of the likelihood of recoupment therefore should be necessary to establish the existence of an alleged predatory scheme even if, in the context of predatory buying, the Court did not also insist on a showing of below-cost pricing.

As both a logical and an economic matter, these points are every bit as true of buy-side as they are of sell-side predation. As two leading scholars of monopsony have observed:

> Successful monopsony predation is probably as unlikely as successful monopoly predation. First, the predatory firm would have to raise the price not only for the inputs it originally purchased, but would have to be prepared to purchase all of that input currently available in the market at the higher price. * * * In addition, in the long run, input suppliers that could substitute into the production of this input would have an incentive to do so, making the financial burden on the predatory firm even greater.
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> Second, the firm has the problem of what to do with the input. One possibility is to destroy it; another is to store it. Any effort to process the input into its final output would likely increase the quantity of that output available and depress its price. All of these options create further financial burdens.
>
> Finally, once the firm begins to take advantage of its monopsony power by depressing the price of the input, ei-

> ther market conditions or actions by the monopsonist must hold off the reappearance of competing buyers. In effect, the buyer must be able to "profit" from the lower price for a long enough period of time that it can make up its predatory "investment." All of these hurdles mean that the prospects for the predatory buyer are probably as unlikely as they are for the predatory seller.

R. Blair & J. Harrison, MONOPSONY 66-67 (1993).

Accordingly, in the monopsony as in the monopoly context, the alleged predatory scheme cannot be thought to make sense unless the plaintiff is able to demonstrate a dangerous probability of recoupment.[9] This requirement is an element of the more general antitrust principle recognizing that, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak*, 504 U.S. at 468-469; *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) ("to survive summary judgment, a plaintiff must have evidence that the predation scheme is economically rational"). The Ninth Circuit erred when it failed to follow the approach specified by this Court and adopted by other courts of appeals and insist that plaintiff demonstrate the probability of recoupment here.

**c. The considerations that underlay use of an objective standard in *Brooke Group* apply in cases that involve**

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[9] Contrary to the Ninth Circuit's view (see App., *infra*, 16a-17a), "it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 589-90; see *id.* at 590 ("These observations apply even to predatory pricing by a single firm seeking monopoly power.").

**allegations of predatory buying.** Against this background, all of the considerations that supported the holding in *Brooke Group* are present here. An unwarranted finding of liability when predatory buying is alleged will discourage desirable competitive conduct, meaning that false positives could "'end up discouraging legitimate price competition.'" *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright*, 724 F.2d at 234). False negatives, on the other hand, are a much lesser concern where predation is concerned because it is self-deterring, as "[m]onopoly prices eventually attract entry." F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984). True predation by a single firm (whether buyer or seller) is "most difficult to differentiate [from] healthy competition on the merits." Pate, *Common Law Approach*, *supra*, at 5; see *Barry Wright*, 724 F.2d at 234 (Breyer, J.). And a predatory buying scheme will make economic sense only if the predator will be able to recoup the costs of predation.

There accordingly is no reason that the considerations giving rise to the *Brooke Group* test apply only in cases involving claims of predatory selling. To be sure, *Matsushita* and *Brooke Group* involved output price-cuts. See 509 U.S. at 223; 475 U.S. at 594. But nothing in those decisions indicates that the concern with "false positives" is limited to reductions in output price. To the contrary, *Brooke Group* used "legitimate price-cutting" as only one example of the sort of "competition on the merits" that an overly restrictive predatory pricing rule could chill. 509 U.S. at 223. Prior decisions had made clear that deterrence concerns arise whenever the challenged practice "appears always or almost always to enhance competition" (*Eastman Kodak*, 504 U.S. at 479) or the applicable legal rule threatens to "'inhibit management's exercise of independent business judgment'" (*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted)). More recently, the Court warned that "[t]he cost of false positives counsels against an undue

expansion of § 2 liability" even though the case at hand did not involve output price reductions. *Trinko*, 540 U.S. at 414.

In separating out the predatory goats from the socially desirable sheep identified by then-Judge Breyer, use of an objective test is imperative. Application of such "objective standards for the evaluation of monopolization and other single firm conduct" is a "priority" for the Antitrust Division. T. Barnett, Deputy Assistant Attorney General, Antitrust Division, *Antitrust Enforcement Priorities: A Year in Review*, at 3 (November 19, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206455.pdf.; Pate, *Common Law Approach*, *supra*, at 6. Scholars agree that, "given the complexity of a full-blown test for predatory buying and the low probability that it is a real threat to competition, a simple under-inclusive test may be appropriate." Blair & Harrison, MONOPSONY, *supra*, at 156; see Salop, *supra*, at 703. The Ninth Circuit accordingly departed from the clear and consistent direction given by this Court when it held that the test of *Brooke Group* should not govern claims of predatory buying.

### B. The Ninth Circuit Confused The Law And Undermined Competition By Adopting A Test For Liability That Is Pegged To Whether A Jury Regards The Challenged Prices As "Fair" Or "Necessary"

Even if this Court were to conclude that a standard other than the one stated in *Brooke Group* should apply to predatory buying claims, review nonetheless is warranted in this case because the standard that the Ninth Circuit adopted is so clearly inconsistent with other decisions of this Court and the courts of appeals.

The court below determined that a defendant will be held liable for predatory buying if a jury concludes that the defendant "purchased more [product] than it needed or paid a higher price for [the product] than necessary," and that it did so "to prevent the Plaintiffs from obtaining the [product] they

needed at a fair price." App., *infra*, 7a n.8. It would be hard enough for an expert administrative agency to determine what price was "necessary" or "fair"; it is quite impossible for "a generalist antitrust court" (*Trinko*, 540 U.S. at 414) – let alone a jury – to make sense of that test. The Ninth Circuit's vague standard warrants review for four reasons in addition to its inconsistency with *Brooke Group*.

*First*, this Court has emphatically rejected use of a closely analogous "reasonableness" test under Section 1 of the Sherman Act. Then-Judge Breyer has explained:

> As the Supreme Court stated * * *, "[w]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can satisfactorily be made only after a complete survey of our economic organizations and a choice between rival philosophies."

*Kartell*, 749 F.2d at 929 (quoting *United States* v. *Trenton Potteries Cos.*, 273 U.S. 392, 397-98 (1927)); see also *United States* v. *Trans-Missouri Freight Ass'n*, 166 US. 290, 331-32 (1897); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). Any contrary conclusion would "require judicial estimation of free market forces" (*Trinko*, 540 U.S. at 410), an approach this Court has decisively repudiated. The Ninth Circuit's approach is wholly inconsistent with this Court's rejection of a reasonableness test; the question whether a price is "fair" or "necessary" is, if anything, *more* subjective and indeterminate than that of whether it is "reasonable."

*Second*, the court of appeals' standard inevitably will lead to wholly arbitrary and unpredictable results – precisely the opposite of what this Court has required of legal standards governing allegedly anticompetitive pricing. Indeed, if the Ninth Circuit had set out to maximize capricious judicial outcomes with respect to the central issue of price, it could not

have done better than the standard it announced in this case. Again quoting then-Judge Breyer, writing in the context of an alleged "price squeeze":[10]

> [H]ow is a judge or jury to determine a "fair price"? * * * Is it the price the competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to determine the proper size of the price "gap"? Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

*Town of Concord*, 915 F.2d at 25. The impossibility of giving consistent (or even intelligible) answers to these questions makes it inevitable that the outcomes in individual cases decided under a "fair" and "necessary" standard will be unpredictable and often erroneous. As Judge Easterbrook has put it, a "fog-bound instruction * * * ensures that confusion and random results will emerge," along with "false positives and false negatives." Easterbrook, *On*, *supra*, at 978.[11]

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[10] A "price squeeze" may arise when a firm operates at two levels of an industry and its competitors at one level are its customers at the other. "[A] price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business." *Town of Concord*, 915 F.2d at 18 (Breyer, J.).

[11] Compounding the problem, juries that are asked whether the price paid by a defeated rival for inputs was "fair" may not fully appreciate that "competition is a ruthless process. A firm that reduces costs and expands sales injures rivals – sometimes fatally. * * * These injuries to rivals are byproducts of vigorous competi-

*Third*, the Ninth Circuit held that a firm may be found liable whenever it cuts into a less efficient competitor's profits by moving aggressively to safeguard a supply of essential inputs, if a jury concludes that the competitor was deprived of a "fair" price. But this Court repeatedly has indicated that the antitrust laws do not "protect competitors from the loss of profits" caused by a rival's aggressive competition, explaining that a contrary approach would have the "perverse" effect of "render[ing] illegal any decision by a firm to cut prices in order to increase market share." *Cargill*, 479 U.S. at 116. The holding below would appear to mean that, the more *inefficient* a competitor is, the more solicitous its rivals must be. But businesses that take advantage of their low cost structures and efficient operations to out-compete their less-efficient rivals are engaging in conduct that is *encouraged* by the antitrust laws: when, as in this case, the nature of the complaint is that the plaintiff was damaged by aggressive competition, "[i]t is inimical to the purposes of these laws to award damages for the type of injury claimed." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

*Fourth*, to the extent the Ninth Circuit's test has any substance at all, it resembles "a loose profit sacrifice test" (Salop, *supra*, at 714 ), instructing the jury to condemn Weyerhaeuser for failing to maximize its short-term profit when it paid more for logs than the jury deemed "necessary." But other courts of appeals have expressly rejected such a standard as unmanageable and inconsistent with antitrust policies. See *Stearns*, 170 F.3d at 533 n.14 (failure-to-maximize-profit test "is no longer tenable in the wake of *Brooke Group*"); *AMR Corp.*, 335 F.3d at 1118-19 (rejecting short-run profit maximizing test as a matter of law; "[c]ourts and scholars have observed that such a sacrifice test would neces-

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tion, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors." *Ball Mem. Hosp.*, 784 F.2d at 1338 (Easterbrook, J.).

sarily involve a great deal of speculation and often result in injury to the consumer and a chilling of competition"); *Barry Wright*, 724 F.2d at 235 (noting "the difficulty of deciding whether or not a firm's price cut is profit-maximizing in the short-run, a determination that hinges not only on cost data, but also on elasticity of demand, competitors' responses to price shifts, and changes in unit costs with variations in production volume.").

The Ninth Circuit's holding accordingly cannot be reconciled with the principles announced by this Court and will frustrate significant antitrust policies. It should be set aside.

### C. The Decision Below Involves A Recurring Issue Of Great Practical Importance

1. The Ninth Circuit's decision is one of great importance, with implications for businesses across the Nation. As we have explained, the holding below has generated immense confusion on a practical level because it is impossible for businesses (a) to know how to comply with a "fair" and "necessary" standard or (b) to act with assurance that their legitimate buy-side competitive efforts will not result in antitrust liability. After the Ninth Circuit's ruling, businesses cannot be certain of the constraints that apply when they seek to procure valuable inputs, are asked to pay a premium for especially desirable resources, or stockpile materials that have an ongoing but unpredictable demand.

"Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984). After all,

> antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. * * * They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal

> language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

*Town of Concord*, 915 F.2d at 22.

As then-Judge Breyer explained in similar circumstances, "we ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a client considering procompetitive [bidding] in a concentrated industry." *Barry Wright*, 724 F.2d at 235. And the answer to that question is that no lawyer can give confident advice on what a jury will think is an "unnecessary" purchase or an "unfair" price. Businesses accordingly will err on the side of less aggressive competition. The harm from this outcome will be felt not only by the buyers, who will be constrained in obtaining necessary inputs, but also by the sellers and small businesses that will be denied the benefit of aggressive buy-side competition for their products. The court of appeals' rule thus will "prove counter-productive, undercutting the very economic ends [it] seek[s] to serve." *Id.* at 234.

This uncertainty will be felt throughout the economy: on its face, the Ninth Circuit's ruling applies to procurement decisions of every kind of business purchasing every kind of input, including produce, natural resources, livestock, sophisticated components, even skilled employees – and there are many concentrated input markets. See Noll, *supra*, at 589-90.

Moreover, the Sherman Act's liberal venue provisions allow *any* firm conducting a national business to be sued in the Ninth Circuit. See 15 U.S.C. §§ 15, 22. We can be confident there will be no shortage of plaintiffs willing to take advantage of the opportunity to bring suit in a forum with favorable and malleable rules. As then-Judge Breyer put it, "if private plaintiffs are allowed to attack [above-cost prices], we are unlikely to lack for plaintiffs willing to make the effort. After all, even the most competitive of price cuts may hurt rivals; indeed, such may well be its object. And those rivals, if

seriously damaged, may well bring suit." *Barry Wright*, 724 F.2d at 235. Such suits can be expected to arise with some frequency: over the years there have been many cases involving overbidding and/or overbuying allegations,[12] and many more alleging buy-side exclusionary practices.[13]

2. The need for review is especially acute because the Ninth Circuit's holding has thrown the law into a state of confusion. As we have noted, this Court has moved antitrust law governing allegedly anticompetitive pricing in the direction of objective standards that leave no room for subjective, indeterminate rules. Other courts of appeals likewise have taken care to assure that antitrust rules are always "clear enough for lawyers to explain them to clients" (*Town of Concord*, 915 F.2d at 22) and do not "involve a great deal of speculation" (*AMR Corp.*, 335 F.3d at 1118-19). Against this background, the decision below is an unfortunate throwback

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[12] See, *e.g.*, *American Tobacco*, 328 U.S. at 803-04; *United States* v. *Patten*, 226 U.S. 525, 538-39 & n.4 (1913); *Seagood Trading Corp.* v. *Jerrico, Inc.*, 924 F.2d 1555, 1564-66 (11th Cir. 1991); *In re Beef Industry*, 907 F.2d at 515; *Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.*, 699 F.2d 1292, 1297-98 & n.5 (9th Cir. 1983); *Houser* v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1228, 1231 (3d Cir. 1988); *Schad* v. *Twentieth Century-Fox Film Corp.*, 136 F.2d 991, 997 (3d Cir. 1943); *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F.2d 600, 604-05 (8th Cir. 1942).

[13] See, *e.g.*, *Consolidated Foods*, 380 U.S. at 593-94; *Motion Picture Adver. Serv.*, 344 U.S. at 393; *Griffith*, 334 U.S. at 109; *Associated Press*, 326 U.S. at 9; *Crescent Amusement*, 323 U.S. at 181; *Toys "R" US, Inc.* v. *FTC*, 221 F.3d 928, 930-31 (7th Cir. 2000); *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776 (7th Cir. 1999); *Balmoral Cinema, Inc.* v. *Allied Artists Pictures Corp.*, 885 F.2d 313, 316-17 (6th Cir. 1989); *Harkins Amusement Enters.* v. *General Cinema Corp.*, 850 F.2d 477, 488-89 (9th Cir. 1988); *Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1208, 1221 (9th Cir. 1982); *Quality Auto Body, Inc.* v. *Allstate Ins. Co.*, 660 F.2d 1195, 1203 (7th Cir. 1981).

that, if left undisturbed, threatens to undo much of the progress this Court has made toward manageable, predictable, and economically supportable antitrust standards.

Faced with similarly important questions, the Court has not hesitated to grant review in antitrust cases even absent a showing of a deep conflict among the lower courts.[14] There is no reason for the Court to hesitate before granting review in this case, where the Ninth Circuit's holding departs in significant respects from the principles articulated by both this Court and other courts of appeals. Issues of monopsony in general, and of predatory buying in particular, have been examined extensively by scholarly commentators, which would assist the Court in addressing the question presented.[15] Cf. *Matsushita*, 475 U.S. at 589-90 (discussing scholarship on predatory pricing). And this case presents an ideal vehicle to clarify the rules governing predatory buying claims: the

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[14] *E.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

[15] See, *e.g.*, Areeda & Hovenkamp, *supra*, ¶¶ 517c5, 575, 720a, 943c, 981a, 1103a1, 1637i, 1778b; see also *id.* ¶¶ 350b, 394c, 2010, 2011b, 2012b, 2135b; Blair & Harrison, MONOPSONY, *supra*, at 66-67, 154-58; R. Posner & F. Easterbrook, ANTITRUST 146-50, 719-20, 850-55 (2d ed. 1982); Blair & Harrison, *Antitrust Policy and Monopsony*, *supra*; S. Calkins, *Comments on Presentation of Steven C. Salop*, 56 ANTITRUST L.J. 65, 68 & n.18(1987); P. Hammer & W. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949 (2004); J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991); Kirkwood, *supra*; T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 282 n.228 (1986); F. Miller, *Health Insurance Purchasing Alliances: Monopsony Threat or Procompetitive Rx for Health Sector Ills?*, 79 CORNELL L. REV. 1546, 1563-67 (1994); Noll, *supra*; Salop, *supra*; Zerbe, *supra*.

Ninth Circuit addressed an issue of law that is unburdened by factual complications. In these circumstances, "the benefits of providing guidance" (*Brooke Group*, 509 U.S. at 230) – and of straightening out the law – counsel strongly in favor of review.[16]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[16] As we have suggested, the Court may wish to consider whether summary reversal is appropriate in this case. See, *e.g.*, *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (summarily reversing antitrust decision that was in clear tension with prior decisions of this Court); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (same).

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OCT 26 2005

No. 05-381

IN THE
# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Ninth Circuit err when it held:

> [W]e hold that the high standard of liability in *Brooke Group* [*Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)] does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing.

Pet. App. 11a.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Ross-Simmons Hardwood Lumber Company, Inc. states that it has not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

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## INTRODUCTION

The petition for certiorari does not raise any question that warrants review by this Court. The Ninth Circuit's decision does not conflict with the decision of any other court of appeals. Nor does it conflict with any decision of this Court. Moreover, the petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court.

The question presented – whether the holding in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ("*Brooke Group*") should be extended to the quite different scenario of Weyerhaeuser's abuse of monopsony power – is so idiosyncratic that no federal court apart from the Ninth Circuit in this case has had occasion to consider it (or even any closely related issue) in the 12 years since *Brooke Group* was decided. The present case thus stands in stark contrast to the 20-year build-up prior to *Brooke Group* of conflicting court of appeals case law on a common issue of exceptional importance (aggressive price-cutting by sellers). *See Brooke Group*, 509 U.S. at 223-27 (detailing that history).

Although petitioner Weyerhaeuser Company asserts that "the Ninth Circuit's analysis departs from the principles announced by this Court" in *Brooke Group*, Pet. at 13, Weyerhaeuser's position actually is that the special rule of liability of *Brooke Group* should be *extended* to cover the fundamentally different market economics and intentional anticompetitive conduct in this monopsony case, which included a combination of pricing and non-pricing behavior. In contrast to the basic price-cutting sale transactions considered in *Brooke Group*, here a dominant buyer with market power forced competitors out of business by intentionally *driving up the costs of and denying competitors*

*access to* a limited supply of natural resource inputs essential for production, with the specific intent of driving input prices down after rivals were forced to exit.

The Ninth Circuit concluded that this conduct can cause consumer harm and does not necessarily or invariably benefit consumers or producers, unlike the aggressive price-cutting that directly benefited consumers in *Brooke Group*. Pet. App. 9a-11a. Furthermore, the Ninth Circuit concluded that Weyerhaeuser's anticompetitive strategy not only was feasible but was likely to succeed, given the unique characteristics of the inelastic market for the limited supply of alder sawlogs. *Id.* 10a-11a. Thus, neither the holding nor the underlying reasoning of *Brooke Group* applies to the quite different factual and economic circumstances present here, and the Ninth Circuit's decision cannot be said to be inconsistent (much less to conflict), even "in principle," with *Brooke Group*.[1]

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[1] In June 2004, this Court denied review in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 141 (2004), wherein the petitioner 3M Company and an array of *amici* from various businesses and trade associations argued unsuccessfully that the *Brooke Group* requirements for predatory price-cutting must be applied outside their context to a claim alleging liability based on bundled rebates by a monopolist seller. Before denying review, the Court asked for the position of the United States, which counseled against review for a range of reasons that apply *a fortiori* here, including lack of a conflict and inadequate development of the law in the lower courts, no pressing need or compelling reason for a decision, and insufficient experience, data, and professional literature to gauge the risk of false positives. Brief for the United States as *Amicus Curiae* at 8, *3M Company v. LePage's Inc.*, 124 S. Ct. 2932 (2004) (No. 02-1865) (hereafter "U.S. Br.") (summarizing reasons to deny review).

Lacking any case law conflict or other viable argument for review, petitioner misstates the impact of one isolated jury instruction on anticompetitive conduct to support an implausible claim that the Ninth Circuit articulated a radical and expansive new rule of law that threatens "economic dislocation on a national scale." Pet. at 2. In reality, the Ninth Circuit broke no new ground and, in fact, simply followed a precedent, *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), that has been on the books for 22 years without triggering any economic consequences, much less the chaos the petition forecasts. Pet. App. 12a-13a.

Far from issuing an expansive or novel decision, a unanimous panel, with substantial practical, jurisprudential, and academic antitrust experience,[2] applied well-established Sherman Act Section 2 principles of liability. 15 U.S.C. § 2. Those principles derive from this Court's decisions, and they also are embodied in model jury instructions on anticompetitive conduct that were integrated into the district court's instructions here. *Id.* 13a-15a, 17a. Judge Nelson's opinion for the panel carefully crafted a holding expressly narrow in scope:

> [W]e hold that the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a

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[2] The Ninth Circuit's opinion was authored by Judge Thomas G. Nelson, a Senior Circuit Judge. The panel's opinion was joined by Judge William W. Schwarzer, a Senior United States District Judge sitting by designation, formerly the Director of the Federal Judicial Center and author of the book, *Managing Antitrust and Other Complex Litigation* (1982). The panel was presided over by Judge Jonnie B. Rawlinson, an active Circuit Judge sitting on the Ninth Circuit.

> relatively inelastic market, not predatory pricing.

*Id.* 11a.

Thus, the petition should be denied.

## COUNTERSTATEMENT

The petition for certiorari conveys the impression that the Ninth Circuit upheld Section 2 liability in this case based upon nothing more than a jury verdict that Weyerhaeuser paid more than it should have for alder sawlog inputs for its sawmill business. That is a false impression. The petition omits key details about the nature of the market and the nature and effect of Weyerhaeuser's conduct. The petition also misstates the issue raised below and preserved for review, as well as the terms and scope of the Ninth Circuit's decision.

### A. Factual Background

The Pacific Northwest is home to dense forests that contain sufficient hardwoods to support the only concentration of hardwood sawmills in the western United States. One of these hardwoods – red alder – grows among the predominantly softwood forests west of the Cascade mountains. Because alder represents 95% of the Pacific Northwest's annual hardwood lumber production, the hardwood mills in the area are called the "alder industry." *Id.* 2a.

Alder sawlogs in the Pacific Northwest comprise a seasonal, regional natural resource input market that has little in common with the broad range of markets that exist on the "buy-side" of the antitrust spectrum. For starters, as the

Ninth Circuit noted, the market is "relatively inelastic." *Id.* 11a. That is, the supply of alder sawlogs generally does not react to the demand for or the cost of alder sawlogs. Rather, several independent factors govern supply. The amount of alder harvested in any given year is limited by the fact that alder is a "come-along" species, which means that its harvest is a byproduct of the much larger and more valuable softwood harvests. It would not be profitable, or even feasible, to harvest alder separate from the harvest of softwood timber. Further, alder trees take 30 years to mature for harvest, so the amount of the near-term supply is a function of planting decisions made decades ago and is not a function of the price that the sawlogs may fetch in any given season. *Id.*; ER 438; SER 117-18, 347, 410-11.[3]

Of equal importance to the inelasticity of the market is the fact that this is a market for a natural resource that is necessary for production. Alder trees are a finite natural resource. Unlike the ordinary sale transaction examined in *Brooke Group*, here Weyerhaeuser as a "dominant" buyer not only had "an ability to control alder sawlog prices," Pet. App. 17a, but also "Weyerhaeuser's overbidding for sawlogs clearly threatened competition because it restricted competitors' access to the limited supply of sawlogs," *id.* 19a.

Ross-Simmons Hardwood Lumber Company, Inc. ("Ross-Simmons") was a pioneer in the alder lumber business, beginning in 1962 and operating its Longview, Washington sawmill continuously until it went out of

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[3] Ross-Simmons' Brief of Appellee sets out a complete statement of relevant facts with record citations at pp. 6-23, 28-37, and 51-58. Select citations to the record in this Opposition refer to "ER" for the Excerpt of Record and "SER" for the Supplemental Excerpts of Record.

business in 2001. Prior to Weyerhaeuser's anticompetitive conduct, Ross-Simmons experienced steady growth in lumber output and consistent profits for more than 30 years, as it solidified into the number two player in the industry. *Id.* 3a; ER 72-73, 87-90, 275-78; Brief of Appellee at App. 02.

Weyerhaeuser, already the nation's largest wood products company, entered the alder industry with the acquisition of two Washington sawmills in 1980. Weyerhaeuser added a third mill, also in Washington, in the mid-1980's. In 1995, Weyerhaeuser acquired three more mills and two of its major competitors including Oregon's largest producer, and thereby controlled six operations in western Oregon and Washington. In 2000, Weyerhaeuser secured the "dominant alder supply" position in British Columbia when it acquired the only sizeable alder sawmill in the Province and its long-term contracts for public log supply. Pet. App. 3a; ER 93-94; SER 68, 140-41, 258-65 (corrected at ER 624), 492.

Within six years of its 1980 entry, Weyerhaeuser's share of the Pacific Northwest alder sawlog market was 50%. By 1996, this share was 65% and by 2001, it had reached 75%. Meanwhile, 31 alder operations went out of business, leaving only 15 mills still operating in Oregon and Washington. Weyerhaeuser owned six of them, plus the only sizeable producer in British Columbia. The remaining mills were owned by nine different individual owners. Pet. App. 3a, 17a, 21a, 23a; ER 93, 443-48; SER 68-69, 127-28, 152-53, 157, 234, 261-62, 492.

Once it had achieved a dominant position, Weyerhaeuser engaged in a calculated, multifaceted plan to "consolidate" and control the alder sawlog input market. Weyerhaeuser targeted its leading competitor Ross-Simmons

for elimination; "tracked competitors' profit margins and estimated the potential effects of targeted increases in sawlog costs on the ability of low-margin competitors to survive," Pet. App. 20a; acquired other competitors and expanded their capacity; and purchased extensive forest lands or locked-in exclusive agreements for alder sawlogs that otherwise would have been potentially available to Ross-Simmons. *Id.* 18a-20a, 24a; SER 74-76, 128, 143-45, 193-98, 242, 251-52, 387-91, 418-19, 439-62, 492-500, 549-77.

The record showed that Weyerhaeuser "was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard, and that [Weyerhaeuser] allegedly overpaid by $20 million per year for logs as part of a scheme to deliberately deprive Ross-Simmons of logs or forcing it to operate at a loss by driving up its costs." Pet. App. 34a (Opinion and Order on Renewed Motion for JMOL).

The record also demonstrated that Weyerhaeuser set up a competing mill across the street from Ross-Simmons and covertly subsidized that unprofitable mill to ensure that it would survive by "internally transferring lumber [sic: logs] to its Longview mill, at below cost, to conceal or compensate for the fact that Defendant's Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep Ross-Simmons from obtaining those logs." *Id.* 33a (JMOL Opinion). As the district court acknowledged, this evidence supports an "inference that Defendant was deliberately trying to evade the antitrust laws and to conceal possible antitrust violations . . . and that Defendant's course of conduct . . . was designed to be anti-competitive and to further its dominance in the relevant market and went far beyond ordinary means of competition." *Id.*

Sawlogs are the lifeblood of the mills, and their cost constitutes as much as 75% of the entire cost of operations. Historically, until Weyerhaeuser acquired market power and began to raise the cost of sawlogs artificially, the cost of sawlogs always had followed temporally and tracked ... metarily the price of lumber. Weyerhaeuser's decision to raise the cost of sawlogs, while the price of milled lumber fell, made it impossible for Ross-Simmons and other competitors to make a profit and remain in business, at a steep cost to Weyerhaeuser which "had given up some $40 to $60 million dollars in the last three years" by its own senior analyst's calculations. *Id.* 19a. Weyerhaeuser's internal strategic planning documents reveal that the Company knew that alder log supplies were inelastic and that a two-pronged strategy could eliminate competitors and increase defendant's market share to 85% by 2003-2007. *Id.* 3a, 17a, 19a-21a; ER 437-38, 450-52, 461-62; SER 70-71, 81, 105-106, 172-75 (corrected at ER 622), 209-21, 374-76, 384-87.

Indeed, the record was replete with direct evidence that Weyerhaeuser acted with the conscious, specific intent to destroy its competitors and control access to alder logs, so that it could maintain monopsony control and drive the prices of that input down over the long term. In 2001, Weyerhaeuser's Director of Finance and Planning stated during internal meetings, "[t]hat was the business strategy, to price up logs to deal with competition," and Weyerhaeuser's division head stated that "we had given up about $20 million in potential log cost opportunity within the past year." Weyerhaeuser's own managers testified, "[i]t was taken as a given [by senior Weyerhaeuser management] that we could influence price;" Weyerhaeuser had a "well-known monopolistic basis" in the alder sawlog market; and "we raised the price of logs when we had adequate supplies." *Id.* 17a-19a; SER 156-60, 203-205, 217-24.

Although some within Weyerhaeuser opposed this strategy, the view that Weyerhaeuser's own increased costs would be recouped many times over by driving down prices once competitors were eliminated always carried the day. At a strategic planning session in 2001, Weyerhaeuser projected the ability to drive sawlog costs down in 2002 and 2003 as a number of competitors closed their mills. When impeached with one of these planning documents, Weyerhaeuser's top executive in charge of raw materials admitted that projected near-term reductions in log costs would dramatically bolster the alder division's profitability. Pet. App. 19a-21a; SER 157-5[illegible], 406-409, 450-58.

Weyerhaeuser's strategy worked as planned. From 1996 on, Weyerhaeuser controlled an increasing share of the region's log supply through exclusive log supply arrangements, forcing its competitors to compete for an increasingly smaller fraction of the annual harvest. Many competing hardwood mills were forced out of business. Ross-Simmons saw its 30-year track record of profitability dramatically reversed, and was forced to close its doors and lay off its 170 employees in 2001. Pet. App. 18a-21a, 24a; ER 91; SER 67, 154-59.

### B. Proceedings Below

This Section 2 action was filed against Weyerhaeuser in December 2000 in the United States District Court for the District of Oregon. Ross-Simmons alleged that Weyerhaeuser deployed an array of exclusionary tactics designed to foreclose much of the log supply from competitors, with price manipulation in the remaining "open market" to drive up log prices to levels that forced its competition to lose money and ultimately to go out of business. Ross-Simmons alleged 15 different specifications

of anticompetitive conduct, only two of which pertained to price-related conduct. The other allegations fell into four general categories: (1) aggressively acquiring competitors; (2) entering restrictive or exclusive contracts with sawlog suppliers; (3) overbuying; and (4) making misrepresentations to state officials to obtain sawlogs from state forests.[4] Pet. App. 3a-4a; 24a; ER 44-63.

At trial, Weyerhaeuser defended its actions as legitimate competitive business practices. Weyerhaeuser's legal position was that *Brooke Group* must apply. Weyerhaeuser accordingly contended that it was entitled to JMOL because Ross-Simmons could not prove unprofitability and a dangerous probability of recoupment or, in the alternative, Weyerhaeuser contended that it was entitled to a new trial because the jury instructions lacked a statement of those *Brooke Group* requirements. Pet. App. 7a-8a.

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[4] Substantial evidence supports each of Ross-Simmons' alternative allegations of anticompetitive conduct, and any single supported allegation is sufficient to require affirmance. *See* Pet. App. 18a n.42 (so holding with respect to the allegation of exclusionary bidding addressed by the Ninth Circuit). Although the Ninth Circuit did not need to consider the alternative bases for affirmance, they exist nonetheless. Ross-Simmons hereby states its reliance on those alternative bases for affirmance and incorporates by this reference its Brief of Appellee in the Ninth Circuit, which expressly addressed those issues. *See* Sup. Ct. R. 15.2 (regarding raising issues that "properly would be before the Court if certiorari were granted"); Brief of Appellee at 2, 4-5, 27, 50-59.

The case was submitted to the jury on a theory of monopsony liability. The jury was instructed that it could impose Section 2 liability only if it found that Weyerhaeuser had market power in the input market for alder logs in the Pacific Northwest, and only if Weyerhaeuser had engaged in anticompetitive conduct within that market that caused antitrust injury. Contrary to the suggestion in the petition for certiorari, the jury was not instructed that it could find Weyerhaeuser's conduct to be anticompetitive under Section 2 if it merely concluded that Weyerhaeuser paid too much for alder logs. Rather, the jury was instructed that:

> Anti-competitive conduct is conduct that has the effect of wrongly preventing or excluding competition, or frustrating or impairing the efforts of other firms to compete for customers within the relevant market, making it very difficult or impossible for competitors to engage in fair competition. Not everything that enables a company to gain or maintain a monopoly is anti-competitive.
>
> In deciding whether conduct is anti-competitive, you should consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition. Anti-competitive conduct does not include ordinary means of competition, such as offering better products or services, exercising superior skill or business judgment, utilizing more efficient technology, better marketing, or exercising natural

> competitive advantages such as unique geographic access to raw materials or markets.

*Id.* 14a n.30.

The instructions then went on to examine several categories of plaintiff's exclusionary conduct allegations in a careful effort by the district judge to apply the model definition of anticompetitive conduct to the evidence in the case. The conduct categories of exclusionary overbidding and overbuying were covered in the following paragraph:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

*Id.*

After a lengthy trial, the jury returned a verdict for Ross-Simmons of $26,256,406, which was trebled to $78,769,218, and judgment was entered. *Id.* 4a.

Weyerhaeuser appealed to the Ninth Circuit, and the principal issue on appeal was Weyerhaeuser's contention that *Brooke Group* must apply, as a matter of law, in this case. The Ninth Circuit affirmed the jury's verdict and the judgment of the district court, emphasizing the unique facts of the case, particularly the effects of raising prices to cut off access to alder sawlogs in this inelastic natural resource inputs market.

The Ninth Circuit paid careful attention to this Court's decision in *Brooke Group*, correctly recognizing that *Brooke Group* created a high standard of liability in a particular category of Section 2 cases, aggressive price-cutting by monopolist sellers. The Ninth Circuit also correctly identified from *Brooke Group* the two principal reasons for that special rule: (1) price-cutting invariably benefits consumers, which is the core goal of the Sherman Act itself, and (2) very substantial experience and research had demonstrated a high risk of false positives in cases based on price-cutting and that the Court did not want to deter the very conduct the Sherman Act otherwise valued. *Id.* 6a-8a.

The Ninth Circuit then compared that factual context to the context here, in which Weyerhaeuser artificially raised the costs of inputs necessary for production in an inelastic natural resource inputs market. *Id.* 8a-11a. The panel concluded that the benefits to consumers identified by the Court in *Brooke Group* attendant upon price-cutting by sellers did not exist in the context here, indeed that consumer harm from Weyerhaeuser's conduct was a distinct possibility, and that *Brooke Group* therefore did not control:

> [T]he concerns that led the *Brooke Group* Court to establish a high standard of liability in the predatory pricing context do not carry over to this predatory bidding context with the same force. Therefore, the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases.

*Id.* 11a.

## REASONS FOR DENYING THE PETITION

### I. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS OR WITH ANY DECISION OF THIS COURT

The Ninth Circuit correctly observed that this case presents a "legal question of first impression." Pet App. 5a. Indeed, no other court has considered whether the special predatory pricing rule of *Brooke Group* should be extended to the quite different situation of a monopsonist's efforts to control the price of and access to a critical input. It should be obvious that there can be no circuit conflict under these circumstances. Nor does the petition for certiorari even identify any cases *predating Brooke Group* that are in conflict with the decision of the Ninth Circuit in this case. Petitioner thus has failed to satisfy the criterion of a circuit conflict that most frequently results in this Court granting certiorari. *See* Sup. Ct. R. 10(a); Robert L. Stern, et al., SUPREME COURT PRACTICE 225-32 (8th ed. 2002).

Nor does the Ninth Circuit's decision "conflict[] with a relevant decision of this Court" pursuant to Rule 10(c) – and the petition does not contend otherwise.[5] It thus fails to satisfy a second important criterion for review.

The Ninth Circuit's decision correctly states the rule of law and rationales from *Brooke Group* and then concludes

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[5] The petition's suggestion that this case is appropriate for summary reversal is baseless, because there is no direct conflict with a decision of this Court. Sup. Ct. R. 16.1; R. Stern, SUPREME COURT PRACTICE, at 315-16. Moreover, there are alternative bases for affirmance not reached by the Ninth Circuit that were raised by Ross-Simmons in the Ninth Circuit and preserved on review here. *See supra* note 4.

that this Court's departure from general Section 2 standards to create specific requirements in monopoly price-cutting cases in *Brooke Group* is not warranted in this very different factual context. Pet. App. 6a-11a; *see also* U.S. Br. at 10 (emphasizing that *Brooke Group* "provided more specific guidance for Section 2 cases in the context of a particular form of potentially exclusionary conduct – aggressive price-cutting"). The Ninth Circuit's unwillingness to extend *Brooke Group* to the quite different factual scenario presented by this monopsony case simply cannot be described as a conflict with *Brooke Group* or any other decision of this Court. The Ninth Circuit did not ignore, or otherwise fail to accord appropriate respect to, a controlling decision of this Court. Nor is this a situation where an intervening decision of this Court created a conflict with a previously issued court of appeals decision that was not yet final.

Lacking any credible basis for asserting a conflict with any other court decision, Weyerhaeuser halfheartedly suggests that this case "cannot be reconciled" with a single Fifth Circuit decision from fifteen years ago, *In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (5th Cir. 1990). Pet. at 16. Weyerhaeuser did not even cite that decision in its opening brief to the Ninth Circuit, much less contend that it prescribed the correct rule of law for the present case. In all events, *In re Beef* did not address either *Brooke Group* (which was decided three years later) or its underlying rationales. The case did not purport to establish a general rule for monopsony pricing, and the Fifth Circuit's actual disposition of the monopsony claim against the single firm in that case held that the claim failed for insufficient evidence of market power. *In re Beef*, 907 F.2d at 514-16. That the petition would have to stretch so far to manufacture an inconsistency (not even an actual conflict) with a single

fifteen-year old decision that *pre-dates Brooke Group* speaks volumes about the weakness of petitioner's case for review.

## II. THE PETITION DOES NOT PRESENT ANY QUESTION OF EXCEPTIONAL IMPORTANCE WORTHY OF THIS COURT'S ATTENTION

The petition also fails to establish that this case presents an important question of federal law that has not been but should be resolved by this Court.

The frequency with which an issue arises is a critically important indicator of its importance. R. Stern, SUPREME COURT PRACTICE, at 228. Here, there are no other reported cases that have presented this issue in the 12 years since *Brooke Group*. The petition itself cites only eight cases in the last century involving exclusionary overbidding or overbuying, and none in the last 15 years. Pet. at 28 n.12.

The infrequency with which the question presented here arises makes quite clear that the question is of no legal or practical importance. Nor is petitioner correct that the Ninth Circuit has announced a radical new rule that threatens a significant expansion of Section 2 liability based on the purchasing practices of companies with market power. *See, e.g.*, Pet. at 2, 27. The general rule that Section 2 applies to the abuse of monopsony power as well as monopoly power has been uncontroversially in place for decades. And the Ninth Circuit's decision here is an extremely narrow one, based expressly on the specific and highly unusual characteristics of the input market for alder hardwood logs in the Pacific Northwest.

Furthermore, the Ninth Circuit did no more than apply its 22-year old *Reid Brothers* precedent, which endorsed the imposition of Section 2 liability under a factual

scenario strikingly similar to the present case. In *Reid Brothers*, the market was geographically confined to the harvest from a single national forest in southeast Alaska. It was highly inelastic because the annual harvest from the Tongass National Forest was limited by statutory sustainability requirements. Two large forest products companies conspired to control that log supply, using essentially the same arsenal of exclusionary tactics employed by Weyerhaeuser here. By the time *Reid Brothers* was tried, defendants' monopsony was complete and log prices had been driven down substantially to the obvious detriment of log sellers, primarily the federal government. The Ninth Circuit upheld the jury's imposition of liability based on the same generally applicable Section 2 standards the Ninth Circuit applied in this case. *Reid Brothers*, 699 F.2d at 1298 & n.5, 1299.

The fact is that *Reid Brothers* has been on the books in the Ninth Circuit for more than two decades without causing any of the legal or practical difficulties about which the petition for certiorari warns. That should be enough to dispose of petitioner's highly unusual plea that the need for immediate review is "especially acute" so that this Court can "straighten[] out the law" at the outset on a legal question of first impression, lest a deluge of litigation ensue. Pet. at 28, 30. That plea is, in all events, antithetical to the principles of judicial restraint that guide this Court's exercise of its certiorari jurisdiction.[6]

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[6] The contrast between this case and other antitrust cases already accepted for review this term illustrates the point. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005), *cert. granted*, 125 S. Ct. 2937 (2005) (No. 04-1329) for example, the issue is the proper treatment of a patent in the analysis of monopoly market power in a tying case, which presents a very common issue that has a substantial history of lower court case law development and circuit conflicts. Those

Even if the question presented in the petition could be said to have some general significance in the abstract (and it does not), review by this Court of petitioner's "legal question of first impression," Pet App. 5a, would be premature. This Court's opinion in *Brooke Group* details a long, full debate leading up to the decision, including the development of economic data and publications by leading antitrust practitioners and theorists, a range of lower court decisions that had confronted the issue and had come to differing and conflicting analytic conclusions and results, and a lead-up to the issue in the Court itself. *Brooke Group*, 509 U.S. at 223-26. Contrast that "two decades of contentious debate" leading up to *Brooke Group* (to use petitioner's own phrase, Appellant's Pet. For Rehearing or Rehearing *En Banc* at 1), with the 12 years of dead silence in the case law since then on the issue presented by the petition in this case. Even *before Brooke Group* was decided, the monopsony question presented in this case rarely arose, and was the subject of no controversy in the courts of appeals.

Indeed, the case for review here is significantly weaker than in *3M v. LePage's* in which the Court denied review in June 2004. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 141 (2004). In that case, the Court declined to take up the question whether *Brooke Group* should be extended to allegations of so-called predatory bundling, after the United States had explained that review would be unwarranted in light of the absence of a

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same certiorari-worthy characteristics are shared by *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004), *cert. granted sub nom. Shell Oil Company v. Dagher*, 125 S. Ct. 2958 (2005) (No. 04-814), *consolidated with Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004), *cert. granted sub nom. Texaco, Inc. v. Dagher*, 125 S. Ct. 2957 (2005) (No. 04-805), which involve the treatment of joint ventures in a price-fixing claim.

circuit conflict and inadequate development of the law in the lower courts, *see* U.S. Br. at 8, 15-16 (noting the lack of conflict, "novel" quality of issue, and need for lower courts to "refine and clarify" the issue); the lack of experience and economic data relevant to the challenged practice (*id.* at 8, 14); the danger of an ill-informed and ill-considered decision, which could result in stifling competition (*id.* at 8-9); and the absence of any pressing need or compelling reason for review (*id.* at 8, 19). The question presented in this case has received even less judicial attention and scholarly expert analysis than the question presented in *LePage's*. Accordingly, just as in *LePage's*, it would be precipitous for this Court to intervene now and grant review.

Finally, in assessing the importance of the issue on review, it is significant that the petition misstates the question presented. In the trial court and the court of appeals, it was Weyerhaeuser's all-or-nothing position that *Brooke Group* must apply, period,[7] and therefore that petitioner either was entitled to JMOL because of a failure of proof or to a new trial because the jury instructions did not state the *Brooke Group* requirements.[8] Accordingly, when

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[7] *See* Fed. R. Civ. P. 51(c),(d) (requiring party to state "distinctly the matter objected to and the grounds of the objection" when challenging a jury instruction in the trial court in order to preserve a claim of error for appeal).

[8] The Ninth Circuit described Weyerhaeuser's position as follows:

> Specifically, Weyerhaeuser argues that the jury instructions were erroneous because the court did not instruct the jury that overbidding for sawlogs could be anticompetitive only if Weyerhaeuser

the Ninth Circuit concluded that *Brooke Group* did not apply to the facts in this case, that completely resolved Weyerhaeuser's challenge to the jury instruction on exclusionary overbidding and overbuying.[9]

The Ninth Circuit's actual decision thus is limited to the question whether *Brooke Group* applies here, and it raises no broader questions about the validity or purported national economic ramifications of the text of the jury instruction on exclusionary overbidding and overbuying given by Judge Panner.

## III. THE NINTH CIRCUIT'S DECISION WAS CORRECT.

Even if a mere plea for error correction could justify granting certiorari (and it cannot), Weyerhaeuser's petition fails because the Ninth Circuit's decision plainly was correct.

This case involves nothing more than a straightforward application of established Section 2 principles. A business violates Section 2 if it seeks or maintains monopoly

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> operated at a loss and a dangerous probability of its recoupment of losses existed.

Pet. App. 7a, 8a (same re: JMOL).

[9] The Ninth Circuit held:

> Our conclusion that *Brooke Group* does not apply here disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety.

Pet. App. 5a.

power by acting "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). Intent remains relevant to determining whether conduct is fairly characterized as anticompetitive, which is behavior that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting III Philip E. Areeda & Donald F. Turner, ANTITRUST LAW 78 (1978)); *see also* U.S. Br. at 9 (detailing the "incremental guidance for applying Section 2" developed by the Court). Those and other related principles are embodied in the American Bar Association's Sample Jury Instructions in Civil Antitrust Cases, C-20 (1999), which were reflected in the jury instructions in this case on anticompetitive conduct, quoted in their full length in the Ninth Circuit's opinion, Pet. App. 14a n.30 (reproduced at pp. 11-12 *supra*).

Ross-Simmons had substantial burdens to meet in order to establish market power, anticompetitive conduct, specific intent to monopolize, and causal antitrust injury. Pet. App. 16a-17a. Weyerhaeuser had ample opportunity to dispute the underlying factual allegations at trial and to justify its conduct on the grounds of efficiency or some other legitimate business practice, and the jury instructions expressly so instructed the jury. *Id.* 14a n.30; *see also id.* 17a ("Anticompetitive acts or predatory acts are those that tend to exclude or restrict competition 'on some basis other than efficiency,'" quoting *Aspen Skiing Co.*, 472 U.S. at 605). Indeed, in addition to the general instructions, the specific instruction on exclusionary overbidding and overbuying also stated that the jury was only permitted to find that raising prices and buying too many logs was

anticompetitive *if it was done to foreclose or unduly restrict competition, i.e.*, "*in order to prevent the Plaintiffs from obtaining the logs they needed* at a fair price." Pet. App. 14a n.30 (emphasis added). There can be no doubt based on the facts and conclusions detailed by the Ninth Circuit and set forth herein at pp. 4-9, *supra*, that Weyerhaeuser possessed market power and acted with the "specific intent to eliminate [or foreclose] competition," Pet. App. 18a, 20a, and that it did so through unnecessarily restrictive means by effectively cutting off its competitors' supply of the resources necessary to operate their business, *id.* 19a ("Weyerhaeuser's overbidding for sawlogs clearly threatened competition because it restricted competitors' access to the limited supply of sawlogs").

In order to extricate itself from clear liability under established Section 2 standards, Weyerhaeuser asks this Court to make intent irrelevant and shield it from liability so long as it was not forced to sacrifice all profit while it successfully and intentionally used its market power to control prices, restrict access to resources necessary for production, destroy its competitors, and eliminate price competition. The cornerstone of that extraordinary request is the argument that monopoly and monopsony are but mirror images, and that their "symmetry" dictates that the special *Brooke Group* requirements which apply to one category of a monopolist seller's conduct (aggressive price-cutting) must apply to *all* categories of conduct by a monopsonist buyer (both price-related and other anticompetitive conduct).

That clichéd characterization of monopoly and monopsony as twins is no substitute for actual economic analysis. *See, e.g.*, Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 The Antitrust Bulletin 1, 5, 11, 43-44 (1991) (monopsony and monopoly are not completely analogous, there is no real-

world symmetry between the two, and there are at least five substantial reasons for analyzing monopsony cases differently).

*Brooke Group* was the culmination of 20 years of study and debate in the academic legal and economic literature, as well as analysis in decisions by this Court and the lower federal courts, to address the particular, common problem in antitrust law of aggressive price-cutting by monopolist sellers. *Brooke Group*, 509 U.S. at 222-24; U.S. Br. at 10 ("Brooke Group has provided more specific guidance for Section 2 cases in the context of a particular form of potentially exclusionary conduct – aggressive price-cutting."). *Brooke Group* ultimately concluded that "[l]ow prices benefit consumers regardless of how those prices are set," and then opted for a two-prong, bright-line test of unprofitability and recoupment based on its concern about the courts policing a system where the demonstrable prevalence of false positives would "chill the very conduct the antitrust laws are designed to protect," *i.e.*, competition to provide lower prices to consumers. *Brooke Group*, 509 U.S. at 223-26 (quotation marks omitted).

Although the petition repeatedly asserts that the essence of *Brooke Group* is protection of unrestricted price competition generally – while ignoring that Weyerhaeuser controlled prices and acted with the specific intent of *putting an end to price competition* – that characterization of *Brooke Group* plainly is not correct. What is correct is that *Brooke Group* sought to protect the manifest direct benefits to consumers from *competition that produced lower prices*: *Brooke Group* created a special rule of Section 2 liability in the "specific context of aggressive price-cutting . . . that preserves the important role of price-cutting as a primary means of competition on the merits." U.S. Br. at 11.

Thus, the first and most important distinction that the Ninth Circuit recognized between *Brooke Group* and this case is that Weyerhaeuser's conduct, raising the costs of natural resource inputs needed for production, is materially different from lowering the price of goods sold to consumers. Pet. App. 10a. Unlike in *Brooke Group*, there is no presumption discernible from case law, professional literature or experience that exclusionary overbidding resulting in higher input costs here is the type of price competition that the antitrust laws are designed to protect. *Id.* 8a-10a; *see also* U.S. Br. at 12-13 (same conclusion as to bundled rebates by monopolist sellers). Commentators as recently as this year have remarked that "[w]hat is plainly needed is a good deal of additional work [on a number of unresolved issues regarding buyer power] that begins with empirical studies of particular industries." Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505, 508 (2005); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 656 (2005) ("As any antitrust expert knows, predatory pricing has generated an enormous literature . . . In contrast, there is little legal or economic analysis of predatory bidding.").

The market and transactions here bear almost no resemblance to the market for sales to consumers that the Court confronted in *Brooke Group*. Accordingly, the Ninth Circuit correctly stated, in a measured conclusion, that the *Brooke Group* concerns "do not carry over to this predatory bidding context with the same force" and the "high standard of liability" of *Brooke Group*, therefore, does not control. Pet. App. 11a.

The Ninth Circuit's conclusion is supported by consideration of the effects of exclusionary overbidding on consumer welfare and the level of risk for false positives. The Ninth Circuit recognized that the "overall effect of a

predatory bidding scheme would result in harm to consumers" because, in part, the monopsonist would have no incentive to pass along any future input cost savings during a recoupment period to consumers. *Id.* 10a-11a. The panel further stated that the inelastic nature of the input market here, where overall supply can't increase, obviates many of the traditional underpinnings for new entrants, innovation, and efficiency that appear in other markets where the output market can expand. *Id.* 11a. Indeed, monopsony control of this market produces a *disincentive* for sellers to plant new trees because of concerns about lack of choice and low prices in the future, and those reductions in supply adversely affect future consumer welfare. *See* Roger D. Blair & Jeffrey L. Harrison, MONOPSONY, 72 (1993). In addition, artificially high, non-optimal prices set by a dominant buyer inevitably result in social welfare losses. *Id.* at 36-61, cited at Pet. App. 6a n.5.

There is no evidence in the record to support any positive consumer benefit.[10] To the contrary, Judge Panner found there was substantial evidence that:

> Defendant was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard,

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[10] In the Ninth Circuit before the panel, Weyerhaeuser took the position that there could be no actionable claim unless there was injury to downstream consumers by an increase in the price of the end product. Brief of Appellant at 23 n.21. When the Ninth Circuit panel then rejected that contention in its opinion, Pet. App. 10a-11a, Weyerhaeuser sought rehearing *en banc* and contended that it was a "fundamental" error for the panel even to consider the effect on downstream consumers, and that the only "consumer" that mattered was the seller of the sawlogs. Pet for Reh. at 7-9. In this Court, Weyerhaeuser continues to repudiate the position that it took before the panel and focuses on the seller as the consumer.

> and that Defendant allegedly overpaid by $20 million per year for logs as part of a scheme to deliberately deprive Ross-Simmons of logs or forcing it to operate at a loss by driving up costs.

Pet. App. 34a. Blair & Harrison have stated that there is one bright-line test highly indicative of predatory buying – destroying a perishable input or hoarding:

> This type of behavior, especially when accompanied by a bidding war for the input, is hard to interpret as anything other than an effort to deny the competing buyers access to the input . . . The welfare loss could not be more obvious.

MONOPSONY, at 155-156. The contrast of the adverse consumer effects here to the presumptive direct benefits to consumers of the price-cutting by sellers considered in *Brooke Group* also "could not be more obvious."

So too is the contrast to *Brooke Group* when one examines the matter of false positives, starting with the fact that the dearth of cases is perhaps the best indicator of the lack of false positives. The petition points to no cases suggesting the existence of false positives, much less the risk that they would occur with any frequency. The Ninth Circuit expressly pointed to the higher likelihood of success of Weyerhaeuser's scheme in an inelastic market, where access to the necessary input is restricted by the monopsonist and the market supply thus cannot respond and act as a corrective force for that anticompetitive conduct. Pet. App. 11a. Similarly, the existence of barriers to entry, which the jury found as an element of market power, necessarily implies that the recoupment that Weyerhaeuser projected here was a

viable strategy. *Id.* 19a-20a (substantial evidence of plan and capacity to recoup); *id.* 22a-25a (substantial evidence of barriers to entry); *see also* Brief of Appellant at 31-32 (Weyerhaeuser contended that barriers to entry were so low that recoupment was not possible).

The low risk of false positives also is clearly demonstrated by the successful schemes chronicled in the Ninth Circuit's opinions in this case and in *Reid Brothers* on nearly identical facts 22 years ago. As Justice Cardozo observed more than 70 years ago, "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932).

Weyerhaeuser has a heavy burden to demonstrate a compelling need to replace well-established Section 2 liability standards with a bright-line *Brooke Group* test. The petition fails to carry that burden. The rationales that supported the *Brooke Group* decision do not apply here; the unusual factual context is not representative of the wide range of potential monopsony situations; and there is a glaring lack of sufficient experience, data, case law or professional literature necessary to inform such a far-reaching decision. *See* U.S. Br. at 18-19 (same in *LePage's*). The Ninth Circuit recognized this and properly issued a narrow, case-specific holding.[11]

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[11] A number of potential *amici curiae* have filed briefs in support of Weyerhaeuser's petition for certiorari, including groups that also appeared as *amicus curiae* in support of 3M Company's petition for certiorari in *LePage's*, where they predicted that similar economic calamities would befall them. Despite their stated concerns, any one of the lawyers for *amici* presumably would have very little trouble distinguishing the Ninth Circuit's decision in this case in virtually any subsequent matter involving their clients. That experience with other distinct factual

There is simply no way that a reasonable legislator supporting the enactment of Section 2 of the Sherman Act would have intended to create a bright-line rule that would eliminate any consideration of Weyerhaeuser's intent or conduct and insulate Weyerhaeuser from antitrust liability just as long as it was making a profit. The Ninth Circuit correctly concluded that the "blind application of a numerical test would only frustrate the intent of the Sherman Act." Pet. App. 12a (quoting *Reid Brothers*, 699 F.2d at 1298 n.5).[12]

The jury in this case was perfectly capable of reaching a reasoned conclusion as to whether Weyerhaeuser's conduct violated the Sherman Act. The jury was entitled to disbelieve Weyerhaeuser's denials that the

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circumstances and the development of the law in the lower courts is precisely what needs to take place before this Court steps in and issues a decision with the kind of sweeping import that Weyerhaeuser urges here.

[12] Indeed, the specific problem of predatory manipulation of log markets has long been a concern of the United States where it sells timber from federal lands. In 1958, Congress amended the Small Business Act to require a "fair proportion" of total sales of government property go to small business "to preserve free competitive enterprise." 15 U.S.C. § 631(a). After experiencing problems with an *ad hoc* approach, the Small Business Administration and the Forest Service in 1971 established defined standards for how and when to reserve sales for exclusive bidding by small business. A challenge to that program was rejected, based in part on testimony from a top SBA official showing that the previous program had been ineffective at preventing preclusive bidding by large companies and their "increasing quasi-monopoly." *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 367, 370 (D.D.C. 1976), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976).

conduct occurred and its protestations that if it occurred the conduct was nothing other than legitimate competitive behavior. That is the authority that Congress expressly gave to a jury, and the result in this case is entirely consistent with the intent of Section 2 itself. The Ninth Circuit correctly concluded that the jury was not obliged by law to apply the stringent requirements of *Brooke Group*, and thus the court properly affirmed the jury's verdict on these facts.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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9 File Date:
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No. 05-381

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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American Bar Association, *Ninth Circuit Holds that Dangerous Probability of Recoupment Not Required in Predatory Overbidding Cases*, Sherman Act Section 2 E-Bulletin, June 6, 2005, at http://www.abanet.org/antitrust/committees/sherman2/e_bulletins/ issue31.html.....5

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### A. This Case Presents The Straightforward Legal Question Whether The *Brooke Group* Test, Rather Than A Subjective "Fairness" Standard, Governs Predatory Buying Claims

Respondent attempts to create confusion about what the court of appeals decided. But there is no doubt about the holding below and the issue presented here: the rule in the Ninth Circuit is that liability may be imposed under Section 2 of the Sherman Act if a jury finds that the defendant purchased more materials "than it needed" *or* paid a higher price for them "than necessary," to prevent competitors from obtaining those materials "at a fair price." Pet. App. 7a n.8. Respondent errs in contending that we have misstated the jury instruction that articulates this standard and was approved by the court of appeals. See Br. in Opp. 11, 21.

Most of the instruction quoted by respondent is immaterial to the issue here. The language identified by the Ninth Circuit as the "relevant jury instruction" (Pet. App. 7a n.8) informed the jury that it could condemn "[a]nti-competitive conduct," and that it "may regard it as an anti-competitive act" if Weyerhaeuser purchased more logs "than it needed" or paid more for those logs "than necessary" to keep the plaintiff from obtaining logs at a "fair" price. *Ibid.*; see *id.* at 14a n.30. Rejecting the *Brooke Group* standard, the court of appeals held that this instruction "provided sufficient guidance regarding how to determine whether conduct was anti-competitive." *Id.* at 14a. Whether that decision was correct is the straightforward question of law presented here.[1]

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[1] Respondent misleads the Court in asserting that "the American Bar Association's Sample Jury Instructions * * * were reflected in the jury instructions in this case on anticompetitive conduct." Br. in Opp. 21. Language similar to part of the ABA instruction was included in the charge, but the ABA model instruction does *not* include anything resembling the "more than needed/higher than necessary/fair price" language that was determinative in this case.

Respondent also attempts to obscure the court of appeals' ruling by reciting at some length the "alleged 15 different specifications of anticompetitive conduct" that it argued below. Br. in Opp. 9-10. See *id.* at 1, 6-9. These allegations are wholly beside the point here. As we noted in the petition (at 4 n.2) – and as respondent does not deny – the Ninth Circuit explicitly rested its decision upholding liability exclusively on the assertions regarding "predatory overbidding." Pet. App. 18a. The court expressly declined to "analyze whether substantial evidence supports the other alleged anticompetitive acts." *Ibid.* Thus, as the case comes to this Court, it turns on whether the Ninth Circuit's subjective "more than needed/higher than necessary/fair price" standard, rather than the rule of *Brooke Group*, governs allegations of predatory buying.[2]

**B. Immediate Review Is Warranted**

1. We explained in the petition (at 2-3, 26-30) that the significant practical and doctrinal implications of the Ninth Circuit's decision strongly favor a grant of certiorari. Although respondent purports to disagree, the most noteworthy aspect of the brief in opposition is its failure to address *at all* the central problem with the decision below that makes immediate review imperative: businesses cannot know how to comply with the Ninth Circuit's subjective "fairness" standard. Respondent makes no attempt to explain how juries are

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[2] Respondent asserts that elements of our argument are not preserved. Br. in Opp. 19-20. This contention is mystifying. Before the Ninth Circuit, Weyerhaeuser presented as separate issues "[w]hether Weyerhaeuser is entitled to judgment as a matter of law, because Weyerhaeuser's purchasing practices were lawful under *Brooke Group*," and "[w]hether Weyerhaeuser is entitled to a new trial, because the jury instructions misstated the law of predatory purchasing." Appellant Ct. App. Br. at 2-3. It presented extensive argument on these points. *Id.* at 22-32, 41-44. And, of course, the issues were squarely decided by the Ninth Circuit.

to determine what price is "higher than necessary" or "fair." It does not deny that the already substantial risk of jury confusion (and of "false positives") that is inherent in any subjective standard is greatly compounded by the reality that rivals and juries will regard competition from lower-cost, more efficient firms as "unfair" – even though "this conception of fairness is, of course, antithetical to both competition and economic efficiency." 1 P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 111d, at 103 (2d ed. 2002). And respondent does not dispute then-Judge Breyer's demonstration that vague liability standards just like the one articulated here are unmanageable and unadministrable. See Pet. 23-24.

The practical problems that will flow from this "marshmallow" standard are not in the least abstract, speculative, or far-fetched. Consider the circumstances of an executive (or of a lawyer who has read the Ninth Circuit's decision and is asked to advise the executive) in a fiercely competitive industry. The executive must place orders for inputs, an essential component that sometimes is in short supply. May the executive buy more inputs than are needed now, in hopes that an advertising campaign will increase demand for the company's product? May he pay slightly more than the list price so as to cement a favorable relationship with a maker of especially high quality inputs? May she make an especially high bid because she fears that competing product manufacturers are likely to increase their purchases? May he increase his bid to purchase the last of the scarce blue inputs, when doing so will make those components unavailable to a less efficient rival? Questions like these, and innumerable others like them, arise thousands of times in the real world every day. But under the Ninth Circuit's standard, an aggressively competitive answer to any of these questions could make the purchaser liable for trebled antitrust damages.

That is why the petition in this case has attracted an extraordinary range of *amicus* support from a broad cross-section of industry – technology, manufacturing, agriculture,

and consumer products companies – as well as three prominent groups representing the entire business community. Indeed, the timberland owners who sell logs to companies like Weyerhaeuser and respondent, and who ostensibly were to be the ultimate *victims* of Weyerhaeuser's alleged predatory scheme, have filed a brief explaining that in reality it is the Ninth Circuit's decision that will harm them by chilling legitimate competition for their logs, and reducing the prices they are able to obtain. See Campbell Group Am Br. The various *amici* provide concrete examples that illustrate the ways that the ruling below "create[s] widespread uncertainty for significant portions of the American economy" and "casts a shadow over many routine, day-to-day purchasing decisions." American Meat Inst. Am. Br. 3; see *id.* at 2-3; Campbell Am. Br. 18-20; Business Roundtable Am Br. 7.

The inevitable result, as we argued in the petition (at 26-28) and as *amici* emphasize, is that the Ninth Circuit's rule *already* is discouraging competition by any firm that does a national business and therefore is subject to suit in the Ninth Circuit. Every sensible business will pause before engaging in aggressive buy-side competition; in many cases, fear of burdensome litigation and potentially crippling liability will lead buyers to lower their bids and reduce their purchases. That will reward less-efficient competitors, depress prices for suppliers, and discourage the innovation that benefits consumers. The Ninth Circuit's rule thus will "undercut[] the very economic ends [it] seek[s] to preserve." *Barry Wright*, 724 F.2d at 234. Respondent could not – and does not – deny any of this; that in itself makes review appropriate.[3]

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[3] Respondent relies on the Ninth Circuit's statement that increased production and new innovation is less likely in this case because the alder supply is relatively inelastic. Br. in Opp. 25 (citing Pet. App. 11a). But this assertion, which finds no support whatsoever in the record, is both wrong and immaterial. There is no reason to doubt the fundamental economic proposition that increased prices

2. Respondent nevertheless maintains that the Court should deny certiorari because the Ninth Circuit's decision is "idiosyncratic" (Br. in Opp. 1), there is no square conflict in the circuits on the issue presented, and allegations of buy-side predation have not been widely litigated since *Brooke Group*. *Id.* at 14-18. To the extent that is true, we submit, it is because courts and potential litigants understandably assumed that the *Brooke Group Matsushita* standard governed claims of predatory buying; indeed, even before *Brooke Group*, the Fifth Circuit held that predatory buying and selling claims should be governed by the same standard.[4]

But the Ninth Circuit's decision in this case, which has been widely noted and discussed,[5] has fundamentally

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will increase supply over the long run and, as *amici* Campbell Group *et al.* show (at Br. 12-13), will do so even in the short term. In any event, the Ninth Circuit did not purport to state a separate rule regarding the application of *Brooke Group* for elastic and inelastic markets, and the jury was not asked to make a finding on the point. Moreover, any such approach would be completely unworkable. The participation of amici from a wide variety of industries confirms the broad impact of the Ninth Circuit's decision. Respondent also asserts that Weyerhaeuser hoarded or destroyed logs. Br. in Opp. 25-26. But the court of appeals made no reference to, and did not rely upon, evidence of any such practice.

[4] See Pet. 15-16 (discussing *In re Beef Antitrust Litig.*, 907 F.2d 510, 515 (5th Cir. 1990)). Respondent is incorrect in attempting to distinguish *In re Beef* on the ground "that the claim [in that case] failed for insufficient evidence of market power." Br. in Opp. 15. The Fifth Circuit rejected *other* claims on that ground; it rejected the predatory buying claim because there was no evidence the defendant paid "a price higher than that which would allow the packer to make a profit." 907 F.2d at 515.

[5] See, *e.g.*, American Bar Association, *Ninth Circuit Holds that Dangerous Probability of Recoupment Not Required in Predatory Overbidding Cases*, Sherman Act Section 2 E-Bulletin (June 6, 2005); *9th Cir. Affirms $78.7 Million Verdict Against Weyer-*

changed the legal landscape. For the reasons set out above, that decision will alter real economic behavior and foment strike suits. The issue here accordingly is ripe for review. Despite respondent's assertion to the contrary, monopsony and buy-side predation have been addressed extensively in the antitrust literature; a sample of this scholarship is cited in the petition (at 29 n.15). The Fifth Circuit has reached the opposite conclusion regarding the issue. And a broader conflict among the circuits is not likely to develop because forum-shopping plaintiffs will take advantage of the Sherman Act's liberal venue rule to file their predatory buying lawsuits in the Ninth Circuit.[6]

Moreover, as we showed in the petition (at 29 & n.14), the Court has reviewed and set aside aberrant antitrust decisions in the absence of numerous conflicting decisions even when the issues involved had implications that were less far-reaching than those of the holding below. And there is no reason for review to wait when a decision that plainly is erroneous – and that will inflict significant injury to the national economy – departs from principles announced by this Court. See Pet. 29-30 & nn 14, 16.[7]

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*haeuser*, 13 No. 4 Andrews Antitrust Litig. Rptr. 9 (July 19, 2005); N. Stoll & S. Goldfein, *The Ninth Circuit – An Appellate Outlier*, New York Law Journal, June 21, 2005, at 3; NERA Economic Consulting, *Appeals Court Verdict on Weyerhaeuser Upholds Predatory Overbidding Charges*, Global Antitrust Weekly Newsletter, May 28, 2005 - June 3, 2005, at 9.

[6] In addition, much litigation that is initiated will not go to judgment; antitrust lawsuits are notoriously time-consuming, burdensome, and expensive, factors that – along with the fear of trebled damages – often yield extortionate settlements.

[7] Respondent asserts (at 16-17) that the absence of adverse consequences from the Ninth Circuit's decision in *Reid Brothers* somehow undermines our argument about the consequences of the decision below. *Reid Brothers* relied entirely on the Ninth Cir-

3. In arguing to the contrary, respondent calls attention to the brief filed by the United States in No. 02-1865, *3M Co.* v. *LePage's Inc.*, cert. denied, 124 S. Ct. 141 (2004). See Br. in Opp. 18-19. In that case, the Third Circuit declined to apply the *Brooke Group* test to a claim challenging a bundled rebate program. *LePage's Inc.* v. *3M Co.*, 324 F.3d 141 (3d Cir. 2003). The Court invited the Solicitor General to submit the views of the United States on whether certiorari should be granted; the United States recommended against review and the Court followed that recommendation. We fully agree that *LePage's* is instructive here, but respondent draws the wrong conclusions from the United States' brief in that case.

The United States observed that "it would be desirable to provide the business community, consumers, and the lower courts with additional guidance on the application of Section 2 to bundled rebates," but concluded that *LePage's* did "not provide a suitable vehicle for providing such guidance." No. 02-1865, U.S. Br. 8. That was so because "[t]he court of appeals was unclear as to what aspect of bundled rebates constituted exclusionary conduct" (*ibid.*; see *id.* at 16); the Third Circuit did not "definitively resolve[] what legal principles and economic analyses should control" (*id.* at 8; see *id.* at 18); there was "substantial uncertainty in the record below concerning facts that could be significant" (*id.* at 8); and there was no "urgent need justifying this Court's immediate intervention." *Ibid.*; see *id.* at 19.

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cuit's then-applicable predatory *selling* standard, which permitted liability for above-cost pricing. That standard was undercut by this Court's decisions just three years later in *Cargill* and *Matsushita*: "reasoning in both cases suggests that only below-cost prices should suffice" to establish liability, even though both opinions formally reserved the question. *Brooke Group*, 509 U.S. at 223. This Court's decisions thus eliminated the chilling effect that *Reid Brothers* otherwise would have had. The Ninth Circuit's decision in this case to adhere to its prior view despite *Brooke Group* creates a new rule that will disrupt legitimate purchasing behavior.

All of those considerations point in the other direction in this case. There is no lack of clarity in the Ninth Circuit's decision or in its view of the legal and economic principles that apply. There is no uncertainty in the record; it is undisputed that Weyerhaeuser (and its relevant components) made a profit throughout the alleged predation period. And, as we have explained, there *is* an "urgent need" for immediate review in this case. In *LePage's*, the United States was unsure whether the Third Circuit's decision would have a widespread impact because "it is not clear that monopolists commonly bundle rebates for products over which they have monopolies with products over which they do not." No. 02-1865, U.S. Br. 19. Here, in contrast, the challenged practice – aggressive (but still profitable) buying of raw materials and other inputs – is ubiquitous throughout the economy.

On the merits, as well, the United States' filing in *LePage's* suggests agreement with our position here. The United States noted that the bundling of rebates at issue in *LePage's* "is not necessarily procompetitive" because it is possible to imagine circumstances where "a bundled rebate or discount can * * * exclude an equally efficient competitor." No. 02-1865, U.S. Br. 12, 13. In this, the United States contrasted bundled rebates with "a low but above-cost price on a single product" (*id.* at 12-13), explaining that *Brooke Group* "made pricing below the defendant's costs the touchstone" in that context. *Id.* at 11. This case – like *Brooke Group* but unlike *LePage's* – does involve a challenge to above-cost pricing regarding a single product. Respondent therefore can take no solace in *LePage's*. If there is doubt on this score, of course, the Court may invite the government to express its views.

**C. The Decision Below Frustrates Antitrust Policies**

Finally, respondent's defense of the Ninth Circuit's decision is strikingly anemic. Respondent asserts that evidence of intent to injure competition can take the place of the objec-

tive evidence required by *Brooke Group* (Br. in Opp. 20-21); that allegations of monopoly and monopsony should not receive similar treatment (*id.* at 22-23); and that price cutting for consumers is the only "type of price competition that the antitrust laws are designed to protect." *Id.* at 24. Each of these points is wrong.

*First*, evidence of intent to damage competitors is of little value in economic analysis – especially when the plaintiff is complaining that it was injured by *hard competition*. After all, "a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. * * * [S]tatements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.). See, *e.g.*, *Morgan* v. *Ponder*, 892 F.2d 1355, 1359 (8th Cir. 1989) (proof of predation requires "a separate showing of predatory conduct"); R. Posner, ANTITRUST LAW 214-15 (2d ed. 2001) (statements of "competitive prowess" are "[e]specially misleading" to judges and juries).

*Second*, respondent simply ignores the pervasive view of courts and antitrust scholars, described in the petition (at 12-13) and by *amici* (see, *e.g.*, Business Roundtable Am. Br. 6-7 n.2), that "assymetric treatment of monopoly and monopsony has no basis in economic analysis." R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 590-91 (2005). Respondent's argument to the contrary is based on a single article, which it cites for the proposition that "monopoly and monopsony are not completely analogous." Br. in Opp. 22 (citing J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 5, 11, 43-44 (1991)). But the view of the authors is that the differences between monopsony and monopoly justify making it *harder* to establish a buy-side than a sell-side claim. Needless to say, that conclusion does not help respondent.

*Third*, and most fundamentally, respondent disregards the many ways in which buy-side competition unquestionably is beneficial and advances antitrust policies. As we showed in the petition (at 14-16), this Court has held unequivocally that the Sherman Act protects sellers. Even if one focuses solely on consumers,[8] we also showed (at 16-17) that higher prices for suppliers must be presumed to help the ultimate purchaser by encouraging innovation and increased production. *Amici* forcefully confirm that view. See, *e.g.*, Campbell Group Am. Br. 12-13. Respondent does not address any of these points. Because the decision below thus discourages healthy competition, frustrates antitrust policies, and departs from principles announced by this Court, further review is necessary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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[8] Respondent complains that Weyerhaeuser argued below that "there could be no actionable claim unless there was injury to downstream consumers." Br. in Opp. 25 n.10. Weyerhaeuser did advance that position in a footnote in its brief to the Ninth Circuit panel. But the Ninth Circuit made no reference to, and did not rely on, that footnote in reaching its conclusions. Even if that position were accepted, there is no doubt that respondent would *lose* because the jury's verdict establishes that Weyerhaeuser lacked power in the downstream market and that its conduct accordingly caused no harm to the ultimate consumers. See Pet. 4 n.2.

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No. 05-381

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

*v.*

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether a plaintiff alleging that a defendant engaged in "predatory bidding" constituting anticompetitive conduct for purposes of Section 2 of the Sherman Act, 15 U.S.C. 2, must prove that the defendant suffered a loss in the short term and that it had a dangerous probability of recouping its loss in the long term.

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Miscellaneous:

1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000) ..... 17
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# In the Supreme Court of the United States

No. 05-381

WEYERHAEUSER COMPANY, PETITIONER

*v.*

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

### STATEMENT

1. Petitioner and respondent operated sawmills in the Pacific Northwest. The predominant hardwood species in that region is red alder. Petitioner and respondent purchased alder sawlogs from timberland owners and loggers and processed them into hardwood lumber, which is used primarily for finished goods such as furniture and cabinetry. Sawlogs represent approximately 75% of a sawmill's total cost in producing alder lumber. Because alder sawlogs degrade quickly and are difficult (and expensive) to transport, alder sawmills typically operate within 100 miles of their sources of timber. Pet. App. 2a-3a; Br. in Opp. 8; Stipulated Facts paras. 9, 14.

Respondent was a pioneer in the alder lumber business and began operating an alder sawmill in Longview, Washing-

ton, in 1962. Petitioner, one of the world's largest manufacturers of hardwood lumber, entered the Pacific Northwest alder lumber business in 1980, and now operates six alder sawmills in the region. During the relevant period, petitioner's share of the Pacific Northwest market for alder sawlogs was approximately 65%; petitioner's share of North American sales for all hardwood lumber, however, was less than 3%. Pet. App. 3a; C.A. E.R. 405.

From 1998 to 2001, the price of alder sawlogs increased, while the price of hardwood lumber decreased. As the margin between those prices narrowed, a net total of 27 alder sawmills in the Pacific Northwest, including respondent's, became unprofitable and closed. Pet. App. 3a, 23a n.57.

2. After closing its plant, respondent brought suit against petitioner in the United States District Court for the District of Oregon, contending, *inter alia*, that petitioner had engaged in monopolization and attempted monopolization of the Pacific Northwest alder sawlog market, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Specifically, respondent alleged that petitioner had engaged in four types of anticompetitive conduct for purposes of Section 2: "(1) predatory overbidding (i.e., paying a higher price for sawlogs than necessary); (2) overbuying (i.e., buying more sawlogs than it needed); (3) entering [into] restrictive or exclusive agreements with sawlog suppliers; and (4) making misrepresentations to state officials in order to obtain sawlogs from state forests." Pet. App. 3a-4a.

After a two-week trial, the case was submitted to the jury. The district court instructed the jury that, in order to prevail on its monopolization or attempted-monopolization claims, respondent was required to prove that petitioner had engaged in anticompetitive conduct. The court defined "anticompetitive conduct" generally as "conduct that has the effect of wrongly preventing or excluding competition." Pet. App. 14a

n.30. The court noted, however, that "[n]ot everything that enables a company to gain or maintain a monopoly is anti-competitive," and further advised the jury that, in deciding whether conduct is anticompetitive, it should consider "whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition." *Id.* at 3a-4a, 14a n.30, 28a; C.A. E.R. 568, 575.

With reference to respondent's "predatory bidding" and "overbuying" claims, the court instructed the jury as follows:

> One of [respondent's] contentions in this case is that [petitioner] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

Pet. App. 7a n.8, 14a n.30. Petitioner objected to that instruction on the ground that respondent's claims were analogous to a claim for predatory *pricing*, in which a plaintiff must show that a defendant engaged in below-cost pricing in the short term and had a dangerous probability of recouping its losses in the long term. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The district court, however, overruled that objection. C.A. E.R. 417-425.

The jury found that petitioner had engaged in monopolization and attempted monopolization and awarded respondent $26.3 million in damages, which the district court trebled to $78.8 million. Pet. App. 4a.[1] The district court then denied

[1] The jury, however, rejected respondent's claim that petitioner had engaged in monopolization or attempted monopolization of the market for finished alder lumber, finding that there was no distinct market for *alder* lumber (as opposed to hardwood lumber generally). C.A. E.R. 581-582.

petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 28a-46a.

3. The court of appeals affirmed. Pet. App. 1a-27a.

At the outset, the court of appeals framed the question presented as "whether the prerequisites set forth in [*Brooke Group*] for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs." Pet. App. 5a. The court concluded that "*Brooke Group* does not control in the buy-side predatory bidding context at issue here." *Ibid.*

The court of appeals acknowledged that "[the] [a]ntitrust laws are * * * concerned with competition on the buy-side of the market as much as on the sell-side of the market," because "[b]oth sides of the market affect allocative efficiency, and hence consumer welfare." Pet. App. 6a. The court explained that, in *Brooke Group*, this Court had "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." *Id.* at 8a. And the court noted that, "in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon." *Ibid.*

The court of appeals nevertheless concluded that predatory-*bidding* cases were distinguishable from predatory-*pricing* cases because "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a. In the short term, the court reasoned, when a firm "pays more for materials * * * and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases," "[n]o consumer benefit results during this predation period if the firm raises or maintains the same price level for its finished products." *Id.* at 9a-10a. The court therefore concluded that "the concerns the *Brooke Group*

Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory bidding is at issue." *Id.* at 10a. And in the long term, the court reasoned, when a firm seeks to "recoup the higher costs it had paid for its materials," "[t]he firm would have little incentive to pass on the benefit of lower input prices to consumers when it possessed greater market power and needed to recoup the higher costs it had paid for its materials." *Id.* at 10a-11a. The court thus concluded that "the overall effect of a predatory bidding scheme would result in harm to consumers." *Id.* at 11a.

The court of appeals recognized that, in some situations, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. Because "[t]he nature of the input supply at issue here does not readily allow for market expansion," however, the court reasoned that, "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." *Ibid.* The court thus determined that "the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing." *Ibid.*

Based on that determination, the court of appeals sustained the district court's instructions, which required the jury to find merely that petitioner "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price." Pet. App. 7a n.8, 13a-14a. The court rejected petitioner's assertion that the jury should have been instructed "that overbidding for sawlogs could be anticompetitive conduct only if [petitioner] operated at a loss and a dangerous probability of [petitioner's]

recoupment of its losses existed." *Id.* at 13a. In the court's view, "[t]he instructions as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive." *Id.* at 13a-14a.

The court of appeals also determined that substantial evidence supported the jury's verdict on respondent's attempted-monopolization claim, finding "substantial evidence of overbidding for sawlogs to support the jury's finding of anticompetitive conduct." Pet. App. 17a. The court did not analyze respondent's other theories of liability because "the evidence of predatory overbidding sufficiently supports the finding that [petitioner] engaged in anticompetitive conduct." *Id.* at 18a. The court also determined that there was sufficient evidence that petitioner had acted with specific intent to eliminate competition, *id.* at 18a-20a, and that there was a dangerous probability that petitioner would achieve monopoly power in the Pacific Northwest alder sawlog market, *id.* at 20a-25a. Finally, the court upheld the jury's damages award, *id.* at 25a-26a, and the district court's award of attorney's fees and costs, *id.* at 27a.

## DISCUSSION

The court of appeals mistakenly held that a plaintiff can establish "predatory bidding" in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, simply by persuading a jury that the defendant purchased an essential input at a higher price than "necessary," for the purpose of preventing competitors from obtaining that input at a "fair" price. The economic and prudential concerns that this Court has articulated in determining the standard governing claims for predatory *pricing* are generally applicable to claims for predatory *bidding* as well. The court of appeals thus erred in holding that a plaintiff alleging predatory bidding need not show that the defendant suffered a loss in the short term or that it had a danger-

ous probability of recouping its loss in the long term. The court of appeals compounded its error, moreover, by approving an instruction that would allow a jury to base its verdict on subjective assessments of factors such as "fairness" and "necessity."

The court of appeals' decision threatens to chill procompetitive conduct by companies that bid aggressively in order to ensure access to inputs or to increase their output. In addition, the court's explicit approval of a subjective and standardless test for Section 2 liability is inconsistent with this Court's Section 2 decisions more generally, which have emphasized the need for objective standards in order to foster robust competition. Certiorari is therefore warranted.

### A. The Court Of Appeals Erred By Upholding The Jury Instruction On Respondent's "Predatory Bidding" Claim

1. In order to prevail on a claim for monopolization or attempted monopolization under Section 2 of the Sherman Act, a plaintiff must prove, *inter alia*, that the defendant has engaged in anticompetitive conduct. See, *e.g.*, *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-459 (1993); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). Conduct is anticompetitive, in turn, when it tends to exclude competition "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation omitted).

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court provided more specific guidance with regard to a particular form of potentially anticompetitive conduct: aggressive price-cutting by the seller of a product.[2] The Court rejected the proposition that it would

[2] Although *Brooke Group* involved a claim for primary-line price discrimination under the Robinson-Patman Act, 15 U.S.C. 13(a), the Court

be sufficient for a plaintiff alleging predatory pricing to show simply that the defendant lowered its prices in order to injure or exclude rivals. Instead, the Court ultimately held that a plaintiff alleging predatory pricing must prove that (1) "the prices complained of are below an appropriate measure of its rival's costs," *id.* at 222, and (2) "the competitor had * * * a dangerous probability[] of recouping its investment in below-cost prices," *id.* at 224.

In formulating that more specific rule for defining anti-competitive conduct in the predatory-pricing context, the Court was guided by several principles. With regard to the below-cost-pricing prong of its rule, the Court acknowledged that "[l]ow prices benefit consumers regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). In addition, the Court reasoned that, at least when a company sets its price above the cost of its product, a low price often "reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *Ibid.* A rule that imposed liability even when a company engages in *above*-cost pricing, the Court concluded, could conceivably "render illegal any decision by a firm to cut prices in order to increase market share." *Ibid.* (quoting *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986)). With regard to the recoupment prong of its rule, the Court reasoned that "[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme," because "it is the means by which a predator profits from predation." *Id.* at 224. The Court noted that

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made clear that the "essence" of that claim was identical to that of a predatory-pricing claim under Section 2 of the Sherman Act: namely, whether "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." 509 U.S. at 222.

unsuccessful predatory pricing produces *lower* aggregate prices in the market, thus *enhancing* consumer welfare. *Ibid.*

In *Brooke Group*, the Court expressly recognized that its rule might permit some price-cutting that would otherwise constitute anticompetitive conduct (insofar as it would exclude rivals on a basis other than efficiency). Specifically, the Court observed that above-cost pricing could sometimes be used to "induce or reestablish supracompetitive pricing," 509 U.S. at 224, and implicitly acknowledged that, even absent recoupment, below-cost pricing could allow a predator to establish short-term market power by injuring and driving out its rivals (until new competitors entered the market and drove the market price back down), *id.* at 224-225; see *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

The Court concluded, however, that such predatory pricing would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Brooke Group*, 509 U.S. at 223. Relatively few instances of truly anticompetitive pricing conduct would escape condemnation under its test, the Court indicated, because "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 226 (quoting *Matsushita*, 475 U.S. at 589); see *id.* at 223. On the other hand, to the extent that a less rigorous approach would impose liability in cases involving procompetitive pricing conduct, "the costs of [such] an erroneous finding of liability are high," *id.* at 226, because it would "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted). And the risks of such "false positives" would be substantial, the Court explained, because "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Ibid.* (internal quotation marks and citation omitted).

2. This case involves an allegation of "predatory bidding" by the *buyer* of a product in an input market. The court of appeals expressly held that *Brooke Group* "does not govern" in the context of "predatory bidding." Pet. App. 13a. The court thus concluded that the district court properly refused to instruct the jury that petitioner's bidding conduct could be treated as anticompetitive only if respondent proved that (1) petitioner suffered a short-term loss as a result of its allegedly higher bid prices, and (2) there was a dangerous probability that petitioner would recoup its loss in the long term. That conclusion was erroneous.

At the outset, the court of appeals correctly noted that, "[i]n a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases," with the expectation that, "[i]n the long run," the firm will be able to "recoup the higher costs it had paid for its materials" through lower input prices. Pet. App. 9a-10a. "Predatory bidding" by a buyer is therefore simply the flipside of "predatory pricing" by a seller. Cf. *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) (noting that "monopsony pricing * * * is analytically the same as monopoly or cartel pricing and so treated by the law"), rev'd on other grounds, 522 U.S. 3 (1997). Both types of behavior involve the manipulation of prices for the purpose of "eliminating competitors in the short run and reducing competition in the long run." *Cargill*, 479 U.S. at 117.

Although the court of appeals recognized that, "in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon," it sought to distinguish predatory bidding from predatory pricing on the ground that "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 8a-

9a. In the short term, the court explained, "[n]o consumer benefit results * * * if the firm raises or maintains the same price level for its finished products." *Id.* at 10a. Although the court recognized that downstream consumers might *temporarily* benefit during the predation period (if the firm simultaneously pays more for inputs and lowers prices in the output market), the court reasoned that such lower prices may actually be *undesirable*, to the extent that the predator's competitors would be forced to pay higher prices for the relevant input while simultaneously receiving less revenue in the output market. *Ibid.* And in the long term, the court reasoned, downstream consumers would likely not benefit either, insofar as the predator would likely not pass on the benefit of lower prices and could instead "charg[e] consumers a higher price" in order to "recoup the higher costs it had paid for its materials." *Ibid.*

The court of appeals' analysis suffers from at least two fundamental flaws. First, to the extent that the court focused on harm to consumers resulting from increased prices in the output market, the court's analysis necessarily rests on unstated assumptions about a market that it did not even analyze. Specifically, it seemed to assume that the defendant's bidding conduct would confer significant market power in the output market, because absent such market power the defendant would be unable meaningfully to affect prices in that market. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992). The jury in this case, however, made no finding of market power in the output market. To the contrary, it found that the sale of finished alder lumber did not constitute a distinct market, and the record reflects that petitioner accounted for less than 3% of North American sales for all hardwood lumber. C.A. E.R. 405, 581-582. More generally, the theory of predatory bidding is that recoupment will occur primarily through the exercise of monopsony power

in the input market to lower prices of inputs in the long run. Some portion of those savings might even be passed on to consumers in the output market, but in all events, the court of appeals' reliance on the potential harm to consumers from increased prices in the output market was misplaced.

Second, the court of appeals simply ignored the effects on sellers in the *input* market. Those sellers unambiguously benefit from higher prices in the short term, and they will suffer in the long term only if recoupment succeeds. The Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers"; to the contrary, "[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of * * * forbidden practices[,] by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).[3] Moreover, just as lower prices for outputs are often a sign of competition, so too are higher input prices, which could reflect a buyer's efficiency or effort to identify high-quality suppliers. Antitrust liability premised on such activity, without evidence of losses and a dangerous prospect of recoupment, could chill substantial legitimate competitive activity. Although the court of appeals acknowledged that the antitrust laws protect competition among sellers, see, *e.g.*,

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[3] Thus, the Department of Justice prosecutes bid-rigging cartels aimed at suppressing competition among buyers under Section 1 of the Sherman Act, 15 U.S.C. 1. See, *e.g.*, *United States* v. *Giordano*, 261 F.3d 1134, 1135-1137 (11th Cir. 2001); *United States* v. *Romer*, 148 F.3d 359, 363 (4th Cir. 1998), cert. denied, 525 U.S. 1141 (1999); *United States* v. *Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir.), cert. denied, 434 U.S. 938 (1977). Similarly, the Department of Justice and Federal Trade Commission challenge mergers that threaten anticompetitive effects in the purchasing of inputs under Section 7 of the Clayton Act, 15 U.S.C. 18. See, *e.g.*, Revised Competitive Impact Statement, *United States* v. *Aetna Inc.*, 64 Fed. Reg. 44,953 (1999); Competitive Impact Statement, *United States* v. *Cargill, Inc.*, 64 Fed. Reg. 44,054 (1999).

Pet. App. 6a, 8a, it failed to recognize that the rationales for *Brooke Group*'s stringent standard of proof for predatory-*pricing* claims are generally applicable in the context of predatory-*buying* claims as well.

Thus, prohibiting buyers from making bids at a higher price could undermine desirable competition in the input market, thus harming input sellers, which benefit from higher prices "regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (citation omitted). Moreover, the exclusionary effect of an increase in input prices may simply "reflect[] the lower cost structure of the alleged predator, and so represent[] competition on the merits." *Ibid.* A rule that attempted to distinguish precisely between competitive and anticompetitive bidding would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate [conduct]," *ibid.*, particularly because "[t]he mechanism by which a firm engages in predatory [bidding]—[raising] prices—is the same mechanism by which a firm stimulates competition" in the input market, *id.* at 226. And to the extent that there are cases involving anticompetitive bidding which do not involve a short-term loss or a prospect of recoupment, the likelihood of "false negatives" is relatively low because predatory-bidding schemes "are rarely tried, and even more rarely successful," *ibid.* (citation omitted), and a broader rule could lead to "false positives" and thereby "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted).[4]

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[4] See, *e.g.*, Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 35 (2006) (noting that "[t]he risks of overdeterrence and false positives are equivalent [in predatory bidding cases] to those in predatory pricing cases" and that "claims [of predatory bidding] are even harder to evaluate, magnifying the possibility of error").

Much like a plaintiff alleging predatory pricing, therefore, a plaintiff alleging predatory bidding should generally be required to prove that (1) the defendant suffered a loss in the short term, as determined by the relationship between the defendant's costs (including the allegedly predatory bid price for the relevant input), and the amount of revenue that the defendant received (or expected to receive) for its finished product;[5] and (2) that the defendant had a dangerous probability of recouping its loss in the long term. To be sure, a predatory-bidding claim may involve not only effects on an *input* market (analogous to the effects of predatory pricing on the market for the predator's product), but also incidental effects on consumers in an *output* market. Since each prong of the foregoing test requires consideration of the revenue that the defendant receives for its finished product, however, the test naturally takes into account the latter effects as well as the former, insofar as changes in the amount that the defendant bids in the input market have effects on the price in the output market (and therefore on the defendant's revenue in that market).[6] Because the court of appeals held that a

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[5] Because the jury instruction did not require any finding that petitioner operated at a loss, there would be no need in this case for the Court to specify the exact relationship between cost and revenue that a plaintiff would need to show in order to satisfy the first prong of the *Brooke Group* test as applied in the predatory-buying context. Similarly, in *Brooke Group* itself, the Court left open the analogous question of how to define the "appropriate measure" of cost. 509 U.S. at 222 n.1.

[6] Even if a company engages in predatory bidding for an input, the price of the finished product may not change (either in the short term or in the long term), to the extent that the downstream market remains competitive—and recoupment could therefore occur exclusively through lower long-term input prices. See, *e.g.*, Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 676 (2005). In this case, as discussed, the evidence indicated (and the jury effectively found) that the downstream market was competitive. See C.A. E.R. 405, 581-582. As it comes to this Court, therefore, this case does not involve a claim that the

plaintiff need not satisfy either prong of the *Brooke Group* standard in order to prevail on a predatory-bidding claim, its decision was erroneous.[7]

The court of appeals suggested that its rejection of the *Brooke Group* test did not necessarily extend to all predatory bidding cases, stating that "the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding *in a relatively inelastic market*." Pet. App. 11a (emphasis added). If supply in the input market at issue is inelastic, it is certainly more likely that a predatory bidder will be able to recoup its losses in the long term, because it is more likely that predatory bidding will cause prices to increase in the short term without significantly increasing supply (thereby facilitating injury to the predator's competitors) and that prices can be forced down in the long term without significantly reducing supply (thereby facilitating recoupment).[8] The same could be said, however, about predatory *pricing* in a case in which *demand* in the consumer market at issue is inelastic. *Brooke Group* did not attach any independent significance to demand elasticity in the predatory-pricing context, instead focusing directly on the likelihood of recoup-

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defendant engaged in monopolization or attempted monopolization of the *downstream* market by engaging in predatory bidding in the *upstream* market. Cf. *Cargill*, 479 U.S. at 114. We express no view here regarding the appropriate test for liability in those circumstances.

[7] The court of appeals did not address respondent's seemingly discrete claim that petitioner had engaged in "overbuying" (*i.e.*, buying more sawlogs than necessary and allowing them to spoil). See Pet. App. 18a & n.42. This case therefore does not present the question of how to analyze such an "overbuying" claim.

[8] On the other hand, it is precisely when supply is inelastic that efforts by relatively efficient firms to expand will lead to an increase in input prices. Thus, the Ninth Circuit's rule will apply the greatest antitrust scrutiny in those markets in which procompetitive expansion is likely to increase input prices and injure competitors (but not competition).

ment, and certainly did not suggest that its two-prong test would be inapplicable in the context of a sufficiently inelastic market. There is no basis for a different approach in the predatory-bidding context.

Indeed, a purported limiting principle based on "relative inelasticity" would be entirely unworkable, as it would entail endless ambiguity and uncertainty. Even if a more objective elasticity criterion could be identified, moreover, the court of appeals' suggested approach would necessitate a complex and costly market-by-market assessment of supply elasticity, frustrating the compelling need for clear and easily administrable rules to govern pricing behavior. Accordingly, there is no justification for refusing to apply the *Brooke Group* standard to a predatory-bidding claim simply because it involves a market with "relatively inelastic" supply.[9]

3. The court of appeals compounded its error in this case by approving an instruction that permitted the jury to find that petitioner had engaged in anticompetitive predatory pricing without any reference to objective standards. Even if *Brooke Group* could be distinguished on the ground that predatory pricing should somehow be treated differently from predatory bidding, the district court's jury instruction would be fatally deficient.

In the Section 2 context, this Court has often recognized "the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Verizon*, 540 U.S. at 408. The Court has noted, moreover, that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Id.* at 414 (quoting *Matsushita*, 475 U.S.

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[9] In addition, the jury made no factual findings on supply elasticity in the Pacific Northwest market for alder sawlogs, and it appears to be a disputed issue. See Pet. Reply Br. 4 n.3; Campbell Group et al. Amici Curiae Br. 12-13 & nn.4-5.

at 594). Accordingly, the Court has stressed the importance of "avoid[ing] constructions of § 2 which might chill competition, rather than foster it." *Spectrum Sports*, 506 U.S. at 458.

The jury instruction on predatory bidding cannot be reconciled with this Court's Section 2 decisions. That instruction did not require the jury to apply any objective standard that would ensure that the challenged conduct was truly anticompetitive in nature, *i.e.*, that it would "exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation omitted). Instead, the district court instructed the jury that it could find that petitioner had engaged in anticompetitive conduct if petitioner had merely "paid a higher price for logs than *necessary*, in order to prevent [respondent] from obtaining the logs [it] needed at a *fair* price." Pet. App. 14a n.30 (emphases added). That standard is entirely unadministrable and wholly subjective, and fails to provide meaningful criteria for distinguishing legitimate competition from anticompetitive conduct.[10]

Nor were those flaws cured by the jury instructions regarding anticompetitive conduct in general. Those instructions advised the jury that, in deciding whether conduct is anticompetitive, it should consider whether "the conduct lacks a valid business purpose" or if "the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition," Pet. App. 14a n.30, but there was no suggestion that those generic principles were limitations on the

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[10] See, *e.g.*, *Spectrum Sports*, 506 U.S. at 459 (noting that "[t]he concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics"); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) (asking "how * * * a judge or jury [is] to determine a 'fair price'"), cert. denied, 499 U.S. 931 (1991); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 111d, at 102 (2d ed. 2000) (stating that "'fairness' is a vagrant claim applied to any value that one happens to favor").

specific instruction regarding predatory bidding, *id.* at 7a n.8. Moreover, the general instructions offered no specific guidance on how the jury should determine whether the price paid by petitioner was higher than "necessary," or what would have constituted a price that was "fair" to respondent. And they certainly did not require that respondent prove either short-term losses or likely recoupment, notwithstanding the court of appeals' acknowledgment that, "[i]n the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials." *Id.* at 10a.[11] The instructions thus offered the jury no meaningful guidance in determining whether petitioner's bidding constituted procompetitive or anticompetitive conduct.

### B. Further Review Is Warranted Because The Decision Below Threatens To Chill Procompetitive Behavior

There are sound reasons for this Court to grant review in this case, notwithstanding the apparent absence of a square circuit conflict on the standard for predatory-bidding claims.[12]

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[11] The jury *was* instructed that, in order to prevail on its attempted-monopolization claim, respondent was required to prove that "there was a dangerous probability that [petitioner] would achieve its goal of monopoly power in a relevant market." C.A. E.R. 575. It does not necessarily follow from such a finding, however, that petitioner had a dangerous probability of successful recoupment of short-term losses (if any) attributable to predation. In order to recoup its losses, a predator must not only achieve some degree of market power, but must achieve enough market power, and maintain it for long enough, to effectuate recoupment.

[12] Petitioner contends (Pet. 15-16) that the court of appeals' decision "cannot be reconciled" with the Fifth Circuit's decision in *In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (1990), which predated this Court's decision in *Brooke Group*. In *Beef Industry*, the Fifth Circuit rejected a claim of predatory bidding, explaining that "[t]he [plaintiffs] presented no evidence that [defendant] ever paid a predatory price (in this case, a price higher than that which would allow the [defendant] to make a profit." *Id.* at 515. That analysis is in tension with the Ninth Circuit's decision below,

1. This case provides a suitable vehicle for addressing the question whether the *Brooke Group* standard for predatory pricing applies to a claim for predatory bidding. The case was presented to a jury in a two-week trial, so the legal question arises in the context of a complete factual record. The question was fully litigated below: petitioner objected to the district court's instruction on the ground that it should have tracked the *Brooke Group* standard, C.A. E.R. 417-425, and the court of appeals expressly held that "*Brooke Group* does not govern" in this context, Pet. App. 13a. To the extent that respondent also relied on other theories of anticompetitive conduct, the court of appeals made clear that it was not passing on the merits of those allegations, in light of its determination that the jury's verdict on the predatory-bidding claim was supported by substantial evidence. *Id.* at 18a. The question of the appropriate standard for predatory-bidding claims under Section 2 is thus squarely presented in a procedural setting well-suited for resolution by this Court.[13]

2. The decision below threatens to chill procompetitive conduct by firms in a wide variety of markets. Although suc-

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which deemed unnecessary any inquiry into the short-term profitability of the defendant's conduct. The Fifth Circuit did not make clear, however, whether its apparent focus on short-term profitability was limited to "this case," *ibid.*, or was instead intended to state the law governing predatory bidding claims generally. It is therefore unclear whether *Beef Industry* conflicts directly with the decision below.

[13] Although there is no square circuit conflict on the standard for predatory-bidding claims, there is a growing body of academic literature, stimulated in part by this case, that discusses the subject of predatory bidding. See, *e.g.*, Hovenkamp, *supra*, at 35-38 (noting, *inter alia*, that the jury instruction approved in this case constitutes "an antitrust disaster of enormous proportions"); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 652-668 (2005); Salop, *supra*, at 709-714; Richard O. Zerbe, Jr., *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717, 717-725 (2005).

cessful challenges to predatory bidding have to date been rare, any firm that has the power to affect prices in an input market by increasing its purchases (and particularly any firm that is subject to suit in the Ninth Circuit) must now take into account the possibility that less-efficient rivals will be able to obtain treble damages merely by convincing a jury that it paid more than "necessary" for inputs so as to deprive those rivals of a "fair" price. Such a prospect will tend to discourage at least some firms from increasing their output (especially in markets with relatively inelastic supply), and thereby "chill the very conduct the antitrust laws are designed to protect." *Brooke Group*, 509 U.S. at 226.

Indeed, the chilling effect of the court of appeals' decision may extend beyond the context of predatory bidding. To the extent that the court of appeals approved jury instructions that dispensed with any objective standard for distinguishing predation from aggressive competition, the court of appeals' decision encourages the utilization of equally vague and standardless jury instructions in other Section 2 cases, and raises the specter that the court of appeals will disregard, in other contexts, this Court's admonition that "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Cargill*, 479 U.S. at 116 (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 05-381

IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF AMICUS CURIAE AMERICAN MEAT INSTITUTE IN SUPPORT OF WEYERHAEUSER COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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## BRIEF OF AMICUS CURIAE AMERICAN MEAT INSTITUTE IN SUPPORT OF WEYERHAEUSER COMPANY'S PETITION FOR A WRIT OF CERTIORARI

### THE INTEREST OF THE AMICUS CURIAE

The American Meat Institute (AMI) is the oldest and largest meat and poultry trade association in the United States. Its two hundred packer/processor member companies account for more than ninety percent of the nation's meat products and approximately seventy percent of the nation's turkey products.

Some meat packers own and raise some of the livestock they process, but almost all of the largest packers also make substantial purchases through various types of arms-length transactions, including open-market "spot" transactions and supply contracts. A single packer may have dozens of buyers purchasing livestock from thousands of livestock producers in different regions of the country.

The decision below, upholding antitrust liability for paying a higher price for inputs "than necessary," and buying more inputs "than . . . needed," casts a cloud of uncertainty over the routine buying decisions that AMI's members must make daily.

AMI sought and received consent from both parties to file this brief in support of the petition for certiorari in this case, and those consents are on file with the Clerk.[1]

## STATEMENT

To appreciate the havoc that the decision below wreaks, imagine that you are a lawyer counseling a beef processor. The purchasing committee is anticipating significant demand growth (perhaps because of increasing exports to developing countries, or possibly a large customer has indicated it plans to run a number of beef features in the coming quarter), and your client would like to ensure that it is able to meet that demand. Your client is considering a significant increase in its spot market purchases of fed cattle, and plans to begin running Saturday shifts at its packing plant to accommodate the extra volume.

The morning conference call of the purchasing committee is about to begin. The call will decide the price point at which the company's many buyers will seek to purchase fed cattle from hundreds of suppliers on the open market that morning and throughout the day. The committee knows that, to get increased volumes, it will have to offer higher prices. It also knows that a small independent beef processing plant has recently opened, having made its investment decisions at a time when demand was low. If livestock prices rise—especially if the small rival lacks the infrastructure to serve the new downstream markets—the new rival will be far less profitable than it had expected, and may even lose money.

Is the committee free to make its decision purely on business grounds, or must it hold prices artificially low to avoid harming the

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[1] No party authored this brief in whole or in part, and no monetary contributions to the preparation or submission of this brief were made by anyone other than AMI and its members.

rival? If it decides purely on the basis of business considerations, what will a jury make of the sudden jump in prices under a jury instruction that demands that prices be "fair" or "no higher than necessary"? And will the advice you offer for this morning's call still be good for this afternoon's call and the calls in the coming days and weeks? Or, with supply and demand conditions—and even business strategies—constantly changing, will you have to separately evaluate each bid, contract offer, or futures price to determine, based on constantly changing market conditions and competitive dynamics, the likelihood that a jury may at some point in the future conclude that the prices bid or paid were "higher than necessary"?

Before the Ninth Circuit's decision in this case, you would have advised that as long as the company was not conspiring with other purchasers, and as long as the purchases were reasonably calculated to result in profitable sales, the company had little to worry about. You would further have advised that, in any event, if potential entry and other competitive conditions would prevent the company from recouping the cost of overpaying for inputs now by cutting prices for inputs or raising prices for outputs later, there was also nothing to worry about. But what will you advise now?

This is but one scenario illustrating the confusion and turmoil that is already flowing from the Ninth Circuit's sudden departure from basic economic principles and from the expectations that have formed around the precedents of this and other courts. The Court should grant the petition for certiorari in order to remove the antitrust uncertainty now surrounding input pricing for businesses like AMI's members and to clarify the antitrust standards that apply to this ubiquitous economic activity.

## DISCUSSION

AMI submits this brief in support of petitioners because the decision below departs from principles laid down by this Court in ways that create widespread uncertainty for significant portions of the American economy, including the meat packing industry. By creating a false dichotomy between "predatory overbidding" for inputs and "predatory pricing" of outputs, the Ninth Circuit casts a shadow over many routine, day-to-day purchasing decisions. The

decision affects not only concentrated industries, but also, as in the instant case, industries in which the downstream markets (here, hardwood lumber) are highly competitive but inputs may be drawn from relatively concentrated (in terms of the number of buyers), geographically limited markets (here, alders in the Pacific Northwest).

The court below recognized, as it had to, that this Court's decision in *Brooke Group*[2] does not permit a finding of monopolization based on predatory pricing unless plaintiff demonstrates that:

> (1) 'the prices complained of are below an appropriate measure of its rival's costs,' and (2) 'a dangerous probability' existed that the rival would later 'recoup[ ] its investment in below-cost prices' once it stopped such pricing.[3]

The court below distinguished *Brooke Group*, however, on the theory that the predatory pricing there was on the "sell-side," whereas the predatory pricing in the instant case was on the "buy-side." It reasoned that "sell-side" predatory pricing would entail lower prices to consumers—something encouraged by the antitrust laws—whereas "buy-side" predatory pricing might not.

1.

Before turning to the ways in which the Ninth Circuit's analysis misreads *Brooke Group*, we note that this Court has previously, if implicitly, made clear that whether the purchase price of an input is anticompetitively high cannot be divorced from the price at which the finished product is ultimately sold. In *Cargill, Inc. v. Monfort Of Colorado, Inc.*,[4] the Court considered plaintiff Monfort's claim that, as a result of a challenged merger, defendant Excel "would bid up the price it would pay for cattle,

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[2] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[3] App. at 7a (quoting *Brooke Group*, 509 U.S. at 222, 223-24).

[4] 479 U.S. 104 (1986).

and reduce the price at which it sold boxed beef." *Id.* at 114. From this scenario the Court deduced two theories of injury:

> (1) a threat of a loss of profits stemming from the possibility that Excel, after the merger, would lower its prices to a level at or only slightly above its costs; (2) a threat of being driven out of business by the possibility that Excel, after the merger, would lower its prices to a level below its costs.

*Id.* In other words, bidding up the price for cattle affected competitors only to the extent it affected their ability to sell boxed beef profitably downstream. The Court then went on to analyze the competitive implications of the two posited forms of injury, and concluded that only the second—selling below cost—could constitute antitrust injury. Reducing one's margins by paying more for inputs or charging less for outputs—but without selling below cost—was "simply . . . vigorous competition." *Id.* at 116.

> The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. . . . The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'

*Id.* (citation omitted).

Thus, although this Court has not previously considered the issue worthy of extended discussion, it has assumed the equivalence between predatory pricing and predatory overbidding. Other courts and scholars have usually made a similar assumption[5]

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[5] The Fifth Circuit treated as obvious—relegating it to a parenthetical—the proposition that predatory overbidding for cattle requires paying "a price higher than that which would allow the packer to make a profit." *In re* Beef Industry Antitrust Litig., 907 F.2d 510, 515 (5th Cir. 1990).

and sometimes openly advocated parallel treatment.[6]

2.

In overturning those expectations and ruling that input pricing that was "higher than necessary" could constitute predation in violation of the antitrust laws, the Ninth Circuit rested its entire analysis on an attempt to distinguish *Brooke Group* as inapplicable to "predatory overbidding." That attempt fails in at least two respects. First, *Brooke Group* was not based simply on the benefits of low prices to consumers, but also on the rationality of inferences permitted to be drawn by the fact-finder. Second, unjustified interference with market mechanisms to keep prices to suppliers low is just as harmful to the economy and to consumer welfare as unjustified intervention to keep prices to consumers high.

a.

*Brooke Group* requires a plaintiff to demonstrate both that defendant has priced below cost and that defendant has "a dangerous probability[] of recouping its investment in below-cost prices."[7] The recoupment requirement flows from the fact that selling below the price that one could obtain for one's product is costly, and such a practice would not be rational unless one reasonably expected to obtain monopoly power. If such an expectation is unreasonable—because of low entry barriers, for example—then it would be improper for a fact-finder to infer that defendant was engaging in a predatory strategy that had a dangerous probability of success. Some other explanation, such as

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[6] Nearly twenty years ago, one of the seminal articles introducing the concept of "raising rivals' costs" as a mode of analysis for unilateral and vertical conduct observed, in a footnote, that a claim that overbuying is anticompetitive should "require proof that, as a result of the inefficient resource use from Overbuying, the purchasing firm's marginal cost is, in effect, driven up to a level above the price it receives for its output. This burden . . . is equivalent to the Areeda-Turner test for predatory pricing, as applied to input purchases." T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 282 & n.228 (1986).

[7] 509 U.S. at 224.

competitive market forces, must explain the "low" pricing, or in this case "high" input prices.

As the Fifth Circuit has noted in another antitrust context: "If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred."[8] Such reasoning is at the heart of the recoupment requirement of *Brooke Group*: a jury is not permitted to infer that a monopolist or would-be monopolist has engaged in predatory pricing unless such behavior is objectively rational. And, as the Court noted in *Brooke Group*, quoting its earlier decision in *Matsushita*: "For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."[9] The Court went on to note that, in its opinion earlier that Term in *Spectrum Sports*, it had observed that

> it was not enough to inquire 'whether the defendant has engaged in 'unfair' or 'predatory' tactics'; rather, we insisted that the plaintiff prove 'a dangerous probability that [the defendant] would monopolize a particular market.'[10]

The *Brooke Group* recoupment requirement is thus a matter of rationality:

> For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals .... This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will.

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[8] AT&T v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir. 1979).

[9] 509 U.S. at 224, quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

[10] 509 U.S. at 225, quoting Spectrum Sports v. McQuillan, 506 U.S.447, 459 (1993).

* * *

> If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market.

* * *

> If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed.

509 U.S. at 225-26. Recoupment, in other words, is a necessary element of a Section 2 offense for predatory pricing because a fact-finder is not permitted to draw irrational or implausible inferences, not simply because low prices may benefit consumers.

In the case of predatory overbidding, paying more for inputs that one could obtain for less is costly, just as selling below the price that one could obtain for one's product is costly. Just as in the predatory pricing scenario, such a practice would not be rational unless one reasonably expected to obtain monopoly power. If such an expectation is unreasonable, it is no more proper for a fact-finder to infer the existence of a predatory scheme than it would be in the predatory selling context. By allowing a jury to be instructed otherwise, the Ninth Circuit has greatly magnified the potential reach of its decision, to the detriment of a wide variety of markets in which entry barriers are low or recoupment is otherwise implausible.

b.

The Ninth Circuit also failed to appreciate that market-based, competitively determined "high" prices to suppliers are as beneficial to competition as market-based, competitively determined "low" prices to consumers. Thus, the court distinguished *Brooke Group* on the ground that "benefit to

consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." App. at 9a. That purported distinction departs both from fundamental economic principles and from this Court's precedents.

"Price is the central nervous system of the economy."[11] Price mediates supply and demand, drives investment decisions and helps to ensure that resources are allocated efficiently throughout the economy.

Indeed, the markets in which AMI's members participate provide an excellent illustration of the way in which the market adjusts prices to supply and demand with a flexibility no judicial process could match. Livestock that are purchased as inputs rather than raised in vertically integrated operations are sold to the meat packing and processing members of the AMI through two primary means. First, livestock may be purchased in "cash markets," which are comprised of hundreds of separate transactions with livestock producers and feedlots throughout the country. Prices also are set through live auctions at which potential purchasers directly bid against one another. Prices vary day-to-day (or more often) and location-to-location based on the numbers of buyers and sellers at a particular auction, demand for downstream products, the productivity of packing plants on the day of the auction, and many other individual factors. Second, livestock may be purchased through supply contracts that allow packers and livestock producers to control risk over time. Each contract is separately negotiated.

Any interference with the price mechanism has the potential to harm consumers, regardless of whether the tendency is to lower or to raise prices. This is so in at least two respects, one of which the court below acknowledged but did not fully deal with, and the other of which it did not even acknowledge.

As to the first, the Ninth Circuit recognized that "rising input prices might encourage new companies to enter the supply side of

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[11] National Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 692 (1978), quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements . . . ." App. at 11a. In the particular facts of the case before it, however, the court believed that the "nature of the input supply at issue . . . [did] not allow readily for market expansion." *Id.* In other words, the Ninth Circuit (though not the jury) concluded that the supply of alder logs was inelastic. Consequently, the Ninth Circuit felt justified in ignoring the possibility that its announced standard would deter procompetitive output expansions that benefit consumers.

But the Ninth Circuit's decision casts a shadow over markets with elastic and inelastic supply alike. The jury instructions approved by the Ninth Circuit did not account in any way for the "nature of the input supply at issue." Those instructions permitted the jury to conclude that the prices paid by Weyerhaeuser for alder sawlogs were "predatory" based solely on its determination that those prices were "higher than necessary." *Id.* at 7a n.8. We cannot know what the jury would have found about the elasticity of supply of alder sawlogs, but more importantly, we cannot know what a future jury would do if called upon to second-guess—under the subjective "higher than necessary" standard—the thousands of individual pricing decisions AMI's members and innumerable other companies make each year. Faced with the prospect of treble damages for pricing "too high," some companies will likely be unwilling, at least on the margin, to bid as high as they otherwise might in a competitive market. This will inevitably lead to the misallocation of resources to the detriment of consumers.

There is a more fundamental error in the Ninth Circuit's analysis, one that it did not even acknowledge. Wholly apart from the role of "high" prices in attracting additional investment into an existing market with elastic supply, economists, as well as this Court, have long recognized that the ability to charge what the market will bear plays another, equally important, function in driving investment and innovation. As this Court recently declared, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it

induces risk taking that produces innovation and economic growth."[12]

The Ninth Circuit's reasoning, if applied to the patent system, would say that once the investments have already been made, the patent has been granted, and the product is on the market, it would do no harm to come in at that point and regulate prices downward. After all, if the patent is sufficiently broad and cannot be invented around, higher prices cannot attract any additional investment and output in that specific product. Such reasoning would be short-sighted in the extreme, because it would discourage investment in research that would lead to new inventions in the *future*.

Similarly, it is far too facile to suggest that, because the growth of alders is inelastic in the short run, it does no harm if the antitrust laws mistakenly deter a company like Weyerhaeuser from paying full value for alder logs. Allowing buyers to bid what they think the timber is worth, thus rewarding the alder growers for decisions made decades ago, is not designed simply to induce additional supply of timber in the short run, but rather to encourage the economy as a whole to function efficiently in the long run.

The Ninth Circuit's decision effectively places a thumb on the scale in favor of lower input prices, altering irrevocably the competitive relationships between input suppliers and purchasers. Such post-hoc pricing intervention is equally damaging whether applied to outputs or inputs.

To borrow the language of this Court's opinion in *Trinko*, "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[13] This is just as true in the case of predatory bidding as in predatory selling. The Ninth Circuit's decision in this case failed sufficiently to account for those costs.

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[12] Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 407 (2004).
[13] *Id.* at 414.

## CONCLUSION

Review by this Court is necessary to undo the confusion and uncertainty flowing from the Ninth Circuit's departure from the principles of *Cargill* and *Brooke Group*.

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IN THE

# Supreme Court of the United States

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*Petitioner,*

*v.*

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR AMICI CURIAE BELLSOUTH CORPORATION, DOW CHEMICAL CO., DUNN LUMBER CO., INC., MICROSOFT CORPORATION, SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the Ninth Circuit erred in embracing a doctrine of "predatory buying" that itself restrains competition by inducing market intermediaries to buy fewer inputs in an upstream market for raw materials and thus to reduce their output in downstream markets for finished products, to the detriment of their trading partners in both markets.

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*Broadcasting Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979) ..... 7

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*Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) ..... 3, 11, 12

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*LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003) ..... 8

*Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993) ..... 5

*Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... 3, 5

### STATUTES

15 U.S.C. § 1 ..... 2, 10

15 U.S.C. § 2 ..... *passim*

### OTHER AUTHORITIES

Baumol, William J. & Blinder, Alan S., *Economics: Principles and Policy* (8th ed. 2000) ..... 5

Easterbrook, Frank H., *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986) ..... 6

Edlin, Aaron S., *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 941 (2002) ..... 6

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Elhauge, Einer, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—and the Implications for Defining Cost and Market Power*, 112 Yale L.J. 681 (2003) ..... 6

Hovenkamp, Herbert, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917 (2003) ..... 6

Posner, Richard A., *Antitrust in the New Economy*, 68 Antitrust L.J. 925 (2001) ..... 7

# In the Supreme Court of the United States

No. 05-381

WEYERHAEUSER COMPANY,

*Petitioner,*

*v.*

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR AMICI CURIAE BELLSOUTH CORPORATION, DOW CHEMICAL CO., DUNN LUMBER CO., INC., MICROSOFT CORPORATION, SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

This brief is respectfully submitted on behalf of BellSouth Corporation, Dow Chemical Co., Dunn Lumber Co., Inc., Microsoft Corporation, SBC Communications Inc., and Verizon Communications Inc. in support of petitioner Weyerhaeuser Co.

### INTEREST OF AMICI

Amici submit this brief to express their common concern about the disruptive consequences of the decision below.[1] Amici and other large firms routinely engage in com-

[1] This brief was prepared in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

petitive bidding for inputs into the goods or services they sell in downstream markets. The decision below exposes such firms to the prospect of treble damages whenever a factfinder, unconstrained by any well-defined legal or economic rules, concludes that the firm bid "too much" for those inputs or bought "too many" of them. Until corrected, that decision will cause large firms throughout the economy to err on the side of purchasing fewer inputs and thus restricting their sale of finished products, to the ultimate detriment of consumers. And, more generally, large firms must inefficiently err on the side of caution in their business practices because they now face the threat of antitrust liability in the Ninth Circuit without clear and administrable rules concerning single-firm decisions about price and quantity. Amici and other companies would benefit from the restoration of sensible and predictable rules in this area.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below holds that a plaintiff may establish antitrust liability under Section 2 of the Sherman Act by persuading a jury that a rival purchased more raw materials "than it needed" from upstream suppliers or paid a higher price for those materials "than necessary, in order to prevent the Plaintiffs from obtaining the [materials] they needed at a fair price." Pet. App. 7a n.8. The Ninth Circuit rejected any limits on a jury's subjective sense of what it means to purchase too many inputs or to pay too much for them. In particular, it held that a market "middleman" may be subject to treble damages for aggressive buying conduct in an upstream input market even if that conduct does not meet this Court's *Brooke Group* test for predatory pricing: *i.e.*, even if the defendant's sales of finished products in the downstream market cover its costs, and even if it would be unable in any event to recoup any losses over the long term.

Thus, a defendant that uses all the inputs it buys can seek to avoid liability under Ninth Circuit law only by buying less and therefore reducing its sales of the finished products. The Ninth Circuit's decision thus contradicts the most fundamental antitrust principles, which encourage increased

output as long as prices do not fall below cost. Indeed, the court's application of Section 2 has the same anticompetitive consequences as would a direct agreement between middlemen to stabilize input prices and allocate purchase quantities—a classic violation of Section 1's prohibition on "conspirac[ies] in restraint of trade." 15 U.S.C. § 1.

The holding below also flies in the face of this Court's recent emphasis on clearly delimiting antitrust liability for single-firm conduct, given the particular risk that indeterminate liability rules in that context will deter economically efficient behavior by large firms. *See, e.g., Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Indeed, this is one of a number of recent cases in which lower courts have found antitrust liability for whatever single-firm business conduct strikes a jury as "unfair." This Court should reverse the decision below to restore determinacy and economic rigor to antitrust analysis in this critical area.

This case also graphically illustrates the doctrinal incoherence into which the lower courts slip when they disregard this Court's limiting principles on antitrust liability. The Ninth Circuit held below that the normal antitrust principles applicable when a firm *sells* products are inapplicable when the firm *buys* products. In so doing, it disregarded the effects of its ruling on the downstream market for the defendant's finished products. The Ninth Circuit's ruling, that Weyerhaeuser could be held liable for buying too much in the input market even absent evidence that it did not use all the inputs it purchased, in effect subjects a defendant in Weyerhaeuser's position to antitrust liability for not restricting output in its downstream market—that is, for not behaving more like a monopolist in that market. The holding below thus perversely threatens the most basic objectives of antitrust law. And it is difficult, if not impossible, to square the Ninth Circuit's ruling with this Court's decision in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), which adopted a unified upstream, downstream analysis of

predatory pricing issues concerning market intermediaries like Weyerhaeuser.

Finally, even if it were somehow appropriate to disregard the downstream market in assessing buy-side conduct in the upstream market for inputs, the Ninth Circuit erred in failing to apply the fundamental antitrust principles set forth in this Court's *Brooke Group* decision. The Ninth Circuit read *Brooke Group* as a narrow rule and distinguished it principally on the ground that a defendant that "buys too much" or "pays too much" on the buying side does not thereby produce the immediate consumer benefits that a defendant creates when it cuts prices on the selling side. But that is a distinction without a difference. A basic purpose of the antitrust laws is to promote allocative efficiency: *i.e.*, the efficient allocation of resources to their most highly valued uses. The consumer benefits of an above-cost price cut in a retail market represent one benefit of allocative efficiency, but so do the benefits that input providers derive from a large but non-money-losing bid from an intermediary buyer. Both have the immediate effect of expanding output. In each case, total welfare, and ultimately the interests of consumers, are best served by leaving resource allocation questions to the free play of market forces, rather than to the unconstrained intuitions of juries about the "fairness" of aggressively competitive behavior.

## ARGUMENT

### I. THE DECISION BELOW IS A THROWBACK TO AN EARLIER ERA OF NON-RULE-BASED ANTITRUST ANALYSIS

"One problem that haunts most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power. The resulting danger is that the courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but that really are the opposite. The difficulty is that effective competition by a firm is always tough on its

rivals."[2] In recent years, this Court has taken this concern increasingly to heart. Since its decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Court has repeatedly emphasized the need for clear and rigorous principles to ensure that the antitrust laws are enforced "for 'the protection of competition, not competitors.'" *Id.* at 488 (internal citation omitted).

In *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court adopted such bright-line principles to govern antitrust claims concerning a defendant's unilateral decisions about price and quantity.[3] The Court there held that a monopolist cannot be held liable for charging buyers too little for goods or services unless the plaintiff proves (i) "that the prices complained of are below an appropriate measure of [the defendant's] costs" and (ii) that the defendant has "a dangerous probability of recouping its investment in below-cost prices." *Id.* at 222, 224. When a price cut does not satisfy both of these criteria, the Court concluded, it should remain lawful because it "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting

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[2] William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 425-426 (8th ed. 2000) (paragraph break omitted). Even more serious, arguably, than penalizing firms for conduct that should be viewed as procompetitive is the danger that courts, by applying unwise rules, will themselves unwittingly compel anticompetitive behavior by inducing firms to restrict their own purchases of inputs and sales of finished products. As discussed below, the Ninth Circuit's decision presents exactly that danger.

[3] In other contexts, too, the Court has imposed strict limits on antitrust liability under Section 2 of the Sherman Act to ensure that antitrust law does not itself thwart competition. *See Trinko*, 540 U.S. at 407 (placing strict limits on any obligation of monopolists to deal with rivals in order, among other reasons, to protect incentives to invest); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993) (predicating Section 2 liability on, among other things, proof of either monopoly power or a dangerous probability of obtaining it).

intolerable risks of chilling legitimate price-cutting." *Id.* at 223.

A few critics of *Brooke Group* and other cases delimiting antitrust liability with bright-line principles have expressed concern that such principles can produce "false negatives": *i.e.*, individual cases in which, from the perspective of an omniscient economist, banning particular conduct in a given market would promote greater long-term consumer welfare than would non-intervention.[4] But a fundamental principle of modern antitrust analysis is that neither antitrust judges nor lay juries are omniscient economists.[5] Bright-line principles are thus necessary both to preclude "false positives"—cases in which the antitrust laws ban conduct that, on balance, enhances total welfare—and to reduce market-distorting uncertainty about the extent to which aggressive competition, normally a core virtue in a capitalist economy, will subject a firm to treble damages under the antitrust laws. As then-Judge Breyer explained long before *Brooke Group* was decided: "Rules that seek to embody

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[4] *See, e.g.*, Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941 (2002); *but see, e.g.*, Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications For Defining Cost And Market Power*, 112 Yale L.J. 681 (2003) (explaining why criticism is unsound).

[5] *See, e.g.*, Herbert Hovenkamp, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917, 942-943 (2003) ("Judge Posner apparently lacks confidence in the ability of federal judges to identify technical errors or misapplications of theory in expert testimony, and with good reason. . . . When the judge himself lacks the skills to determine whether an expert's report is technically accurate, the worst possible outcome is the one that too often obtains: the judge washes his hands of the matter and gives it to the jury, thus passing the issue off to an even less qualified decisionmaker."); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 976-977 (1986) ("[T]he processes of litigation—especially litigation conducted to lay deciders who may know nothing of the industry and see the inside of a courtroom but once—favor argument based on fair ex post division of gains. . . . To require the defendant to show that its conduct is efficient is to hand victory to the plaintiff in a large number of cases no matter whether the defendant's conduct helped or harmed consumers.").

every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983).

The Ninth Circuit's decision in this case rejects that tradition by upholding a jury instruction that dispenses with bright-line tests altogether. In the Ninth Circuit, juries may now impose treble damages on any company that, in the jurors' subjective view, "purchased *more* [goods] than it needed" from input suppliers or "paid a *higher* price for [those goods] than necessary, in order to prevent the Plaintiffs from obtaining the [goods] they needed at a *fair* price." Pet. App. 7a n.8 (emphasis added). These are not standards, but empty locutions, devoid of analytical content. They create grave uncertainty about the circumstances in which a firm with market power will violate the antitrust laws by bidding "too much" for inputs, buying "too many" inputs, or otherwise placing rival buyers at an "unfair" disadvantage in getting what they "need." In that respect, the decision is a throw-back to an earlier era in which antitrust factfinders remained free to penalize a large company for conduct that they subjectively considered "unfair," irrespective of the long-term effect of those penalties on consumer welfare.[6]

This concern can arise whenever a lower court finds that, at some level of specificity, the case before it is exempt from the basic principles this Court has adopted to limit claims against firms for their unilateral decisions about price and quantity. Decisions like the Ninth Circuit's holding here

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[6] As Judge Richard Posner has observed, recent antitrust analysis "reflect[s] a series of emphatic post-*Alcoa* [*United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945)] statements by the Supreme Court that the antitrust laws protect competition in the sense of efficient business practices rather than in the sense of rivalry per se." Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 931-932 n.7 (2001) (citing, *inter alia*, *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

thus encourage litigants to argue that the particulars of their cases make them different from this Court's prior cases and therefore not subject to the principles embraced by this Court in those cases. In another recent case, for example, the Third Circuit agreed to treat bundled-product discounts differently from single-product discounts, and to expose firms to potentially enormous liability for offering them, even though the discounts benefited consumers and violated none of the established tests (including *Brooke Group*) for predatory pricing and illegal tying. *See LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003); *see also Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000). Indeed, the Third Circuit seized upon the fact that the defendant's bundling arrangement violated neither the rules against predatory pricing nor those relating to tying arrangements as a basis for proceeding to a third, less rigorous analysis, under which the doctrinal limits defining those rules became irrelevant and the defendant could be held liable under a subjective "totality of the circumstances" test. *LePage's*, 324 F.3d at 162-164.

Antitrust, however, should not be subject to this type of stovepipe analysis, under which strict rules apply if a plaintiff pleads a traditional theory of antitrust liability but anything goes if the plaintiff pleads a novel variation on such a theory. In *Brooke Group* and similar cases, this Court adopted firm boundaries on antitrust liability for two general reasons: they help courts distinguish desirable pro-competition rules from undesirable pro-competitor rules, *see Brunswick Corp.*, 429 U.S. at 488, and they free businesses from a fear of treble damages whenever they do what firms are supposed to do in a healthy economy—*i.e.*, compete aggressively for business. The lower courts frustrate both of those objectives whenever they look for case-specific excuses to ignore those boundaries. The Court should grant certiorari to confirm both that antitrust law requires clear, determinate legal principles and that standards articulated in cases like *Brooke Group* reflect fundamental antitrust principles rather than narrow, formalistic legal rules.

## II. THE DECISION BELOW IMPROPERLY IGNORES THE DOWNSTREAM IMPLICATIONS OF PREDATORY BUYING CLAIMS AGAINST MARKET INTERMEDIARIES

The Ninth Circuit's holding is not only indeterminate, but substantively incoherent, and it flouts the basic objectives of the antitrust laws.

As noted, the Ninth Circuit affirmed an instruction that permitted the jury to find that Weyerhaeuser violated Section 2 of the Sherman Act by paying "more than necessary" for timber or buying "more than it needed." The court reasoned that no more precise instruction was necessary because the allegedly unlawful conduct concerned an upstream market in which Weyerhaeuser purchased inputs for its business, rather than the downstream market in which it sold its products.

The notion of paying too high a price, standing alone, has no antitrust significance. Neither the Ninth Circuit nor the district court identified evidence that Weyerhaeuser could have purchased the same quantity of timber at a lower price. There is, in other words, no basis to conclude that Weyerhaeuser paid more than "necessary" to purchase the timber it acquired. Moreover, even if it had paid more than "necessary" in that respect, that fact would have been immaterial. The "overpayment" would not have reduced the amount of timber available to rivals or otherwise adversely affected competition; rather, it would simply mean that Weyerhaeuser had transferred money unnecessarily to its suppliers. No antitrust harm can flow from such a purely distributional transaction. And courts are poorly positioned in any event to "determin[e] what is a 'reasonable' or 'competitive' price." *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.).

The real crux of the plaintiff's grievance, therefore, is not that the defendant paid "too much" for its timber, but that the defendant's willingness to pay more for sawlogs allowed it to buy more, leaving fewer for the plaintiff to buy at its preferred price. The ostensibly disjunctive jury instruction thus collapses into a single test: whether Weyerhaeuser

"purchased more logs than it needed." But input buying is plausibly characterized as anticompetitive only if, among other things, the buyer either wastes the inputs or cannot profitably sell the finished products derived from them in a downstream market. *See generally American Tobacco Co. v. United States*, 328 U.S. 781, 803-804 (1946) (finding anticompetitive the large-scale purchases of certain grades of tobacco that defendants did not use, but that their competitors did). Here, however, the Ninth Circuit affirmed liability even though it found neither waste nor unprofitability, and it endorsed a jury instruction that made waste and unprofitability unnecessary to the legal analysis.

The logical upshot of the Court's holding, therefore, is this: the defendant should have *restricted its output* in the downstream market for finished hardwood products, for that is the necessary result of reducing its purchase of inputs. Yet reductions in supply typically raise consumer prices, all else held equal, and one of the chief aims of antitrust enforcement is to *prevent* large firms from inefficiently restricting their output and thus increasing their prices. The Ninth Circuit's approach turns that objective on its head, inducing firms in Weyerhaeuser's position to behave more like monopolists on pain of antitrust liability if they do not. That is not the law. As *Brooke Group* confirms, courts undermine the very purpose of antitrust when they adopt rules that induce sellers to restrict output and raise prices. 509 U.S. at 223-227.

The Ninth Circuit arrived at this perverse result because, in its competitive analysis, it ignored the downstream, "sell-side" market for finished hardwood lumber. But the welfare of that market is part and parcel of any analysis of Weyerhaeuser's conduct in the upstream, "buy-side" market for alder sawlogs. At least in a single-input, single-output context such as that involved here, a claim of over-buying in the upstream market (buying inputs that a rival needs) collapses into a claim of over-selling in the downstream market (making sales that the rival needs). The gravamen of either claim is that the defendant is seeking unlawfully to

"squeeze" a rival middleman's margins: to preclude the rival from earning a profit in the downstream market given the higher costs and reduced availability of inputs in the upstream market.

Indeed, the Ninth Circuit noted this connection between the upstream and downstream markets when it stated that, "[i]n a predatory buying scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases." Pet. App. 9a-10a. But the court then ignored the significance of that connection. If the defendant itself is earning positive margins in the downstream market, its success "either reflects [its] lower cost structure . . . , and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks," *Brooke Group*, 509 U.S. at 223—in this case, risks of deterring economically efficient purchases and sales. As discussed, if a firm can resell its "excessive" upstream purchases at a profit in the downstream market, it would flout basic antitrust objectives to impose liability for "squeezing" its rival's margins. The threat of such liability would force the firm to cut production in the downstream market, to the detriment of its trading partners there, by reducing its acquisition of inputs in the upstream market, to the detriment of its trading partners in *that* market too.[7]

In these respects, the Ninth Circuit's analysis conflicts with *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), in which this Court implicitly recognized the impor-

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[7] The Ninth Circuit thought it was significant that the supply of sawlogs was inelastic during the "alleged predation period." Pet. App. 11a. The court reasoned that Weyerhaeuser's conduct therefore could not benefit consumers by increasing the supply of logs. Apart from the court's inappropriate short-term focus in assessing the benefits of uninhibited marketplace competition, the court erred in not recognizing that overall output is expanded when more efficient middlemen are able to increase their purchases and sales.

tance of a unified buy-side, sell-side analysis in cases involving antitrust disputes between rival middlemen. There, the Court addressed the claim, similar to the plaintiff's claim here, that the defendant's market power "threaten[ed]" the plaintiff's "supply of [inputs in the upstream market] and its ability to compete" in the downstream market. *Id.* at 107. Specifically, the plaintiff alleged that the merger of two integrated beef packers would allow the resulting entity to "bid up the price it would pay for cattle, and reduce the price at which it [would sell] boxed beef," disadvantaging the plaintiff (also an integrated beef packer) in both the input and output markets. *Id.* at 114; *see also id.* at 108. The Court appropriately analyzed this "price-cost squeeze" allegation as a single predatory pricing claim. *See id.* at 114-119. It did not compartmentalize its analysis into separate buy-side (upstream) and sell-side (downstream) inquiries, much less make the Ninth Circuit's mistake of focusing almost entirely on the buy-side market to the exclusion of the sell-side market.

The Court's conclusions in *Cargill* also are instructive. The parties had presented two possible standards for liability: "(1) a threat of a loss of profits stemming from the possibility that [the defendant], after the merger, would lower its prices to a level *at or only slightly above* its costs," and "(2) a threat of being driven out of business by the possibility that [the defendant], after the merger, would lower its prices to a level *below* its costs." 479 U.S. at 114 (emphasis added). The Court found that only the latter theory—below-cost pricing—stated a proper antitrust claim. *Id.* at 114-119.[8] Like *Brooke Group*, *Cargill* thus reaffirms that, in cases in-

[8] The Ninth Circuit emphasized evidence that "Weyerhaeuser suffered declining profits due to the high prices it was paying." Pet. App. 17a. The decline could of course have reflected market forces beyond Weyerhaeuser's control. Even if it did not, moreover, the Ninth Circuit's decision is inconsistent with the Court's decisions in both *Cargill* and *Brooke Group*, which hold that the issue is not whether the court thinks a different strategy might have enabled the defendant to make bigger profits, but whether the chosen strategy caused the defendant to lose money.

volving competition among middlemen, a defendant's purchases of inputs in the upstream market can be predatory only if the result is below-cost pricing (combined with the prospect for recoupment) in the sell-side market for finished products.[9]

Ironically, if the plaintiff here *had* alleged that Weyerhaeuser so "bid up" the price of sawlogs that it sold its finished lumber at a loss, the Ninth Circuit likely would have followed *Cargill* and required proof of below-cost pricing to support such a "price-cost squeeze" claim. It is only because the plaintiff made no such allegation (*see* Pet. 5) that the Ninth Circuit felt free to ignore *Cargill* and *Brooke Group* and hold the plaintiff to an easier standard. It makes no sense, however, to hold plaintiffs alleging less culpable (or non-culpable) behavior to *less* rigorous standards for establishing liability. The Court should grant certiorari to clarify proper antitrust analysis in cases involving unilateral price and output conduct by competing intermediaries.

## III. THE *BROOKE GROUP* ANALYSIS IS FULLY APPLICABLE HERE, EVEN APART FROM DOWNSTREAM ANALYSIS

Although *Brooke Group* involved claims of predatory selling rather than predatory buying, the basic logic of that decision applies whenever a plaintiff challenges a large

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[9] Although respondent alleged below that Weyerhaeuser occasionally "stockpiled" the sawlogs it purchased (*see* Pet. 4), that allegation is both procedurally irrelevant and substantively without force. As a procedural matter, the court of appeals cited no basis for concluding that Weyerhaeuser wasted or did not use all of the inputs it purchased; just as important, the jury was not required to find such a basis. The allegation of stockpiling is thus irrelevant to this Court's review of the Ninth Circuit's decision upholding that verdict. In any event, evidence of "stockpiling," without more, is insufficient to establish antitrust liability in these circumstances because unused inputs could simply reflect (among other factors) changes in demand in the downstream market or in inventory costs, rather than predatory conduct. And if there were unused inputs, the costs incurred to purchase or dispose of them could be taken into account in determining whether the downstream market prices are sufficient to generate revenues in excess of the defendant's costs.

firm's unilateral decisions about price and quantity. *Brooke Group*'s animating principle is that antitrust rules concerning such decisions should be drawn narrowly enough to preserve every firm's incentives to compete vigorously with its rivals by, among other things, expanding its output to the benefit of its trading partners. *Brooke Group* applies that principle to protect a monopolist from antitrust liability when it competes against smaller firms by lowering retail prices and increasing output. But it is no less essential to protect a large firm's ability to compete against its rivals to the benefit of its trading partners when it bids for inputs, whether in the form of talented employees, research and development of new technologies, or (as here) raw materials. In each case, it would defeat the purpose of the antitrust laws to quell competition, reduce output, and disadvantage the trading partners simply to protect the rivals. To that general principle, *Brooke Group* carves out a single exception: where the dominant firm conducts its transactions at a loss with the purpose of excluding its rivals *and* enjoys a "dangerous probability" of recouping that loss to the *detriment* of its trading partners. 509 U.S. at 222, 224. That general principle, and its single exception, are as applicable to buying as to selling.

As explained in the previous section, the lawfulness of a market intermediary's buying practices in an upstream market can be judged only by reference to the intermediary's ability to cover its costs when selling finished products in the downstream market. But even a narrower focus solely on the upstream relationship between the intermediary and its supplier confirms the applicability of the *Brooke Group* analysis, as the petition here amply explains.

The Ninth Circuit deemed *Brooke Group* inapplicable to claims of predatory bidding principally because the court concluded that "excessive" purchases from an input supplier do not generate the immediate consumer surplus produced when a monopolist cuts prices in a retail market. Because the Supreme Court cited that consumer benefit as a key reason for adopting its rule constraining antitrust liability for

price cuts, *Brooke Group*, 509 U.S. at 223-224, 226-227, the Ninth Circuit concluded that no such rule could be appropriate in the absence of that benefit. *See* Pet. App. 8a-9a.[10]

This reasoning confuses means with ends. A fundamental objective of antitrust is the promotion of economic welfare through allocative efficiency. That objective favors rules that permit market incentives to produce lower prices in a concentrated retail market, where the main seller is a monopolist. *See Brooke Group*, 509 U.S. at 223-224, 226-227. But it likewise favors rules that permit market incentives to promote higher prices in a concentrated upstream market, where the main buyer is a monopsonist. The common theme, in either market, is the need for rules that foster greater quantities of output. And in each case, the question is whether the defendant can be presumed to promote the efficient allocation of resources when it enters into a business arrangement that is profitable for both itself and its trading partners (even if not for its competitors).

There is no reason to answer that question differently when the trading partners are suppliers of the inputs a defendant buys rather than retail customers of the finished products the defendant sells. And *Brooke Group* provides the same answer in both contexts: mutually beneficial ar-

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[10] The Ninth Circuit separately purported to distinguish *Brooke Group* on the ground that the input market for alder sawlogs has high barriers to entry (*see* Pet. App. 11a), a proposition it did not base on any record evidence (*see* Pet. 17 n.7). This logic is perplexing. High barriers to entry could be relevant to the *Brooke Group* analysis only insofar as they are evidence of a firm's ability to recoup losses after a predation period (if, unlike Weyerhaeuser here, it is found to incur such losses). *See* 509 U.S. at 226. But the court of appeals deemed the likelihood of recoupment, like the *Brooke Group* principles more generally, to be legally irrelevant to a proper analysis of predatory buying claims. Its assumption about high barriers to entry thus amounts only to speculation that plaintiffs might have been able to meet the second *Brooke Group* condition for liability if only they had been instructed to consider it (and if only they could also meet the first condition, operating at a loss, which they could not). But the court's speculation about barriers to entry cannot be a basis for rejecting the applicability of *Brooke Group* in the first place.

rangements between a firm and its trading partners should be trusted to produce economically efficient outcomes so long as the firm does not thereby operate at a short-term loss in the realistic hope of long term gain through the exclusion of rivals. Indeed, even if the firm *does* operate at a short-term loss, an antitrust court should not intervene unless there is in fact a dangerous probability that the firm will succeed in recouping that loss from its trading partners after driving its current rivals out of the market. 509 U.S. at 224-226. Here, too, there is no reason to suppose that recoupment is more likely to succeed after predatory bidding than after predatory price-cutting.

In sum, except where a plaintiff can satisfy the *Brooke Group* standards for antitrust liability, economic welfare is best served over the long run by leaving unilateral price and quantity decisions to market dynamics. The decision below, however, permits a finding of liability even when the defendant's conduct remained profitable in the short term and even when the defendant would be incapable of recouping its losses in any event. That decision thus substitutes the subjective and unpredictable "fairness" judgments of factfinders for the bright-line *Brooke Group* rule that has brought much-needed certainty to predatory pricing cases. This Court should intervene to reverse the decision below and restore analytical clarity to this critical area of law.

## CONCLUSION

The petition for certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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No. 05-381

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IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR AMICI CURIAE THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER


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## BRIEF FOR AMICI CURIAE THE BUSINESS ROUNDTABLE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae The Business Roundtable is an association of approximately 160 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $4 trillion in revenues.[1] The executives who created The Business

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or sub-

Roundtable believed that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers of major corporations more directly into public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

The National Association of Manufacturers ("the NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Business Roundtable and the NAM have a strong interest in this issue, as the question presented has enormous practical importance for their members nationwide. The Ninth Circuit has held that a company can be subjected to treble damages under the Sherman Act based on a jury's finding that the company purchased more inputs "than it needed" or paid more "than necessary" for them. Pet. App. 7a n.8. That open-ended inquiry not only is judicially unmanageable, but will deter companies from making efficient purchasing decisions as they seek to adjust to market conditions, all to the ultimate detriment of consumers. The members of the Roundtable and the NAM have long relied on this Court's standards for "predatory pricing" claims set forth in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which make clear that courts and juries are not to engage in such open-ended price regulation. The

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mission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk. Petitioner is a member of The Business Roundtable and the NAM.

Ninth Circuit's departure from *Brooke Group* significantly upsets that reliance, threatening stability and predictability in the law that is essential to productive economic enterprise.

The members of The Business Roundtable and the NAM include numerous companies that routinely buy inputs and sell outputs. Each of these companies must engage in price negotiations and decisions at each stage of the market process—all with an eye toward maintaining efficiency and engaging in the vigorous competition that benefits consumers. By subjecting companies to an unknowable risk of treble damages from efficient and commonplace purchasing decisions, the Ninth Circuit's decision ultimately deprives consumers of the benefits of market efficiencies.

## SUMMARY OF ARGUMENT

The Ninth Circuit adopted a dangerous and unworkable rule that subjects purchasing decisions of businesses throughout the Nation to judicial oversight as to whether a company purchased more inputs "than it needed" or paid more "than necessary" for them, thereby preventing a competitor from buying at a "fair price." Pet. App. 7a n.8. That holding, if not corrected, would deter companies from making efficient purchasing decisions to adjust to rapidly-evolving market conditions, thereby fostering inefficiencies that ultimately harm, rather than help, consumers. Because no company could ever predict what a jury, in hindsight, might conclude is a higher price than "necessary" or more inputs than "needed," companies will be deterred from engaging in vigorous purchasing competition and from acquiring critical inputs that may be needed to meet future needs. Courts and juries should not serve as virtually standardless regulators of millions of purchasing decisions that occur every day. The standards set by this Court in *Brooke Group* should apply to any allegation of predatory pricing—whether selling or buying—and the Ninth Circuit erred in disregarding those standards in this case.

This case is of extraordinary national importance. The Ninth Circuit's vague liability standard, if not corrected by this Court, would disrupt efficient market behavior nationwide. Firms must have the flexibility to determine and adjust their prices—both up and down—to accommodate ever-changing economic conditions. That flexibility must apply both to selling and buying decisions, for there are many economically rational reasons why a particular firm might choose to pay more or less for a particular input than a competitor. Moreover, the Ninth Circuit's rule encourages inefficiency and discourages innovation, by holding that a more efficient firm must alter its own pricing decisions to ensure that a less efficient rival is able to perpetuate itself in business. Subjecting pricing decisions to the whim of juries applying a vague fairness test would deter economically beneficial behavior and disrupt the efficient allocation of resources that results from those price signals. The specter of such economic disruption warrants this Court's review.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S VAGUE STANDARD DEPARTS FROM THIS COURT'S PRECEDENTS, WILL CHILL VIGOROUS PRICE COMPETITION, AND IS JUDICIALLY UNMANAGEABLE.

This Court has made clear that businesses are entitled—indeed, encouraged—to engage in above-cost price competition without fear that those pro-competitive actions will subject them to antitrust liability. "The purpose of the [Sherman] Act is not to protect businesses from the working of the market." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993). Therefore, "this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it." *Id.*

In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court noted that ill-defined "predatory" pricing claims might "deter procompetitive con-

duct." *Id.* at 593. The Court agreed with a statement of then-Judge Breyer that courts "must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Id.* at 594 (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)); *see also Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984) (it is "sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects"). Subsequently, and following this reasoning, the Court in *Brooke Group* established a clear standard and high threshold for claims of predatory pricing. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." 509 U.S. at 222. Second, the plaintiff must demonstrate "that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224. In adopting this heavy burden, the Court noted that "predatory pricing schemes are rarely tried and even more rarely successful, and the costs of an erroneous liability finding are high." *Id.* at 226 (citation omitted).

As frequent high-volume purchasers and sellers of products and services, the members of The Business Roundtable and the NAM have long relied on the clear standards of *Brooke Group* and its forebears when engaging in a central activity of any business: determining the prices to be paid or charged. These standards have encouraged efficient market behavior by protecting "management's exercise of independent business judgment." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted); *see also Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (criticizing agreements that " 'cripple the freedom of traders and thereby restrain their ability to sell in accordance with

their own judgment' ") (quoting *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)).

The Ninth Circuit, however, has now jettisoned the *Brooke Group* rule in favor of an unpredictable inquiry that allows a jury to subject a company to potentially crippling liability based on whether that jury believes the company paid more than "necessary" for inputs, bought more than "needed," or subjected a competitor to a price that was not "fair." The Ninth Circuit held that it need not follow the rigorous standards of *Brooke Group* because this case involves allegations of predatory buying rather than predatory selling. This was an error, and one that has the potential to disrupt efficient market behavior nationwide. Companies must be able to rely on predictable and stable legal rules that do not permit juries to second-guess and micromanage daily pricing decisions. That need is no less important when companies are setting prices paid to purchase inputs than it is when they are setting prices received for selling outputs.[2]

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[2] Monopsony (buying side power) is analytically the same as monopoly power (selling side power), and should be so treated under the law. *See Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) ("monopsony pricing * * * is analytically the same as monopoly or cartel pricing and so treated by the law"), *rev'd on other grounds*, 522 U.S. 3 (1997); *Vogel* v. *American Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("monopoly and monopsony are symmetrical distortions of competition from an economic standpoint"); *United States* v. *Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) (Kozinski, J.) (" 'Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side' ") (citation omitted); *see also* Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589, 591 (2005) ("asymmetric treatment of monopoly and monopsony has no basis in economic analysis"); Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 Antitrust L.J. 563, 576 (2005) ("If consumer welfare is

Just as they do in setting the prices at which they sell their own goods and services, companies routinely make purchase-price decisions based on such factors as current and potential future market conditions, business strategies, efficiency concerns, supplier reputation, and expected growth or decline in customer demand. Companies—big and small—require that the rules governing pricing determinations be clear, objective, and predictable. This is especially true for allegations of predatory pricing, where the Court has repeatedly recognized the difficulty in drawing the line between aggressive competition and predation.

Just last Term, the Court cautioned that the risk of false condemnations of business decisions under the antitrust laws can "chill the very conduct the antitrust laws are designed to protect." *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citing *Matsushita*, 475 U.S. at 594). As the Court noted, "[t]he cost of false positives counsels against an undue expansion of § 2 liability." *Verizon*, 540 U.S. at 414. By ignoring the high bar set by *Brooke Group* for predation claims, the Ninth Circuit's nebulous standard subjects businesses to the chilling effect the Court has striven to avoid, to the ultimate detriment of market efficiency and consumer welfare.

Price regulation that is subjective and open-ended is likely to "disrupt the proper functioning of the price-setting mechanism." *FTC* v. *Indiana Fed. of Dentists*, 476 U.S. 447, 461-462 (1986) (condemning agreement that causes party to consider "whether a particular purchase is cost justified"). It is also imperative that antitrust rules "must be clear enough for lawyers to explain them to clients," and must be "administratively workable." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). In formulating antitrust liability standards, courts must consider "what

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the equivalent of allocative efficiency, a buyer power abuse is just as anticompetitive as a seller power abuse.").

advice a lawyer, faced with [that] rule, would have to give a client" and whether the lawyer would have "to point out the risks of suit—whether ultimately successful or not—by an injured competitor." *Barry Wright*, 724 F.2d at 235.

The open-ended nature of the Ninth Circuit's standard ignores all this. Because the Sherman Act's generous venue rules allow any firm conducting business nationwide to be sued in the Ninth Circuit, *see* 15 U.S.C. §§ 15, 22, every such firm must now seek to comply with the Ninth Circuit's rule. Yet no lawyer or company will be able to predict when a jury, exercising hindsight, might find that the company's purchases were a bit too expensive, included a few extra "unneeded" inputs, or resulted in a market price that the jury would view as not "fair" to competitors. And because this fairness standard is apparently relative to the circumstances of others in the market, a firm could not begin to comply without knowing exactly what competitors it is bidding against and the nature of those competitors' own price and cost considerations and supply needs—the kind of information sharing the antitrust laws often discourage.

Thus, while the Ninth Circuit's liability standard is entirely unpredictable, the ensuing damage to efficient market behavior is entirely predictable. Firms with any degree of market power will be discouraged from engaging in aggressive buy-side price competition for fear that a jury might conclude that the prices paid were too high. And such firms will be discouraged from stockpiling inputs that managers believe might be needed for future use, lest a jury conclude, in retrospect, that such stockpiling was not "necessary." Rather than risk a jury condemning a particular purchase price as too high or unfair, and rather than hire a cadre of lawyers and economic consultants to attempt to justify every new proposed payment to a supplier, many firms will simply avoid vigorous competition when purchasing inputs. The need to subject every purchase pricing decision to legal review will likewise hinder rapid response to changing market condi-

tions. This is no academic concern. The front-line personnel who make purchasing decisions every day must now make those decisions against the specter of capricious liability imposed by the Ninth Circuit. And given the nationwide impact of the decision below, these businesspeople cannot wait for the issue to "percolate" further in the lower courts.

Price competition is "the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The Ninth Circuit's open-ended invitation for juries to second-guess decisions about the prices to be paid for goods and services will disrupt this central nervous system just as much as it would to impose the same standardless inquiry on the corresponding decisions about the prices at which those goods and services are sold.

Judges and juries are ill-equipped to administer the liability standard adopted by the Ninth Circuit, for neither can determine what prices are "fair" or "necessary" or how many inputs a particular company "needs." Thus, this Court and other courts have long rejected antitrust liability standards based on what juries would consider a fair or reasonable price. Indeed, one reason the Court has adopted *per se* rules on certain conduct is to avoid entangling juries in the impossible task of determining the reasonableness of prices. *See id.* at 220-221 (holding that if "the reasonableness of prices" were an issue under the Sherman Act, "its philosophy would be supplanted by one which is wholly alien to a system of free competition" and "[t]he reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures"); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow."). As the Court has explained, "it is exceedingly difficult to formulate even the term of the rule itself which should govern in the matter of determining what would be reasonable rates" because "there is such an infinite variety of facts entering

into the question of what is a reasonable rate, no matter what standard is adopted." *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-332 (1897).

As with similar standardless antitrust inquiries, when a court inquires into the reasonableness or fairness of prices, it chooses to "set sail on a sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (6th Cir. 1898) (Taft, J.). *See also Town of Concord*, 915 F.2d at 25 (Breyer, J.); Robert H. Bork, *The Antitrust Paradox* 22 (2d ed. 1993) (noting Court's holding that "a reasonable price standard was no standard"). Thus, the Court in *Brooke Group* set a high threshold for predatory pricing claims in part because a rule that seeks to police above-cost pricing decisions would be "beyond the practical ability of a judicial tribunal to control." 509 U.S. at 223. *See also* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 Geo. Wash. L. Rev. 1103, 1118-19 (2001) ("identifying [above-cost predation strategies] in the particular case without chilling aggressive, competitive pricing is far beyond the capacity of any antitrust tribunal"). That fact is no less true for profit-making purchasing decisions like those at issue here.

The open-ended, standardless inquiry endorsed by the Ninth Circuit does not permit businesses to conform their conduct to the law, and will disrupt a central activity upon which our free market economy is based. This Court's review is therefore warranted.

## II. THE NINTH CIRCUIT'S DECISION WILL HINDER EFFICIENT MARKET BEHAVIOR NATIONWIDE.

The national importance of this case is manifest, for it directly affects an essential activity of all businesses: pricing. The Ninth Circuit permitted respondent to recover for losses that resulted from Weyerhaeuser's decision regarding what to pay for inputs, even though Weyerhaeuser failed to satisfy

the requirements for predatory conduct recognized in *Brooke Group*. Thus, the court held that a loser in the competitive process can recover treble damages for its inability to meet a rival's input purchase price—even if that inability results from the plaintiff's own inefficiency. Far from benefiting consumers, the Ninth Circuit's holding will harm them, by distorting and disrupting efficient market behavior.

The liability imposed in this case is truly extraordinary. Disregarding *Brooke Group*, the Ninth Circuit allowed a jury to penalize Weyerhaeuser based on a finding that it paid more than "necessary" or bought more than "needed," without any finding that Weyerhaeuser was not turning a profit or that its alleged predatory scheme had any chance of success. Weyerhaeuser was penalized without any allegation, much less proof, that it restricted its output or increased prices for consumers. Nor was there any allegation or proof that Weyerhaeuser paid so much for sawlogs that it was selling its finished lumber below cost; it is undisputed that the hardwood division operated at a profit throughout the alleged period of predatory buying. Pet. 5. And there is no question that Weyerhaeuser sold all of the alder lumber it could produce. *Id.* at 3. Nonetheless, the plaintiff cried foul because Weyerhaeuser was allegedly not maximizing its own potential profits and because the plaintiff could not pay the price for sawlogs that it wanted to pay. *Id.* at 5. The claim that Weyerhaeuser did not maximize its profits included no evidence that Weyerhaeuser was likely—let alone reasonably probable—to recoup its losses later. Thus, the crux of plaintiff's allegation was that it suffered harm because it was either unable or unwilling to match Weyerhaeuser's efficiency in bidding for sawlogs.

The Ninth Circuit believed that its decision would not disrupt efficient economic behavior because this case involves an allegation that the prices paid by Weyerhaeuser were too high, not too low. But the reasons for not subjecting pricing decisions to standardless oversight by juries apply regardless

of whether the allegation is predatory selling at too low prices or predatory buying at too high ones. There are myriad reasons why a company might rationally pay more to buy a particular input than its rivals are willing to pay, or purchase more of that input than it might be able to use at that moment—all of which are economically efficient. For example, a company may be willing to pay more for inputs to ensure a predictable and steady supply from a particular supplier; to recognize the reputability or reliability of a particular supplier; to increase its own output by encouraging increased supply of inputs; to meet a pressing need for inputs on an expeditious basis; or to reduce or eliminate transaction costs with sellers. Similarly, a company might stockpile inputs to meet a future anticipated demand or to ensure availability of supplies in the event of unanticipated disruption.

The reasons for purchase pricing decisions are limitless, as firms continually adjust the prices they pay for goods and services—both up and down—in order to meet ever-changing market conditions. Prices are the signals that the market sends to suppliers to ensure that resources are allocated efficiently in response to current conditions. Higher prices for inputs ensure that more are produced in order to meet market demand; lower prices discourage production. It is basic economics that when suppliers are paid more for an input, they will supply more to the extent they can. Because the price paid for the input is higher, any suppliers that can substitute into the production of the input will have an incentive to do so. Roger D. Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 66-67 (1993). More inputs will result in more finished products for sale to consumers, and more finished products on the market will result in lower prices. In this case, for example, just as loggers could withhold their timber from sale in hopes of receiving a higher price later, Pet. 4, they could also harvest their timber if the right price incentive existed. Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72

Antitrust L.J. 669, 676 (2005). Consumers benefit from these uninhibited, competitive, and non-collusive pricing decisions because accurate price signals ultimately result in the efficient allocation of resources across the entire economy. The Ninth Circuit's rule would disrupt these critical signals by dissuading firms from engaging in efficient price competition lest a jury conclude in hindsight that the prices paid were too high or the purchases too large.

Moreover, the Ninth Circuit's rule ignores that a rival's own inefficiency may account for the discrepancy between what it might be willing to pay for an input and what an efficient firm such as Weyerhaeuser might pay. A company with higher distribution costs due to a lack of innovation or other economic inefficiencies will be unable to pay the market price offered by more efficient rivals. Indeed, that appears to have been true in this case, where Weyerhaeuser was more efficient than the plaintiff, *see* Pet. 3, and was able to earn a profit notwithstanding the prices it paid for logs, whereas the plaintiff was not. And during the same time Ross Simmons incurred a loss and shut down, four new sawmills began operations and others expanded. *Id.*

Under the Ninth Circuit's analysis, however, if an efficient firm competes against a less efficient rival, the efficient firm must distort its own pricing decisions to make certain its rival can buy however much that rival needs at whatever price a jury would deem "fair." In other words, a company with a higher profit margin because of higher efficiency must conform its own pricing behavior to that of an inefficient rival, thereby ensuring the rival's continued survival. Such an outcome is anathema to the goals of the antitrust laws, which "were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis added) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). *See* Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001) ("It would be absurd to require the firm to hold a price umbrella over less

efficient entrants."). Such a rule discourages innovation and efficiency, and encourages inefficiency, all to the ultimate detriment of consumers. "[A] firm should not be penalized for having lower costs than its rivals and pricing accordingly." Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 154 (2005) (citing Posner, *supra*, at 194-195).

Even a company whose pricing forces a rival to exit the market is not condemned if the pricing is profitable, for "[s]uch behavior is completely consistent with our conception of proper competition." Hovenkamp, *supra*, at 156. There is a reason for the *Brooke Group*'s high liability standard in predatory pricing cases. "Competitive and exclusionary conduct look alike." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 972 (1986). In the context of predatory pricing, not only is there a danger of confusing the two and chilling procompetitive conduct, but economic rationality makes predatory pricing decisions rare and self-deterring.[3]

Predatory buying is particularly unlikely to succeed, since the perpetrator must recoup its losses by later lowering its purchase price, which "will succeed only in eliminating sources of inputs by driving potential suppliers out of the input market." Jack A. Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 Loyola Univ. L. Rev. 857, 865 (1987). Whereas very high barriers to *entry* might theoretically sustain a pre-

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[3] *See Brooke Group*, 509 U.S. at 226 ("As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are high.") (internal citation omitted); *Matsushita*, 475 U.S. at 595 ("economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the [predator]").

datory *selling* scheme, there are few if any insurmountable barriers to *exit* for suppliers affected by the end stage of a predatory *buying* scheme. In both predatory buying and selling, then, the high likelihood of false positives outweighs the small likelihood of undetected schemes. While true predation is self-correcting over time, there is no market correction for imposing liability on, and therefore deterring, beneficial conduct. Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law*, 52 Emory L.J. 1401, 1412-13 (2003).

The difference between legitimate competition and unlawful predatory conduct already requires "the most subtle of economic judgments about particular business practices." *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). *Brooke Group* recognizes that liability must be carefully circumscribed, so as not to deter pro-competitive conduct in the zeal to root out highly improbable anti-competitive schemes. By contrast, inquiries into the "fairness" of prices and the "necessary" levels of purchases by each competitor would do just that. At the end of the day, the ultimate losers from the chill cast on competition are consumers—the very group the antitrust laws were designed to protect. The Court should therefore grant review to ensure that companies will not be deterred from engaging in efficient pricing decisions by the specter of enormous liability meted out by juries under vague and unworkable standards.

## CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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(5)

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IN THE

# Supreme Court of the United States

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WEYERHAEUSER COMPANY,
*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF *AMICI CURIAE* THE CAMPBELL GROUP; FOREST SYSTEMS, LLC; GLOBAL FOREST PARTNERS LP; HANCOCK NATURAL RESOURCE GROUP, INC.; MENASHA FOREST PRODUCTS CORP.; PLUM CREEK TIMBER COMPANY, INC.; AND RESOURCE MANAGEMENT SERVICE, LLC, SUPPORTING PETITIONER

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## QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory buying may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

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*Khan* v. *State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997) ..... 17, 18

*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) ..... 16

*Mandeville Island Farms* v. *Amer. Crystal Sugar Co.*, 334 U.S. 219 (1948) ..... 8, 15, 18

*Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*

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*Morton Salt Co.* v. *United States*, 235 F.2d 573 (10th Cir. 1956) ..... 16

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*United States* v. *Champion Int'l Corp.*, 1975-2 Trade Cases ¶ 60,453 (D. Or. 1975), aff'd, 557 F.2d 1270 (9th Cir. 1977) ..... 14

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REGULATORY MATERIALS

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MISCELLANEOUS

P. Areeda & H. Hovenkamp, *Antitrust Law* (2d ed. 2002) ..... 12

P. Areeda & L. Kaplow, *Antitrust Analysis* (5th ed. 1997) ..... 9

R. Blair & J. Harrison, *Monopsony* (1993) ..... 6, 10

TABLE OF AUTHORITIES—Continued

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I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) ..... 12

J. Howard, U.S. Dept. of Agric., *U.S. Timber Production, Trade, Consumption, and Price Statistics 1965-1999* (2001) ..... 18

E. Kerwel & W. Strack, FCC, *Auctioning Spectrum Rights* (Fed. 20, 2001) ..... 9

J. Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 Southern Forest Economics Workshop (1998) ..... 13

J. Schumpeter, *Capitalism, Socialism, and Democracy* (3d ed. 1950) ..... 12

A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Modern Library ed. 1994) (1776) ..... 10

U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005* (2005) ..... 19

D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199 (1999) ..... 13

R. Yin & D. Newman, *A Timber Producer's Entry, Exit, Mothballing, and Reactivation Decisions Under Market Risk*, 5 J. Forest Econ. 305 (1999) ..... 12

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## BRIEF OF *AMICI CURIAE* THE CAMPBELL GROUP; FOREST SYSTEMS, LLC; GLOBAL FOREST PARTNERS LP; HANCOCK NATURAL RESOURCE GROUP, INC.; MENASHA FOREST PRODUCTS CORP.; PLUM CREEK TIMBER COMPANY, INC.; AND RESOURCE MANAGEMENT SERVICE, LLC, SUPPORTING PETITIONER

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## INTEREST OF *AMICI CURIAE*

The Ninth Circuit's decision in this case holds that a purchaser—here, a purchaser of alder sawlogs—may be held liable for treble damages under Section 2 of the Sherman Act, 15 U.S.C. § 2, for paying more than "necessary," without any showing that the prices paid made its operations unprofitable or that the purchaser could recoup the supposed excess payments by charging higher prices for its goods (or paying lower prices for inputs) later on. *Amici curiae*—The Campbell Group; Forest Systems, LLC;

Global Forest Partners LP; Hancock Natural Resource Group, Inc.; Menasha Forest Products Corp.; Plum Creek Timber Company, Inc.; and Resource Management Service, LLC—are owners and managers of some of the largest private timberlands in the Nation. They are in the business of harvesting trees and selling logs to companies like petitioner and respondent. As a result, they have a profound interest the Ninth Circuit's decision in this case. By establishing an unintelligible standard for antitrust liability (imposing liability for paying more than a "fair" price or for buying more logs than "necessary"), the decision chills price competition for the trees and logs that *amici* sell. That injures not merely *amici*, but consumers as well. By lowering the prices of *amici*'s goods, the decision reduces the incentive to expand supply—by reaching out to otherwise uneconomic timberlands—in times of high demand. And it distorts the market by preventing price competition from allocating resources to the highest-value buyers.[1]

## STATEMENT

1. Congress enacted the Sherman Anti-Trust Act, 15 U.S.C. § 1 *et seq.* ("Sherman Act"), to prohibit persons in interstate commerce from accumulating and exploiting market power. Section 2 of the Sherman Act provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * *." Federal antitrust law also provides a treble damages remedy for those injured by violations of the Act. 15 U.S.C. § 15.

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[1] The parties have consented to the filing of this brief in writing. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

This Court has interpreted Section 2 to prohibit "predatory" behavior, such as *selling* goods at a price designed to drive competitors out of business, but only if the goods are sold *below* cost and such conduct poses "a dangerous probability of actual monopolization." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 455 (1993); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). This case concerns whether similar principles apply to allegedly exclusionary *purchasing* conduct.

2. In general, the alder sawlog market of the Pacific Northwest comprises three categories of participants: (1) timberland owners and managers, which harvest and supply raw logs; (2) production facilities (*i.e.*, sawmills), which process the raw material into finished lumber; and (3) purchasers of processed material, who buy lumber for use in various consumer products. Pet. App. 2a-3a. *Amici* fall into the first category: They manage timberlands, harvest trees, and supply raw logs. Petitioner Weyerhaeuser Company is in the second category: It owns and operates production facilities. From 1996 to 2001, Weyerhaeuser purchased approximately 65% of the alder sawlogs marketed for processing in the Pacific Northwest. *Id.* at 3a. During that time, several sawmills in the region closed, but others opened. Pet. 3.

Respondent Ross-Simmons Hardwood Lumber Co. operated a competing production facility that closed in 2001. Pet. App. 3a. It filed suit against Weyerhaeuser, claiming that Weyerhaeuser violated Section 2 of the Sherman Act by attempting to monopolize the alder sawlog market in the Pacific Northwest. Respondent alleged that Weyerhaeuser overpaid for and overpurchased, through contractual commitments, alder sawlogs to drive competing production facilities out of business. *Ibid.* Respondent, however, did not allege that Weyerhaeuser paid so much that its business became unprofitable. Pet. 5.

At the close of trial, the district court instructed the jury that it could find Weyerhaeuser guilty of violating the Sherman Act if it found that Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." Pet. App. 7a n.8. The jury found for respondent, and the court awarded treble damages in the amount of $78,769,218. *Id.* at 4a. The trial court denied Weyerhaeuser's motion for judgment as a matter of law or for a new trial. *Ibid.*

3. The court of appeals affirmed, holding that allegations of predatory *buying*—as opposed to the charges of predatory *selling* at issue in *Brooke Group*—did not require a showing that (1) Weyerhaeuser's predatory behavior was unprofitable in the short term, or that (2) Weyerhaeuser had a dangerous probability of recouping short-term losses once its competitors had exited the market. Pet. App. 7a. The court of appeals concluded that "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 8a-9a.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is not merely out of step with the decisions of other courts of appeals and standard principles of antitrust law. It also throws a judicial monkey-wrench into the machinery of competition. By licensing juries to substitute their assessment of a "fair" price and the "necessity" of purchases for the discipline of the competitive market—without any showing that the defendant's conduct was unprofitable or would result in the recovery of monopoly profits—the decision chills price competition among purchasers of inputs. Exposed to the threat of treble-damages actions for paying "too much" for needed inputs, purchasers will necessarily curtail their bids.

That has profound consequences. By muting price competition among purchasers, the decision below limits the price increases that, in times of shortage, typically drive timberland owners to augment supply by accessing and harvesting trees from lands that otherwise would not be economically viable. More important, the decision distorts the market in favor of less efficient purchasers. As a matter of fact and theory, price competition for inputs among purchasers allocates resources to the purchaser that values them most highly. By barring efficient purchasers who value inputs most highly from bidding aggressively for those inputs, the Ninth Circuit's decision effectively redirects those goods to less efficient producers who value them less. That injures competition; it injures sellers; and it injures consumer welfare. This Court's immediate intervention is necessary to avoid widespread consequences for the timber industry and other major industries throughout the Ninth Circuit.

## I. The Ninth Circuit's Reasoning Is Fundamentally At Odds With This Court's Precedents And The Economic Principles That Undergird Them

### A. The Ninth Circuit's Decision Undermines This Court's Decision In *Matsushita* And Its Progeny

1. On its face, procompetitive behavior is often indistinguishable from anticompetitive conduct. No less than would-be monopolists, fierce competitors in fully competitive markets are always out to beat the competition. The difficulty of distinguishing aggressive competition from anticompetitive conduct arises with particular force where "predatory" behavior is alleged. Predatory selling, for example, involves an attempted monopolist's price-cutting to eliminate competition. But healthy price competition also involves sellers' price-cutting to win market share. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Conversely, "predatory buying" involves bidding up the price of a production input until the competition can no

longer afford to purchase the input, driving it out of business. R. Blair & J. Harrison, *Monopsony* 66 (1993). But the "competitive instinct" of all buyers competing for valuable resources is "to bid up price." *Kartell* v. *Blue Shield of Mass.*, 749 F.2d 922, 925 (1st Cir. 1984).

In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court confronted that difficulty and established the ground rules for distinguishing procompetitive (or competitively neutral) conduct from "predatory" behavior. Noting "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful," 475 U.S. at 589, the Court explained that "courts should not permit factfinders to infer" such conduct "when such inferences are implausible * * * ." *Id.* at 593. The Court thus imposed two requirements that must be met by any plaintiff alleging predatory pricing. First, conduct that is "as consistent with permissible competition as with illegal [conduct] does not, standing alone, support an inference of antitrust [violations]." *Id.* at 588. Thus, plaintiffs must show conduct that is *inconsistent with* permissible competition. Second, a plaintiff's allegations of anticompetitive conduct must be grounded in economic reality: "[I]f the factual context renders [plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

In *Brooke Group*, this Court applied *Matsushita*'s requirements to allegations of predatory selling in violation of Section 2 of the Sherman Act. 509 U.S. at 222-224. At the outset, the Court noted that "sound antitrust policy" cannot "be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition." *Id.* at 224. Accordingly, the Court held that it was not enough to prove that a competitor charged less than it could have. Instead, the plaintiff "must prove that the

prices complained of are below an appropriate measure of [the defendant's] costs." *Id.* at 222. In addition, the Court reiterated *Matsushita*'s requirement that allegations of anticompetitive conduct must be economically "plausible." See *id.* at 224 (citing *Matsushita*, 475 U.S. at 589). In the case of predatory pricing, the Court explained, the predator effectively endures losses in the short term, treating those losses as an investment to be recouped through later monopoly profits. "For the investment to be rational," the Court observed, "the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Ibid.*

2. In this case, the Ninth Circuit refused to apply *Matsushita* and *Brooke Group* to allegations of predatory buying in violation of Section 2 of the Sherman Act. First, the Ninth Circuit refused to require proof that Weyerhaeuser purchased the raw materials at prices that were economically unprofitable for it. See Pet. App. 7a. (Indeed, it is our understanding that Weyerhaeuser's alder sawmill business operated at a profit during the relevant period. Pet. 5.) Second, the Ninth Circuit refused to require proof that Weyerhaeuser had a dangerous probability of recouping short-term losses by either charging (high) monopoly prices, or paying (low) monopsonistic prices, later on. See Pet. App. 7a. The court of appeals justified that refusal by arguing that those requirements apply only in cases of sell-side predatory conduct because "benefit[s] to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing. * * * No consumer benefit results during [the] predation period if the firm raises or maintains the same price level for its finished products." Pet. App. 9a-10a.

That reasoning cannot be squared with *Matsushita*, *Brooke Group*, or basic economic theory. *First*, although *Matsushita* and *Brooke Group* both involved predatory selling claims, those cases offer no reason why their analysis

would not apply with equal force to predatory buying claims. The risk of deterring procompetitive conduct is equally inherent in both types of claims. Just as "cutting prices in order to increase business is often the very essence of competition," *Matsushita*, 475 U.S. at 594, so too is competing for raw materials with other bidders on the basis of price. From the perspective of the alleged predator, the two acts are indistinguishable—both diminish profits but also offer potential competitive advantages. As *Matsushita* broadly explained, "[w]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Ibid.* (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)). The Ninth Circuit's limitation of *Matsushita* to predatory *sales* thus ignores this Court's fundamental concern about judicial intervention and condemnation—upon pain of treble damages—of potentially procompetitive conduct.

*Second*, the Ninth Circuit's attempt to distinguish *Matsushita* turns on the flawed assumption that the only "procompetitive conduct" to consider is that which creates immediate "consumer benefit." That is, the Ninth Circuit conflates competition with short-term consumer price cuts. As explained below, that is wrong as a matter of basic economics. See pp. 9-14, *infra*. But it is also wrong as a matter of law. *Matsushita* did not narrowly define procompetitive benefits *solely* as reduced prices. To the contrary, the Court warned that mistaken inferences "chill the very conduct the antitrust laws are designed to protect * * * [,] discouraging legitimate price competition," 475 U.S. at 594, without limiting that admonition to price cuts with an immediate consumer impact. Simply put, the antitrust laws do not focus solely on short-term price reductions for consumers. Rather, they seek to protect full competition in the marketplace generally. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The

[Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."); see also pp. 14-17, *infra*.

### B. The Ninth Circuit's Decision Deters The Procompetitive Conduct This Court's Precedents Protect

The Ninth Circuit's decision is also inconsistent with economic reality—and, as a result, threatens the very efficiency and competition this Court's precedents seek to protect. Price competition among purchasers allocates inputs to those buyers who, because they will be the most efficient and intensive users, value the inputs most highly. Higher prices resulting from competition for inputs, moreover, often signal and permit increases of supply that will alleviate shortages. By muting price competition for inputs, the Ninth Circuit's decision interferes with both mechanisms. It allocates scarce resources to *less* efficient users who, because they value the resources less highly, are unwilling to pay as much for them. And it prevents the sorts of price increases that, in properly functioning markets, signal sellers to bring additional inputs to the market where, absent price increases, doing so would be uneconomic.

1. "Price is the central nervous system of the economy." *Nat'l Soc'y of Prof. Engineers* v. *United States*, 435 U.S. 679, 692 (1978) (quotation marks omitted). It is price in the first instance that directs inputs and resources to their most productive use. When prices, set by competition, accurately reflect demand for the production input, then the supply of that input will be allocated efficiently to those who can make the most productive use of it. P. Areeda & L. Kaplow, *Antitrust Analysis* 7-8 (5th ed. 1997). For that very reason, the United States has adopted a policy of allocating some scarce public resources (such as electromagnetic spectrum) to the highest bidder. Simply put, "competitive bidding" ensures that each resource is made "available to those who value it most highly and therefore are most likely to put it to its most economically efficient

use." 62 Fed. Reg. 9636, 9640-9641 (Mar. 3, 1997) (spectrum auctions); see E. Kwerel & W. Strack, FCC, *Auctioning Spectrum Rights* 2 (Feb. 20, 2001) (assigning licenses to high bidders allocates them to "the parties that value them most highly," *i.e.*, those who are "generally best able to provide consumers with the services they most want, while using the spectrum most efficiently."), available at http://wireless.fcc.gov/auctions/data/papersAndStudies/aucspec.pdf. If a purchaser cannot compete effectively for inputs in an otherwise competitive market, the most logical explanation is that its higher-bidding competitors are more efficient and better able to put the resource to a higher-value use—not that they are behaving nefariously.

The Ninth Circuit's decision ignores that fundamental economic reality. Instead, it suggests that even economically rational purchasing behavior (*i.e.*, bidding more than competitors for raw materials where a profit can still be made) is evidence of anticompetitive behavior. That is simply not the case. In competitive markets, producers of finished goods *will* bid up the price of raw inputs.[2] For the reasons given above, that is both expected and healthy. Where competitors openly and aggressively compete for inputs in a free market, the market allocates the goods to the competitor that values them most highly and that will put them to their best use. When that occurs, consumers are the ultimate beneficiary. And when it does not occur—

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[2] See, *e.g.*, Blair & Harrison, *Monopsony*, *supra*, at 66 (contrasting competitive prices with monopsonist prices); *Kartell*, 749 F.2d at 925 (explaining that the "competitive instinct" of all buyers is "to bid up price"); Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book One, ch. VII (Modern Library ed. 1994) (1776) (explaining that, where demand for a commodity outpaces supply, "[a] competition will immediately begin among [buyers], and the market price will rise * * * , according as either the greatness of the deficiency, or the wealth and wanton luxury of the competitors, happen to animate more or less the eagerness of the competition").

when resources are allocated to less efficient participants—it is consumers that suffer.

The Ninth Circuit's decision not only ignores, but also affirmatively undermines, price as an efficient allocation mechanism. Under the Ninth Circuit's rule, the most efficient and best user of sawlogs (or any other input) cannot outbid others without risking treble-damages liability for paying more than what a jury determines to be "fair" prices. That is true even if the more efficient purchaser (as here) uses all that it buys. That is true even if the more efficient purchaser (as here) continues to make a profit while paying higher prices. Perversely, the reward for greater efficiency is, under the Ninth Circuit's approach, not competitive advantage but treble damages liability. That is precisely the sort of result this Court has warned against. "Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Verizon Communications Inc.* v. *Trinko*, 540 U.S. 398, 414 (2004) (internal quotation marks omitted).

The long-run consequences of the Ninth Circuit's rule are deeply troubling. If price is the "central nervous system" of the market economy, efficiency is the muscle that drives growth. Less efficient competitors (in this case, competing sawmills) would undoubtedly prefer not to face pressure to improve efficiency, including the pressure that results from price competition for supplies.[3] But that pressure and the potential for their demise is the "creative destruction" necessary for the free market to satisfy con-

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[3] Cf. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 466 U.S. 752, 763 (1984) ("[C]omplaints about price cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals. Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, arise in the normal course of business and do not indicate illegal concerted action.") (quotation marks omitted).

sumer preferences. That process *is* the "essential fact about capitalism." J. Schumpeter, *Capitalism, Socialism, and Democracy* 83 (3d ed. 1950). The Ninth Circuit's decision unnecessarily intrudes into that process by protecting inefficient firms from their own shortcomings—or rewarding them for failure with treble damages awards—while condemning more efficient ones for competing effectively as buyers.

2. The Ninth Circuit's rule also imposes inappropriate inefficiencies on the suppliers of raw materials. In fully competitive markets, suppliers react to pricing signals by increasing or decreasing their investment in the production of the input. As Professors Areeda and Hovenkamp aptly note, if input producers "are forced to accept less than the competitive price for their product, * * * the result will be that individual [producers] will either produce less or stop producing at all. [Input buyers] will purchase fewer [inputs] and * * * will also produce less [of their finished product]." 12 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 2011b1, at 128-129 (2d ed. 2002).

For example, in the alder sawlog industry, certain timberlands that are more expensive to purchase or harvest (*e.g.*, remote areas, or those with difficult terrain) ordinarily will not be utilized. In the event that demand increases suddenly and sawlog purchasers begin paying higher prices, suppliers can and will put additional lands, including higher-cost timberlands, into profitable service.[4] Increasing price

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[4] See, *e.g.*, I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) ("Price expectations play a critical role in timber markets. Each period, producers must decide whether to harvest or hold their timber."); R. Yin & D. Newman, *A Timber Producer's Entry, Exit, Mothballing, and Reactivation Decisions Under Market Risk*, 5 J. Forest Econ. 305, 306 (1999); *id.* at 317 ("Due to harvest flexibility and relatively low costs associated with temporary suspension of production, mothballing [*i.e.*, the temporary suspension of production,] enters the producer's choice set as a critical marketing decision."); J.

triggers increasing supply, alleviating shortages. Under the Ninth Circuit's approach, however, purchasers will have to think long and hard before bidding up prices in response to a shortage. And without the price stimulus to put additional or more costly resources into service, the owners of timberlands cannot act to alleviate the shortage.[5]

The United States, which relies on market forces to allocate the timber resources it owns among competing pur-

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Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 Southern Forest Economics Workshop 26 (1999) ("Timber supply responds to market signals through the myriad private and public decisions to harvest a portion of timber inventories. The aggregate response to price is, therefore, a function of biology, the environment, the characteristics of the inventory, and the objectives of the harvest decision makers."), available at http://www.srs.fs.usda.gov/econ/pubs/misc/jpp992.pdf; D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199, 211 (1999) ("Supply in the short and medium runs may be highly variable in response to market fluctuations * * * ."), available at http://www.srs.fs.usda.gov/econ/pubs/misc/dnw941.pdf.

[5] The Ninth Circuit rejected concerns that its ruling would adversely affect the relevant market because—according to one economist's research—the market for alder logs is "a limited, relatively inelastic, resource-based input market." Pet. App. 9a n.14. But it is far from clear why the claimed inelasticity of the market would obviate the need for an efficient pricing mechanism. Even for inelastic resources (such as electromagnetic spectrum), an efficient market awards the resource to the highest bidder because it is the highest-value user. See pp. 9-10, *supra*. In any event, the Ninth Circuit's characterization of the timber market is fundamentally flawed. The timber market is dynamic and the supply of timber delivered to market is quintessentially elastic. See pp. 12-13 n.4, *supra*. More important, the Ninth Circuit's mistake in evaluating the timber market's elasticity illustrates the difficulty with requiring courts to resolve complicated issues of economic theory before determining which legal standard should apply. The virtue of the *Brooke Group* and *Matsushita* test, by contrast, is that it asks relatively straightforward questions that are susceptible of judicial resolution regardless of the elasticity of supply and demand.

chasers, conducts its own business in precisely that fashion. When harvesting rights are set for auction, bidders must bid in excess of an appraised-value reserve price in order to win the right to extract the timber. 16 U.S.C. § 472a(a), (e)(1)(B). In other words, the government increases the amount of timber put on the market when prices exceed a certain threshold (the appraised-value reserve), and decreases the supply of marketed timber when prices fall below that line. That system, moreover, underscores the folly of trying to establish a "fair" price by fiat rather than allowing the market to regulate. Although the government establishes what it believes to be the fair or appraised value as a floor, bidding regularly exceeds that amount. Under the Ninth Circuit's theory, each such bid—because it exceeds the "fair" price—is a potential antitrust violation.

Finally, even in the timber industry, the government has shown its commitment to protecting procompetitive price competition among buyers for the supply of timber, prosecuting bidders who collude to depress auction prices and thereby deprive the government of bids in excess of the reserve price. See *United States.* v. *Champion Int'l Corp.*, 1975-2 Trade Cases ¶ 60,453, 67,040 (D. Or. 1975) ("The bidders, of course, were delighted with this [collusive] bidding pattern because, being without opposition, they were able to purchase the timber sales at or near the appraised value."), *aff'd*, 557 F.2d 1270 (9th Cir. 1977). The Ninth Circuit's disregard for price competition among buyers for resources—and timber in particular—cannot be reconciled with the government's use of criminal prosecutions to protect that competition.

3. As does economic theory, this Court's precedents recognize that price competition has value on both sides of each transaction: Would-be sellers compete for sales by countering each other with lower prices, while would-be buyers compete for inputs by countering each other with higher offers. Each side of the competition "coin" is pro-

tected by the Sherman Act. As this Court warned in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940), the antitrust laws bar not only the anticompetitive "raising" and "stabilizing" of prices, but the anticompetitive "depressing" of prices as well.

Indeed, this Court's Sherman Act Section 1 cases are replete with efforts to protect and foster the procompetitive benefits of competition among buyers. The Court established its most explicit defense of buy-side competition in *Mandeville Island Farms, supra.* There, sugar beet growers alleged that sugar beet refiners had conspired to depress the price paid to growers for produce. 334 U.S. at 221-223. The Court, in holding that the plaintiff growers stated a cause of action under the Sherman Act, *id.* at 246, noted that the plaintiffs' claims were not defeated by the mere fact that the plaintiffs were producers rather than consumers:

> It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specifically injured under the treble damage claim are sellers, not customers or consumers. * * * The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these.

*Id.* at 235-236 (footnotes and citations omitted). The Court found it "impossible to accept" "[t]he idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product * * *." *Id.* at 241. Thus, *Mandeville Island Farms* directly rejected the core of the Ninth Circuit's analysis below: to wit, that competition for the inputs of production does not benefit consumers and does not promote competition throughout the market. See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,*

*Inc.*, 340 U.S. 211, 213 (1951) (holding horizontal agreements to fix *maximum* prices unlawful because, "no less than those to fix minimum prices, [they] cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"); *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 351 (1982) (rejecting defendants' argument that their fixing of maximum consumer prices constituted "procompetitive" conduct, because "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation").

More fundamentally, the Ninth Circuit's disparate treatment of predatory conduct by sellers (price cuts) and predatory conduct by purchasers (increased bids) contradicts this Court's established practice of giving equal treatment to buy-side and sell-side conduct. "Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" is illegal. *Socony*, 310 U.S. at 223; see *Mandeville Island Farms*, 334 U.S. at 236 ("The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."). Recognizing that parity of treatment, the courts of appeals have treated bid-rigging and other buy-side efforts to fix prices among competitors under the same standards used to evaluate sell-side efforts to fix prices among competitors. See, *e.g.*, *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976) (affirming the finding of collusive buying) (citing *Morton Salt Co.* v. *United States*, 235 F.2d 573 (10th Cir. 1956)); *In re Beef Indus. Antitrust Litigation*, 907 F.2d 510 (5th Cir. 1990); *American Tobacco Corp.* v. *United States*, 328 U.S. 781, 803-804 (1945) (drawing no distinctions between evaluation of alleged sell-side predatory pricing and alleged buy-side predatory pricing by same defendant). There is no reason why Section 2 of the Sherman Act should be read to draw a

distinction between seller conduct and buyer conduct that is wholly foreign to Section 1.

## II. The Ninth Circuit's Decision Creates A Conflict On Whether Predatory Buying Claims Require Evidence That The Buyer's Purchases Were Unprofitable

The Ninth Circuit's decision, moreover, cannot be reconciled with recent decisions by the Fifth and Seventh Circuits, including *In re Beef Industry Antitrust Litigation*, 907 F.2d at 510, and *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1360-1361 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997).

In the *In re Beef Industry* case, individual cattlemen alleged that IBP, Inc., a beef packer, violated Section 2 of the Sherman Act through predatory buying of fed cattle. Like respondent here, the plaintiffs there alleged that IBP had "attempted to drive its competitors out of the fed cattle procurement market by paying a higher price for fed cattle than the market suggested." *Id.* at 515. The Fifth Circuit rejected that claim because the plaintiffs "presented no evidence that IBP ever paid a predatory price (in this case, a price higher than that which would allow the packer to make a profit) for the fed cattle." *Ibid.* Thus, consistent with *Matsushita* and *Brooke Group*, the Fifth Circuit has held that allegations of predatory buying require evidence that the buyer paid an unprofitable price for the input at issue. Here, the Ninth Circuit reached the opposite result, affirming a judgment for tens of millions of dollars without any finding that Weyerhaeuser "paid a predatory price (in this case, a price higher than that which would allow [Weyerhaeuser] to make a profit)." Instead, the Ninth Circuit held it was sufficient for the jury to find that Weyerhaeuser "purchased more logs than necessary" and thereby prevented competitors from obtaining logs "at a fair price." Pet. App. 7a n.8; see *id.* at 10a.

In *Khan*, the Seventh Circuit stated—albeit in dictum—that allegations of monopsony (buyer market power) should

be judged by the same standard as allegations of monopoly (seller market power). In that case, the Seventh Circuit considered the claim that a gasoline supplier violated Section 1 of the Sherman Act by setting the maximum price at which its customer could resell the product. 93 F.3d at 1360-1361. In explaining the economics of maximum-price-fixing, Judge Posner's opinion noted that "monopsony pricing * * * is analytically the same as monopoly or cartel pricing[, and is] so treated by law." 93 F.3d at 1361 (citing *Mandeville Island Farms*, 334 U.S. at 236); see also *United Airlines, Inc.* v. *U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005) ("[Plaintiff] fancies the position of monopsonist, which the antitrust laws forbid on equal terms with monopoly.") (Easterbrook, J.). Thus, the Seventh Circuit reads *Mandeville Island Farms* to require that buy-side and sell-side conduct be evaluated under the same rubric. The Ninth Circuit's decision in this case, by contrast, draws a sharp distinction between the two, holding that price competition for inputs among buyers, unlike price competition among sellers, lacks procompetitive benefit under the antitrust laws. That result cannot be reconciled with the Seventh Circuit's position that the two are "analytically the same." *Khan*, 93 F.3d at 1361.

## III. The Need For This Court's Review Of The Ninth Circuit's Decision Is Particularly Urgent

This Court's immediate intervention is necessary to prevent significant and long-lasting harm from the Ninth Circuit's decision. Given the practical realities of the timber industry, comparable suits arising from timber production will flock to the Ninth Circuit. In fact, approximately one-third of all lumber produced annually in the United States is produced in the West. See J. Howard, U.S. Dept. of Agriculture, *U.S. Timber Production, Trade, Consumption, and Price Statistics 1965-1999* at 61 (Table 29), available at http://www.fpl.fs.fed.us/documnts/fplrp/fplrp595.pdf. And it is easy to imagine that Sherman Act plaintiffs will quickly seize upon the decidedly pro-plaintiff rule now available

there, bringing any claim with a conceivable connection to any of the Western States that make up that jurisdiction.

The result will not merely be litigation. Confronted with the realistic possibility of treble-damages actions for competing too aggressively for logs—even when the bids are profitable—purchasers will compete less aggressively. That means artificially depressed prices, a depressed industry, and depressed supply. Given the sheer size of the timber industry, the disruptive impact should not be underestimated. In 2001, forestry and logging operations employed 78,000 workers, with an annual payroll of $2.16 billion. U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005*, Table No. 841 (2004). That same year, timber-related manufacturing operations, including sawmills and paper manufacturers, employed 1,090,700 workers, with a payroll of $39.3 billion. *Ibid.* Timber-related manufacturing contributed $95.1 billion to gross domestic product in 2001. *Id.* at Table No. 843.

The Ninth Circuit's decision also affects countless other industries that rely on lumber for production of finished goods. Because the Ninth Circuit's analysis threatens to chill bidders that may quickly need to escalate their bids above historical trend levels, the Ninth Circuit's decision threatens to paralyze the markets precisely when they need to be most responsive. As recent natural disasters—including the Gulf Coast hurricanes—demonstrate, demand for lumber can escalate rapidly to support local rebuilding efforts. The Ninth Circuit's decision retards the price competition that is necessary to bring new and needed supplies on line promptly and efficiently. By regulating price unnecessarily and capriciously, it threatens to leave shortages unredressed and to extend the time it takes to rebuild communities destroyed by such disasters.

Finally, the impact of the Ninth Circuit's decision extends well beyond the timber industry. Any commodity subject to fluctuations in demand or supply, with corres-

ponding fluctuations in price, now must operate under the chilling shadow of uncertainty cast by the Ninth Circuit's decision. The industries subject to such pressures include, but are not limited to, electricity and natural gas, both of which often conduct business amidst rapid escalation and de-escalation of market prices in response to fluctuations in supply and demand. The Ninth Circuit's decision may cause severe dysfunction in those markets, as buyers find themselves unable to compete rapidly and aggressively for resources under changing conditions.

## CONCLUSION

For the foregoing reasons, and those stated in the Petition, *amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted.

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No. 05-381

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER


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Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991) ..... 11

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber), a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The American Forest and Paper Association (AF&PA) is the national trade association of the forest, paper and wood products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard, and wood products. The forest products industry accounts for approximately seven percent of total U.S. manufacturing output, employs 1.1 million people, and ranks among the top ten manufacturing employers in 42 states. AF&PA member companies represent approximately 84 percent of the domestic paper, paperboard, and market pulp production capacity, and account for more than half of the solid wood manufacturing capacity. They own a significant portion

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

of the nation's commercial forests and annually plant nearly half of all tree seedlings in the United States.

In this case, the Ninth Circuit affirmed a $78 million antitrust judgment against Weyerhaeuser based on a claim of "predatory bidding." In doing so, the court applied a liability standard that fails to provide any objective basis to distinguish a manufacturer's legitimate and desirable competition to acquire the raw materials that it uses to make its products from buying behavior that is truly predatory and anticompetitive. The amorphous liability standard that was used provides virtually no guidance to businesses and gives juries no meaningful basis to separate competitive from anticompetitive conduct. That unfortunate reality will cause many businesses to compete less vigorously in order to avoid the risk of treble-damage antitrust liability. The effects of the Ninth Circuit's decision reach far beyond the lumber industry in which Weyerhaeuser conducts its business. Manufacturers, suppliers of raw materials to manufacturers, and consumers of manufactured products of all kinds will be affected by this decision.

The *amici* are well situated to explain the practical effects that the Ninth Circuit decision will have on these disparate groups. AF&PA members include businesses that are substantial producers of forest products that are used as inputs to produce wood and paper products, as well as businesses that buy such inputs to produce wood and paper products. The Chamber's membership, likewise, includes many businesses that produce raw materials and other inputs used by manufacturers, as well as manufacturers that purchase such inputs.[2] The Chamber's membership also includes businesses that purchase

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[2] Although petitioner Weyerhaeuser is a member of both the AF&PA and the Chamber, this brief is filed on behalf of each *amicus* as a whole, not merely on behalf of a member. The Chamber as a matter of policy ordinarily does not publicly disclose the identity of its members, but counsel for respondent specifically requested that this brief disclose whether Weyerhaeuser is a member of each organization, and Weyerhaeuser has authorized that disclosure.

billions of dollars of manufactured products of all kinds. The Ninth Circuit's decision, by deterring vigorous competition among manufacturers to acquire raw materials, will adversely affect all of these groups, for the reasons explained below.

## STATEMENT

Weyerhaeuser owns and operates six hardwood sawmills in the Pacific Northwest. It purchases alder timber from timberland owners and loggers and uses those sawlogs to produce finished alder lumber. From 1998 to 2001, alder sawlog prices increased, while the price of finished alder lumber decreased. Weyerhaeuser's profits declined, but it continued to operate profitably. Ross-Simmons Hardwood Lumber Company, one of Weyerhaeuser's competitors, lost money during this period and shut down in 2001. It sued Weyerhaeuser, claiming that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in predatory "overbidding" and "overbuying" of alder sawlogs in order to eliminate Ross-Simmons and others as competitors in the market for the purchase of sawlogs. The case was tried to a jury, which found for Ross-Simmons on this claim[3] and awarded damages of $26 million (automatically trebled to $78 million). Pet. App. 2a-4a; Pet. 3-5.

The Ninth Circuit affirmed. It observed that Section 2 of the Sherman Act prohibits monopolization of markets for the purchase of products, as well as of markets for the sale of products. Pet. App. 6a. It described Ross-Simmons's claim as one in which "the price level itself is the anticompetitive weapon." *Id.* at 8a. It recognized that, "[i]n the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials" during the period of the so-called overbidding. *Id.* at 10a. "[T]he recoupment phase of a predatory bidding scheme mirrors the recoupment phase of a predatory pricing scheme." *Id.* at 11a n.19.

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[3] The jury returned a verdict for Weyerhaeuser on a separate claim that it had monopolized the market for the sale of finished alder lumber. See Pet. 4 n.2.

The court of appeals held, nonetheless, that the plaintiffs did not need to prove the prerequisites for predatory pricing liability established by *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). There was no "need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." Pet. App. 13a. "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a. The jury was properly instructed, according to the court of appeals, when it was told that it could be an anticompetitive act if Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." *Id.* at 14a n.30.

## SUMMARY OF ARGUMENT

This Court has held that claims of predatory pricing by a seller must be evaluated under strict, objective standards. Otherwise, lawful and desirable competitive behavior might be mistaken for unlawful and predatory behavior, and the risk of a mistaken inference of predation by an antitrust jury could deter the kind of vigorous competition that the antitrust laws were meant to promote. The court of appeals rejected the use of such standards here because this case involved claims that a buyer, rather than a seller, engaged in predation. But the standard it endorsed – whether Weyerhaeuser paid more than a "fair" price for the logs it purchased to produce lumber, and whether it purchased more logs than it "needed" – poses a serious risk of false positives. The standards that govern predatory selling claims – Are the defendant's prices unprofitable in the short term, and is it likely that those losses will be recovered by non-competitive pricing in the long term, after rivals have been eliminated? – are needed to protect against that risk.

The Ninth Circuit's decision therefore threatens to deter vigorous competition by buyers to acquire the inputs that are used to make their products, and to produce exactly the result that the antitrust laws are meant to protect against in this context

– artificially reduced prices for sellers. That threat is compounded by the court of appeals' misguided concept of market power. The court should have asked whether Weyerhaeuser had the ability to cause the relevant antitrust injury, *i.e.*, a sustained reduction in the prices paid to sellers. Only firms with very large market shares have that ability. Instead, the court asked whether Weyerhaeuser was able to cause a short-term increase in the price paid to sellers. Firms with much smaller market shares have the ability to do that. Because such firms would be incorrectly deemed to have market power under the Ninth Circuit's approach, those firms, too, will be deterred from competing vigorously to buy raw materials for their manufacturing operation.

The court of appeals rejected a more rigorous standard for predatory bidding because of its belief that buying competition produces fewer benefits than selling competition. That view grossly underestimates the value of buying competition. An antitrust liability standard that discourages such competition harms sellers and reduces their incentives to expand output of their products. It also harms competition among buyers, because a buyer that buys a smaller quantity of raw materials (which is what Weyerhaeuser should have done, according to the plaintiff and the court of appeals) will necessarily reduce its output of the finished products made with those raw materials. The result will be to reduce the total output of the finished products, or to shift production of those products from more efficient to less efficient manufacturers, both of which are inconsistent with the objectives of the antitrust laws. The consumers of finished products will also suffer, because output of finished products will decline or will be more costly, and because output of raw materials will eventually be suppressed by the reduction of buying competition. A decision that will deter competition on such a broad scale merits review by this Court.

## ARGUMENT

In *Brooke Group*, this Court held that claims of predatory pricing under the Sherman Act must satisfy two prerequisites.

First, a plaintiff must prove that the defendant's low prices were unprofitable in the short term, *i.e.*, that "the prices complained of are below an appropriate measure of [defendant's] costs." 509 U.S. at 222. Second, a plaintiff must show a "dangerous probability" that the defendant would recover its short-term losses (from charging below-cost prices) by charging monopoly prices in the long run, after its rivals had been driven from the market. *Id.* at 224. The Court required such proof because the mechanism by which a seller engages in predatory pricing – lowering prices – is the same mechanism by which a seller stimulates competition. Without those two prerequisites for liability, there would be too great a risk that a jury would mistakenly infer predation from conduct that was, in fact, lawful and procompetitive. "It would be ironic indeed if the standards for predatory pricing were so low that antitrust suits themselves became a tool for keeping prices high." *Id.* at 226-227. See also *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnation 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

This case, like *Brooke Group*, presents the same risk of an antitrust liability standard that is so low that antitrust suits will become a tool for achieving precisely the result the antitrust laws were meant to prevent. This case, like *Brooke Group*, involves a claim of predatory pricing, but here the claim is against a buyer, rather than a seller. Section 2 of the Sherman Act prohibits monopolization of markets for the *purchase* of products – "monopsonization" – just as it prohibits monopolization of markets for the sale of products. See, *e.g.*, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (Sherman Act protects sellers from anticompetitive conduct by buyers). A seller's monopoly causes harm because a seller with market power can restrict the output of its product and raise its price *above* competitive levels. A buyer's monopsony causes harm because a buyer with market power can re-

strict its purchases of a product and cause the price to fall *below* competitive levels. But, just as the liability standard for predatory selling should not discourage firms from lowering the prices at which they sell, the liability standard for predatory buying should not discourage firms from raising the price at which they buy. Otherwise, the risk of false positives will deter legitimate and desirable competition among buyers.

The Ninth Circuit disregarded that fundamental teaching of *Brooke Group*. It held that the plaintiff did not have to prove that Weyerhaeuser suffered short-term losses because of its "predatory bidding" for timber, or that there was a dangerous probability that Weyerhaeuser would recover the short-term costs of its alleged buying strategy by paying less-than-competitive prices in the long term. The Ninth Circuit, instead, endorsed a jury instruction that permitted liability if the jury found that Weyerhaeuser "purchased more logs than it *needed* or paid a higher price for logs than *necessary*, in order to prevent the Plaintiffs from obtaining the logs they needed at a *fair price*." Pet. App. 14a n.30 (emphasis added).

The Ninth Circuit's decision is legally wrong, for reasons that are explained in the petition and that we will not belabor here. But that decision is not merely wrong; it will have severe practical consequences. The liability standard endorsed by the court of appeals provides no objective benchmark to help a jury decide whether a buyer paid too dearly or bought too much; a jury can render judgment based only on its notions of a price that would be "fair." Because that standard fails to provide a transparent and objective dividing line between lawful and unlawful purchasing behavior, and thus leaves treble-damage liability to the unpredictable whim of a jury, its practical effect on business behavior (if the decision is allowed to stand) is entirely predictable. Purchasers inevitably will adjust their behavior to avoid the risk of unfounded liability for predatory bidding. They will compete less vigorously to acquire inputs for their manufacturing operations, by paying less and buying less. That response to an amorphous liability standard will produce exactly the economic harm that monopsony, itself, causes. And

that harm, as we explain below, extends to the sellers of inputs, to the manufacturers that buy the inputs, and ultimately to the consumers who buy the manufacturers' products.

## I. The Ninth Circuit's Liability Standard Will Deter Lawful And Desirable Competition To Purchase Scarce Inputs

1. The liability standard endorsed by the court of appeals articulates no meaningful boundary between vigorous competitive behavior by a purchaser – bidding to secure the raw materials it will use to sustain or expand its production of finished products, and paying the price that the *market* demands for those raw materials – and behavior that is truly predatory. Every manufacturer must purchase the raw materials from which its products are made and, in a market economy, the prices of those materials will fluctuate in response to the forces of supply and demand. When supplies are scarce, prices will rise. A manufacturer must either pay those higher prices or reduce its use of the material.

There is nothing the slightest bit pernicious about the former response. Buying raw materials or other inputs at market prices is something that every manufacturer does every day, and *must* do to maintain its business. But the liability standard applied in this case will inevitably push manufacturers toward the latter response. That liability standard invites juries to award treble damages to unsuccessful businesses if the jury believes that the defendant bought too much of the scarce material – more than it "needed" – and, in doing so, bid up prices to levels that were not "fair" to the unsuccessful rival.

As a matter of principle, that standard is wrong. Market economies do not and should not allocate scarce resources to each producer in accordance with its "needs." Competitive markets (which the antitrust laws are designed to protect) are valued because they tend to allocate resources *efficiently*, to those who can put those resources to their most valuable use, by allowing the forces of supply and demand to set prices (whether those prices are "fair" or "unfair"). Antitrust courts are supposed to

protect the competitive process against artificial restraints, not pass judgment whether competition produces results that are fair. See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978) ("[T]he statutory policy precludes inquiry into the question whether competition is good or bad.").

The practical shortcomings of the Ninth Circuit's standard are at least as troublesome as its theoretical defects. A standard based on "need" and "fairness" provides no meaningful guidance to juries – or to businesses seeking to comply with the law – that would help them distinguish between desirable competitive behavior and predatory behavior. See Pet. 22-24. Business executives must make very concrete decisions, and must make them in real time: How much should we buy? How much should we offer to pay? Courts should not "mak[e] the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).[4]

This Court in *Brooke Group* appreciated that more specific guidance was essential for predatory pricing claims against sellers because, without such objective standards, the risk of misguided antitrust liability would deter the very behavior that the antitrust laws were meant to encourage. Here, the court of appeals refused to apply any form of the two standards that *Brooke Group* deemed critical to distinguish between competition on the merits and anticompetitive predation. The court of

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[4] This Court in *Trenton Potteries* referred to a survey of pricing as necessary to determine whether a particular price is "reasonable." Such a survey is an unacceptable prerequisite to determining the legality of conduct not only for the reasons the Court gave in that case, but also because the exchange of information about prices between competitors can itself be anticompetitive. See *Great Atl. & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-459 (1978).

appeals did not think that *Brooke Group*'s standards required adaptation to be applied in the buying context, but rather that they had no bearing at all in this context and that a standard of an utterly different character should be applied here. The court of appeals did not require proof that Weyerhaeuser paid prices so high that it could not operate profitably in the short term; indeed, it affirmed liability even though it was undisputed that Weyerhaeuser *did* operate profitably, even during the period when it paid "high" prices for sawlogs. Nor did it require proof of a dangerous probability that Weyerhaeuser would recover any profits it may have sacrificed in the short term (by paying more than was "necessary" for sawlogs) through a sustained reduction in sawlog prices over the long term.

For any manufacturer whose purchases represent a significant share of the market demand for an input, the Ninth Circuit's standard creates a very real threat that treble-damage liability will arise from vigorous competition. If such manufacturers bid vigorously to acquire the materials with which their products are made, their bidding necessarily will tend to drive up the price of those materials. That effect, if a jury concludes that the price is not "fair," may produce liability for "predatory bidding."

The Ninth Circuit's decision will create powerful incentives for unsuccessful businesses to file such lawsuits. Because of the liberal jurisdiction and venue provisions of the antitrust laws, any business with nationwide operations can be sued in the Ninth Circuit by a forum-shopping plaintiff. See 15 U.S.C. § 15(a). If liability ultimately rests on an amorphous standard such as "fairness," and if *Brooke Group*'s objective prerequisites for predatory pricing liability do not constrain the inquiry in any way, there will be no easy way to use summary judgment procedures to weed out claims that lack merit. Defendants will be forced to settle unmeritorious claims or roll the dice and hope for a favorable jury verdict, but many will lose that gamble and face ruinous treble-damage liability merely for competing vigorously. Prudent antitrust counsel will surely tell their clients about these risks. See *Barry Wright Corp.* v. *ITT*

*Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.) ("[W]e ask ourselves what advice a lawyer * * * would have to give a client firm considering procompetitive price-cutting tactics in a concentrated industry. Would he not have to point out the risks of suit – whether ultimately successful or not – by an injured competitor?").

Confronting those realities, any sensible manufacturer will think twice before competing hard to buy scarce inputs, when doing so would disadvantage a less efficient rival; many will rationally conclude that the better choice will be to restrict their purchases in order to protect less efficient competitors from the full brunt of hard-nosed competition, and to protect themselves from a lawsuit. It is bad enough that the court of appeals' decision, if allowed to stand, would lead to unwarranted treble-damage judgments against defendants who have merely been zealous in their profitable efforts to compete by being aggressive in their buying behavior. An even more substantial harm would come from the chilling effect on competition that would be invisible to the courts, and uncorrectable by the courts, because that anticompetitive effect will stem from, rather than lead to, a lawsuit. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 596 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

2. This deterrent to vigorous competition is compounded by the court of appeals' upside-down conception of "market power." The court of appeals correctly recognized that a plaintiff alleging monopolization (whether of a buy-side or a sell-side market) must prove market power, either by showing that the defendant has a dominant share of a market with significant barriers to entry, or by direct evidence that defendant has exercised market power. Pet. App. 20a-22a.

In sell-side markets, market power is usually defined as a seller's "ability profitably to maintain prices *above* competitive levels for a significant period of time." U.S. Department of

Justice & Federal Trade Commission, 1992 Horizontal Merger Guidelines (with 1997 revisions) § 0.1, http://www.ftc.gov/bc/docs/horizmer.htm (emphasis added). In a market with substantial entry barriers, a large market share – say, 65% – is required to support an inference of market power. See Pet. App. 21a-22a. That requirement is based on the insight that, if a putative monopolist unilaterally attempts to raise price above competitive levels, its effort will be unprofitable if the other firms in the market have a collective market share of more than 35%, because those other firms will have sufficient capacity to serve additional customers who turn to smaller suppliers to avoid the price increase. If the smaller firms can serve enough of those customers, the "monopolist's" effort to increase prices will be unprofitable, and it will be forced to lower prices to competitive levels. A presumption that a firm must have a market share of 65% or more to *raise* selling prices, therefore, can also be expressed as a presumption that a firm with a market share of more than 35% can *lower* selling prices in the market. For buy-side markets, the analysis is the same, except that market power is defined as the ability "to *depress* the price paid for a product to a level that is below the competitive price and thereby depress output." 1992 Horizontal Merger Guidelines, *supra*, § 0.1 (emphasis added).[5]

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[5] As this quotation suggests, the antitrust authorities understand – as do economists – that "[t]he core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act." *Chicago Prof. Sports Ltd. Partnership* v. *National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) (Easterbrook, J.). The antitrust laws are concerned with buyer as well as seller power because either power can be used in such a way that ultimately output is reduced. To translate its concern about paying excessive prices for alder sawlogs into a legitimate concern of the antitrust laws, however, the Ninth Circuit would have had to identify some way in which Weyerhaeuser's allegedly excessive payments could have led ultimately to a reduction in output – such as by eliminating a competitor, creating additional monopsony power during a "recoupment" period, leading to use of that power to pay low prices at which the sale of alder logs would decline, and creating an

In this case, the court of appeals relied on so-called direct evidence that Weyerhaeuser had exercised market power (Pet. App. 21a), but its analysis was exactly backwards. It did not ask whether Weyerhaeuser had the power to *lower* the price of sawlogs below competitive levels – the definition of monopsony; it asked whether Weyerhaeuser had "used its power to *raise* the price of sawlogs." Pet. App. 21a (emphasis added). That is a fundamental mistake. While a buyer must have a very large share of the market to be able to force sellers to accept low prices (which sellers, of course, will try to avoid), a buyer with a much smaller share of the market will be able to cause a price increase (which sellers will enthusiastically welcome). Market power, in other words, is not required to *lose* money by paying more than a competitive price for raw materials – many firms have that capability – it is required to *make* money, on a sustained basis, while paying less than a competitive price for raw materials.

The court of appeals' fundamental error in defining market power means that the risk of misguided liability findings for "predatory" bidding is not confined to those buyers who account for a very large share of the total demand for an input. That risk extends also to much smaller buyers, with market shares well below the threshold usually required to support an inference of market power, and even below the threshold at which courts might find a plausible attempt to monopolize. See Pet. App. 21a. Those smaller buyers may have the power to cause an increase in market prices, even if they lack the power to cause a decrease. And, because the risk of unjustified liability extends to any firm that has the power to raise prices, smaller buyers too

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artificial shortage in the supply of products made from alder logs. But the Ninth Circuit eschewed any inquiry into whether such an output-reducing scenario was plausible on the record of this case, instead opting to describe the question in terms of "fair price[s]" and "necessary" prices and quantities and leave those determinations to a jury. Its opinion, like the opinion the Seventh Circuit reversed in *Chicago Prof. Sports*, "reads like the ruling of an agency exercising a power to regulate rates," *ibid.*, which is the antithesis of proper antitrust analysis.

will be deterred from vigorous competition to acquire scarce inputs for their manufacturing operations.

## II. Sellers Of Inputs, Buyers Of Inputs, And Consumers Of Finished Products Will Be Harmed Because The Ninth Circuit's Decision Will Deter Vigorous Competition

There is only one way for substantial buyers of inputs to reduce the risk of liability for "predatory bidding" under the Ninth Circuit's misguided standard: They must pull their punches when they participate in the purchasing market, by offering lower prices and purchasing less. This is, of course, precisely the course of conduct that Ross-Simmons says Weyerhaeuser should have followed. And the result of such behavior will be exactly the result that the antitrust laws seek to prevent by outlawing monopsonization: prices for the purchased input will be reduced.

The court of appeals seemingly recognized this risk, but it refused to follow *Brooke Group* because it believed that the "benefit to consumers and stimulation of competition" were less significant in buying markets than in selling markets. Pet. App. 9a. That conclusion grossly underestimates the benefits of competition among buyers, as well as the economic cost of overly broad and amorphous liability standards that deter competition among buyers.

Three groups are harmed when such competition is suppressed: the sellers of inputs, the buyers of inputs, and consumers of the finished products made with those inputs.

1. When buying competition is artificially suppressed by the threat of misguided antitrust liability, the direct and immediate victims are sellers. If major purchasers choose to offer lower prices and to buy less in order to avoid unfounded charges of predatory behavior, the inevitable result will be lower prices for sellers.

Artificial restraints on competition to buy are condemned by the antitrust laws to the same degree that restraints on competition to sell are condemned:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

*Mandeville Island Farms*, 334 U.S. at 236.

The reason for that even-handed approach is straightforward. Restraints on market forces lead to inefficiencies that ultimately cause harm to all participants in the market. Artificial restraints on prices – whether those restraints cause prices that are above competitive levels or below competitive levels – are especially pernicious, because "[p]rice is the 'central nervous system of the economy.'" *Prof'l Eng'rs*, 435 U.S. at 692 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)). Prices convey essential information to producers and consumers and provide incentives for them to act efficiently. High prices are a signal to producers that society will benefit if they expand production. Cf. *Trinko*, 540 U.S. at 407 ("The opportunity to charge monopoly prices * * * induces risk taking that produces innovation and economic growth."). They also tell consumers to look for substitute products that are less costly or to seek efficiencies that will reduce their consumption of the high-priced product.

Free competition among buyers that bids up the price of inputs serves an important purpose. As the court of appeals recognized, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. Unfortunately, the court of appeals dismissed those benefits because of its belief that the supply of alder sawlogs was inelastic, *i.e.*, that supply would not increase rapidly in response to higher prices.

That response is unpersuasive for two reasons. First, as a practical matter, it would be unworkable to apply *Brooke Group* to predatory bidding claims in some markets (where supply is elastic) but not in others (where supply is inelastic). The court of appeals expressed no intent to do so. Second, the court of appeals' reasoning is backwards. If it takes a long time for supply to increase in response to higher prices (*e.g.*, because newly planted seedlings require many years to mature into harvestable timber), it is all the more important to ensure that misapplication of the antitrust laws does not artificially depress prices. The economic harm that will be caused by such non-competitive pricing will endure for many years, because of the lag between higher prices and an increase in supply.[6]

2. By deterring competition among manufacturers to acquire scarce inputs, the Ninth Circuit's decision also inflicts harm to competition in the production and sale of those manufacturers' finished products. The reason is readily apparent. If a large producer restricts its purchases of raw materials for fear of incurring liability for "predatory bidding," it must also restrict its production of finished goods made from those raw materials. Conversely, a manufacturer that wishes to lower its price and expand its production of finished goods cannot do so

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[6] The court of appeals also opined that, "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." Pet. App. 11a. That statement reflects profound confusion. Truly *predatory* behavior – be it buying ("bidding") or selling ("pricing") – necessarily results in a net loss to consumers and to competition. To label the conduct at issue in this case "predatory bidding" was to assume the conclusion of the very question the court was supposed to be answering. The task before a court is not to decide which categories of predation do and do not benefit consumers, but to determine which categories of conduct should be *labeled* predatory *because* they *do not* benefit consumers and competition on balance. One who starts with the assumption that competition is "predatory" is naturally going to be as skeptical of its benefits as the Ninth Circuit was here, but rules of law are supposed to be designed to distinguish the rare case of true predation from the common case of aggressive competition that inconveniences rivals but is a positive virtue under the antitrust laws.

unless it also increases its purchases of the inputs from which those finished goods are made. See 2A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575, at 363-364 (2d ed. 2000) ("The important and often overlooked consequence of monopsony power is reduced output on the monopsonist's selling side – that is, because the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less."). The Ninth Circuit's description of this case illustrates the point. During the period of Weyerhaeuser's so-called predatory bidding, the price of finished lumber declined and Weyerhaeuser's share of the market increased. Pet. App. 3a, 23a. Concerns about treble-damage liability under the Ninth Circuit's erroneous holding will discourage manufacturers from doing that which the antitrust laws should encourage: increasing output and lowering prices of the products they sell.

Of course, if the largest manufacturer in a market chooses to restrict its output of finished products and its purchases of inputs in order to reduce the risk of wrongful antitrust liability, its smaller rivals may pick up some of the slack. But that, too, is a result that is inimical to the purposes of the antitrust laws if those smaller rivals are less efficient. In this respect, too, the record in this case illustrates the point. Ross-Simmons suffered losses from 1998 to 2001, a period when the price of sawlogs increased and the price of finished lumber declined. In the same period, Weyerhaeuser continued to operate profitably – a fact that reflects its indisputable ability to manufacture and sell finished lumber more efficiently than Ross-Simmons. Had Weyerhaeuser restricted its purchases of sawlogs, as Ross-Simmons would have liked, the plain effect would have been that less efficient sawmills such as Ross-Simmons would have processed a larger portion of the alder timber, while more efficient sawmills such as Weyerhaeuser processed less.

Some juries, of course, might believe that larger and more efficient producers should not exploit their advantages, because that is "unfair" to their smaller and less efficient rivals. They might believe that Weyerhaeuser did not "need" to acquire 65% of the sawlogs and could have maintained a profitable business

even it acquired less. Such notions of "fairness," though, are not a proper basis for antitrust liability. See 1 AREEDA & HOVENKAMP, *supra*, ¶ 111d, at 103 ("[R]ivals may think * * * competition from a more efficient firm to be unfair, especially when the latter firm is larger than the complainant and particularly when the larger firm has lower costs. * * * [T]his conception of fairness is, of course, antithetical to both competition and economic efficiency."). Objective requirements of liability, most notably the requirement of proof that an alleged predator suffered short-term losses because of its pricing policy and had a realistic prospect of recouping those losses after driving a competitor from the market, provide critical protection for legitimate competition. A price that permits the defendant (but not the plaintiff) to operate *profitably* usually reflects "the lower cost structure of the alleged predator, and so represents competition on the merits." *Brooke Group*, 509 U.S. at 223. And, even if prices result in short-term losses for the defendant, there can be no harm to *competition* unless recovery of those losses through long-term non-competitive pricing is likely; whether pricing "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured." *Id.* at 224.

3. Consumers of finished products will also be harmed if competition to acquire scarce inputs is artificially constrained. That consumer injury is a direct consequence of the harms described above. In the short term, expanded output by the manufacturers of finished products depends on those manufacturers' ability to compete effectively to acquire the raw materials from which finished products are made. If that competition is not constrained, the increased demand may well place upward pressure on the price of raw materials, but consumers nonetheless benefit from the expanded output of finished products – just as they benefited from the lower prices of alder lumber in this case, even as alder sawlog prices increased.

Over the longer term, the competition that bids up the price of raw materials encourages the producers of those materials to expand their own output, which will place downward pressure

on the price of those materials. If price competition among buyers is artificially suppressed because of a plausible fear that competition will lead to antitrust liability, producers' incentives to invest to expand their output will also be suppressed. This is the exact opposite of sound antitrust policy. See note 5, *supra*.

4. There is no reason to incur the economic costs described above by adopting, as the Ninth Circuit did, a lax standard for predatory pricing liability. The only conceivable benefit of such a standard is increased deterrence of predatory pricing on the buying side, but there is no reason to think that truly predatory pricing schemes (unlike false positives) will be common or that they will pose a special threat to competition. Rather, "'predatory pricing schemes are rarely tried, and even more rarely successful.'" *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, 475 U.S. at 589). Predatory pricing is a costly means of exclusion. It requires an initial period of sustained losses, sufficient in duration and magnitude to drive rivals from the market. There is considerable risk for the predator that its efforts will not succeed at all and, if they do, there is still more risk that the payback, through sustained non-competitive pricing after rivals are gone, will be insufficient to cover the up-front costs. See *Matsushita*, 475 U.S. at 588 (discussing risks of predatory pricing strategies); *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 119-120 n.15 (1986) (discussing factors that make successful predation extremely difficult); *id.* at 121 n.17 ("it is plain that the obstacles to successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous"). Because predatory pricing is such a costly and risky strategy, it is unlikely to be employed very often. See Susan Creighton, D. Bruce Hoffman, Thomas Krattenmaker & Ernest Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005) ("cheap exclusion" will be relatively more common than "expensive" predation, of which predatory pricing is the "archetypal example").

Legitimate and economically beneficial competition among buyers, by contrast, is a pervasive phenomenon. *Every* manufacturer must secure the raw materials or other inputs needed to

make its products and must compete with other manufacturers that seek the same raw materials or other inputs. In a dynamic economy, the forces of supply and demand for those inputs change frequently and sometimes dramatically, causing market prices to rise or fall. Every manufacturer must respond to those changing market conditions by adjusting the price it pays to secure inputs.

A rule of law that threatens antitrust liability whenever a large buyer chooses to pay more to maintain or increase the volume of its purchases will therefore cut a wide swath in the economy. It will affect competition to buy inputs in every market in which purchases are concentrated among a small number of buyers. A rule that deters competition so broadly merits review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 05-381

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE COCA-COLA COMPANY, CATERPILLAR INC., APPLE COMPUTER INC., AND THE BLACK & DECKER CORPORATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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*Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293 (1949) . . . . . 15

*United States v. Grinnell Corp.*, 384 U.S. 563 (1966) . . . . . 10

*Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004) . . . . . 10, 19

**Statute and Rule**

Sherman Act, Section 2 . . . . . *passim*

Sup. Ct. R. 37.6 . . . . . 2

**Other Authorities**

4A Phillip Areeda, Herbert Hovenkamp & John Solow, ANTITRUST LAW ¶ 981 (1998) . . . . . 14

Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 108 (4th ed. 2005) 13, 16, 17

Herbert Hovenkamp, FEDERAL ANTITRUST POLICY 299 (1994) . . . . . 11

John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625 (2004) . . . . . 16

Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2004) . 9, 14, 15, 16, 18

## BRIEF OF *AMICI CURIAE* SUPPORTING PETITIONER

## STATEMENT OF INTEREST

*Amicus* The Coca-Cola Company ("Coca-Cola") is a worldwide manufacturer and distributor of soft drinks and other products. The Company is widely known, with operations and products spanning the globe. Coca-Cola depends upon the ability to purchase competitively to succeed.

*Amicus* Caterpillar Inc. is a technology leader and the world's leading manufacturer of construction and mining equipment, diesel, and natural gas engines and industrial gas turbines. Caterpillar products and components are manufactured in 49 facilities located in the United States and, as a result, Caterpillar also needs the freedom to purchase competitively to maintain its success.

*Amicus* Apple Computer Inc. ("Apple") is a leader in the personal computer and consumer electronics industry. Today, Apple produces desktop and notebook computers, a software operating system, as well as in the digital music market with its iPod portable music players and iTunes online music store. Apple's businesses depend upon the ability to purchase competitively in the markets in which it competes.

*Amicus* The Black & Decker Corporation ("Black & Decker") is a global manufacturer and marketer of power tools and accessories, hardware and home improvement products. Black & Decker requires the freedom to purchase and price competitively to maintain its established worldwide business.

The decision below creates substantial uncertainty over one of the most common and procompetitive business practices—outbidding a competitor to purchase a product that both want. The court of appeals held that outbidding a rival could be deemed "predatory," and thus illegal, based on a

bare showing that a defendant with a large share of purchases in a local market paid "more than necessary" for the product in question. That determination is standardless, wrong, and presents an issue of great importance warranting Supreme Court review. The decision is contrary to applicable decisions of this Court, in particular the decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). By failing to adopt a principled and comprehensible rule governing the unilateral pricing decisions of purchasers under the Sherman Act, the court's decision threatens to chill legitimate and procompetitive purchasing activity throughout the country.[1]

## SUMMARY OF ARGUMENT

1. This case severely clouds the application of the antitrust laws to a firm's unilateral pricing and purchasing decisions. The court of appeals held unambiguously that a jury is permitted to attach antitrust liability to a firm based on nothing more than proof of a large share of a local purchasing market coupled with evidence that the defendant paid "more than necessary" for the product in question. It is no exaggeration to say that the decision of the Ninth Circuit—which governs a large and important part of the national economy—will wreak havoc with the most basic purchasing decisions of businesses throughout the country. Review by this Court is a matter of national importance to ensure that purchasing decisions—of the sort that are made

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[1] In accordance with Supreme Court Rule 37.6, Amici state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

thousands of times a day, every day—are evaluated under a correct legal standard.

The decision of the court of appeals affects not only market leaders but small firms as well. Under the decision below, firms with small shares of sales in output markets, but with large shares in smaller, local purchasing markets, may find themselves liable for treble damages if they succeed in outbidding their rivals to purchase local supplies. Indeed, those are the facts presented by this very case. A company with as small as a *three percent* market share in its output market has been found liable for almost $80 million in treble damages under the unworkable liability standard laid out in the opinion below.

The decision also represents part of a disturbing trend among several of the lower courts that permits the antitrust laws to interfere unduly with businesses' unilateral pricing decisions. In addition to the Ninth Circuit in this case, the decision of the Third Circuit in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 2932 (2004), applied an equally standardless analysis to bundled pricing practices—allowing, as in this case, triers of fact to substitute their judgment as to the appropriate measure of price competition without regard to whether the defendant's actions posed any threat to consumer welfare. The Court should use this opportunity to reaffirm its holding in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the landmark antitrust case establishing the rules relating to unilateral pricing decisions, especially in those cases where, as here and in *Brooke Group*, the pricing decision involves a single product.

2. In its decision, the Ninth Circuit ignored the substantial body of precedent of this Court commanding that courts apply Section 2 in a manner that limits antitrust liability

to actions that harm consumer welfare. Instead, the court focused, improperly, on the welfare of petitioner's competitors. This Court held in *Brooke Group*, however, that a plaintiff can prevail on a predatory pricing claim only where the plaintiff demonstrates (1) that the defendant sacrificed profits by charging customers a price below an appropriate measure of cost, thereby threatening to drive competitors from the market, and (2) that once the competitive threat was weakened or removed, the defendant would be likely to recoup its losses by increasing prices to supracompetitive levels, thus harming consumer welfare. *Id.* at 224.

In *Brooke Group*, the Court adopted this bright-line rule for one primary reason: judging pricing decisions without clear safe harbors "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Id.* This same risk of falsely identifying pricing decisions as anticompetitive repeatedly has led the Court to exercise restraint in applying the antitrust laws to unilateral pricing activity. *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The decision below, therefore, conflicts with the Court's decisions.

3. The failure of the court of appeals to apply the standard set out in *Brooke Group* to the facts of this case represents unsound antitrust policy. Because monopsonistic predatory overbuying functions, at worst, in the same manner as monopolistic predatory pricing, it makes no sense to evaluate buying claims under a harsher set of rules, as the court of appeals here has done. Using the same standard for predatory pricing both by buyers and sellers ensures consistency in both the courts and in markets, and adequately informs the business community as to the outer limits of

permissible competition. As it stands, the decision of the court of appeals introduces substantial uncertainty into the law, and threatens to chill legitimate and procompetitive pricing and purchasing behavior. If the Ninth Circuit's ruling is allowed to remain in force, firms will not have any guidance as to what purchasing competition is permissible and what is illegal, necessarily tempering and dulling the vigor of their purchasing conduct. Moreover, by failing to anchor its predatory overbuying Section 2 standard to a requirement to demonstrate recoupment, the court of appeals' decision provides no mechanism to demonstrate harm to consumer welfare.

4. The business community, consumers, and the lower courts need guidance on the application of Section 2 to predatory overbuying cases, and this case provides an ideal vehicle for providing such guidance. The court of appeals' decision plainly stated its opinion of the law, and it was limited to a clear and uncontested interpretation of the activity held to constitute exclusionary conduct. The Court is thus presented with a narrow and defined issue as to what legal principle should control: specifically, whether the rule in *Brooke Group* applies to predatory overbuying cases or whether a showing that the defendant paid "more than necessary" is enough. The issues here are neither novel nor difficult, but the need for clarification of the law is urgent, necessitating intervention of the Court. *Certiorari* should be granted accordingly.

## ARGUMENT

### I. THE NINTH CIRCUIT'S LIABILITY STANDARD—WHICH MAKES THE LEGALITY OF PURCHASING CONDUCT TURN ON WHETHER THE DEFENDANT PAID "MORE THAN NECESSARY"—IS BOTH WRONG AND UNINTELLIGIBLE, AND REPRESENTS A DISTURBING DEPARTURE FROM THIS COURT'S SECTION 2 JURISPRUDENCE.

A. This case involves an allegation of predatory buying in the market for "alder sawlogs" in the Pacific Northwest. *See Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1034 (9th Cir. 2005). The parties, both sawmill operators in the Pacific Northwest region, competed until the plaintiff—respondent here—went out of business in 2001. *See id.* The plaintiff contended that the defendant--petitioner here—purchased more logs than it needed, or paid a higher price for such alder sawlogs than was necessary, with the intent to deprive plaintiff of the opportunity to acquire such logs. *See id.* at 1034-35. This activity, according to plaintiff, led it to exit the market. The district court instructed the jury that if it found that the defendant either "purchased more logs than it needed" or "paid higher prices than necessary," that finding by itself was sufficient to predicate liability against defendant under Section 2 of the Sherman Act. *Id.* at 1035. The Ninth Circuit affirmed.

In affirming the decision of the district court, the court of appeals set forth an impossibly vague and standardless explanation of the law, which threatens to disrupt the day-to-day purchasing decisions of businesses everywhere. Expressly rejecting the defendant's contention that this Court's decision in *Brooke Group* applied, the Ninth Circuit

concluded that it was unnecessary for an antitrust plaintiff to demonstrate anything more than that a defendant paid "more than necessary" for an input or purchased "too much of it." *Id.* Notwithstanding the very clear dictate of this Court to avoid an expansive and standardless application of Section 2, the court of appeals concluded that the district court "did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if [the defendant] operated at a loss and a dangerous probability of [the defendant]'s recoupment of its losses existed." *Id.* at 1039.

The standard set forth by the court of appeals is unworkable. As then-Judge Breyer noted, it is impossible in antitrust cases to assign liability simply by instructing a trier of fact to "determine[e] what is a 'reasonable' or competitive' price." *See Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984). Yet that is precisely what the Ninth Circuit has done. A firm with a large share in a local buying market—even if that firm has but a tiny share of sales in a geographically larger selling market[2]—risks substantial antitrust liability under a standard with which the firm cannot possibly comply and still compete aggressively in the marketplace. It is precisely this type of subjective, unpredictable, and inconsistent standard that this Court has repeatedly sought to avoid with its careful and restrained interpretation of Section 2 to ensure that the antitrust laws do not act to undermine the "very essence of competition." *Matsushita Elec. Indus. Co.*, 475 U.S. at 594.

B. The Ninth Circuit decision also represents part of a disturbing trend among decisions of several of the lower

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[2] For instance, although the defendant in this case accounted for approximately 65% of alder sawlog purchases in the Pacific Northwest, the defendant's sales accounted for only about 3% of the nationwide hardwood floor sell-side market. Pet. 3-4 & n.2 (and record references there cited).

courts that have permitted triers of fact unduly to interfere with businesses' unilateral pricing decisions. The Supreme Court should grant *certiorari* to restore the application of its sensible *Brooke Group* rubric to apply to all challenges of a firm's unilateral pricing decisions (on both the buy-side and sell-side).

In addition to the Ninth Circuit decision in this case, the decision of the Third Circuit in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S.Ct. 2932 (2004) (rejecting *Brooke Group* in bundled discount situations), also allows triers of fact to condemn a firm's unilateral pricing decisions based upon nothing more than their own unguided judgment as to an appropriate measure of price competition, and without consideration of whether the defendant's decision to price compete might ultimately harm consumer welfare. As discussed above, however, the decision of the court of appeals here is even more problematic than the Third Circuit's *LePage's* decision, because in this case the court of appeals condemned a unilateral pricing decision involving *a single product*—precisely the conduct at question in *Brooke Group*. The decision below, particularly when coupled with *LePage's*, sets forth a dangerous new standard for Section 2 liability that threatens competition in a wide range of industries by punishing precisely the type of conduct the antitrust laws are designed to protect. *Certiorari* is warranted to reverse this trend and reaffirm that the basic principles underlying the decision in *Brooke Group* must apply where there is a challenge to a firm's unilateral pricing decisions.

The decision below and *LePage's* demonstrate that, absent intervention by this Court, the court of appeals may veer into the most serious errors of law and policy through what appears to be a fundamental misunderstanding of what the antitrust laws prohibit. The Sherman Act does not punish pricing conduct merely because it has the effect of harming a

rival. *See Atlantic Richfield Co.*, 495 U.S. at 328. Price competition benefits consumers, and without a demonstration that the defendant's pricing involves a short-term profit sacrifice designed to harm customers in the long term, condemnation of price competition represents a decision to punish "the lower cost structure of the alleged predator, [which] represents competition on the merits . . . beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223.

## II. IN THE ABSENCE OF A CLEAR DEMONSTRATION OF HARM TO CONSUMER WELFARE, THIS COURT HAS REFUSED TO PENALIZE UNILATERAL PRICING CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT.

A. The court of appeals' decision in this case addressed the application of Section 2 of the Sherman Act to the so-called business practice of "predatory overbuying." *See, e.g.*, Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2004). The court of appeals incorrectly held that this Court's decision in *Brooke Group* does not apply where a plaintiff alleges predatory overbuying in violation of Section 2. Specifically, the court of appeals concluded that "the [trial] court did not instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." *See Weyerhaeuser*, 411 F.3d at 1036. The decision to ignore *Brooke Group* is not only fundamentally flawed; there is a significant danger that it will chill the legitimate business activities of *amici* as well as the business community at large.

As this Court repeatedly has held, although some forms of conduct are unambiguously anticompetitive, it is often "difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). Such "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citation omitted).

In light of the danger that overbroad and vague applications of Section 2 can stifle legitimate competition, this Court has cautioned lower courts to interpret Section 2 carefully, and has provided clear guidance for doing so. *See, e.g., id.*; *see also United States v. Grinnell Corp.*, 384 U.S. 563 (1966). The Court has urged particular caution where the alleged violation of Section 2 involves a defendant's pricing decisions. *See, e.g., Brooke Group*, 509 U.S. at 223-24; *Atlantic Richfield Co.*, 495 U.S. at 328; *Cargill*, 479 U.S. at 104; *Matsushita Elec. Indus. Co.*, 475 U.S. at 594. Because pricing activity is the *sine qua non* of competition, it is often difficult to determine when a particular pricing decision is procompetitive or anticompetitive. To avoid identifying procompetitive pricing decisions incorrectly as violations of Section 2, this Court has commanded courts to limit the application of Section 2 to those instances in which clear, objective and unambiguous evidence shows that the defendant's pricing decisions were designed to be anticompetitive and in fact had the effect of harming long-term consumer welfare.

The Court's decisions also have recognized that the purpose of Section 2 is to protect competition, not smaller and sometimes inefficient competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The

antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"). Unless a plaintiff demonstrates that the alleged anticompetitive act harmed or is likely to harm consumers, the plaintiff's claim fails. *See Atlantic Richfield Co.*, 495 U.S. at 330. Thus, predatory pricing is not condemned because it exacts a toll on other competitors. Instead, "[i]t is condemned because, if successful, it will eventually result in reduced output and higher prices." Herbert Hovenkamp, FEDERAL ANTITRUST POLICY 299 (1994).

In its decision below, the Ninth Circuit ignored this Court's repeated admonitions to confine the application of Section 2 to those instances where the conduct clearly threatens harm to consumer welfare. The decision allows a trier of fact to attach liability if it determines only that a purchaser paid or purchased more "than necessary" for an input—whatever that means. By failing to provide any operational guidance to a trier of fact, the Ninth Circuit's decision allows a jury to condemn pricing and purchasing judgments made by companies entirely without regard to the effect, if any, on competition.

B. The Court has consistently crafted antitrust rules under Section 2 that minimize interference with the unilateral pricing decisions of firms in the marketplace. *See, e.g., Matsushita Elec. Indus. Co.*, 475 U.S. at 594 (holding that because "cutting prices in order to increase business often is the very essence of competition," mistaken inferences that price cuts are anti-competitive "are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

As a result of this concern, in *Brooke Group*, the Court established a clear standard for predatory pricing claims. At the most general level, the Court defined predatory pricing as

an "unfair" price, designed "to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Group*, 509 U.S. at 222. Specifically, the Court held that a successful predatory pricing claim requires two elements: "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* "The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224.

In *Brooke Group*, the Court recognized that, as a theoretical matter, above-cost price reductions might result in injury to competition. *Id.* at 223. The Court nonetheless refused to impose antitrust liability in such situations because doing so would "court[] intolerable risks of chilling legitimate price-cutting." *Id.* The Court stated that imposing liability on a producer that was not engaged in predatory pricing is "especially costly" to competition because doing so "'chill[s] the very conduct the antitrust laws are designed to protect.'" *Id.* at 226 (quoting *Cargill, Inc.*, 479 U.S. 104); *see also Matsushita Elec. Indus. Co.*, 475 U.S. at 594. The *Brooke Group* Court's two-part test established a rule that condemns pricing behavior only where the conduct creates a substantial likelihood of true competitive injury to the market—while avoiding any chilling effect on legitimate, procompetitive pricing activity.

The decision below jettisons the reasoning and the policies underlying the Court's decision in *Brooke Group*. Supreme Court review is therefore warranted.

## III. THE STANDARD ARTICULATED IN *BROOKE GROUP* SHOULD APPLY TO ALLEGATIONS OF PREDATORY OVERBUYING.

A. The Ninth Circuit's decision is especially disturbing to *amici* and other similarly situated businesses because it will ensnare firms with a large share in a local buying market even if that firm has but a tiny share of sales in a geographically larger selling market. The overbroad standard set forth in the court of appeals' decision punishes firms who compete aggressively on price in the input market just to remain competitive in the output market, as the facts of this very case demonstrate.

An understanding of how monopsony power is achieved, and how it harms customers, is important to an understanding of the issues underlying this case. The Ninth Circuit concluded below that predatory overbuying was different from predatory pricing and, as a result, concluded that the *Brooke Group* test was not applicable to predatory overbuying claims. *See Weyerhaeuser*, 411 F.3d at 1039. The Ninth Circuit's decision was fundamentally flawed because it failed to recognize that, to the extent that predatory buying claims differ at all from predatory selling claims, those differences counsel application of rules that are *more* deferential to the defendant's pricing decisions and are more, not less, clear for businesses to understand.

Just as monopoly power is the power to restrict output (production) and thereby increase selling prices, monopsony power is the power to restrict output (purchases) and thereby decrease buying prices. *See* Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 108 (4th ed. 2005). By decreasing its own demand, the monopsonist decreases overall demand in the input market. When demand for the input is reduced, the sellers of the input will have

excess supply of that input, forcing them to lower the price of the input to a level at which the monopsonist is willing to purchase it. Consumers are harmed, not by the lower prices as such, but because, when the monopsonist decreases its purchases, market output of the input product is reduced and allocative efficiency is impaired.

Buyer-side market concentration generally, and monopsony power in particular, are much less prevalent in our national economy than seller-side concentration (and power). *See* 4A Phillip Areeda, Herbert Hovenkamp & John Solow, ANTITRUST LAW ¶ 981 (1998). Given that fact, there can be no empirical or theoretical basis for treating buyer-side conduct more harshly than sell-side behavior. If anything, the opposite is true.

The circumstances under which a large buyer has both the power and the *incentive* to reduce market supply and thereby harm consumers are particularly rare. The monopsonist typically will have little incentive to reduce market supply of the input product (or otherwise render the buying side of the market less competitive) because a less competitive input market will impair the company's ability to compete downstream on the selling side. Consumer harm is plausible, therefore, only where a firm has true monopsony power—the power to reduce buying prices by reducing purchases and thus output marketwide—*and* the incentive to exercise that power to the detriment of consumers. *See generally* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2004). There is no evidence that those essential conditions are prevalent in our economy.

Hypothetically, a firm can attempt to gain monopsony power through predatory overbuying, much in the same manner that a firm can attempt to gain monopoly power through predatory pricing. Predatory overbuying occurs

when a buyer bids up the market price of a critical input to such a high level that rival buyers cannot compete. The buyer gains market power in the input market as rival buyers are forced to exit the market because they are unable to purchase the input and remain profitable as prices for the input continue to rise. *See id.* at 675.

During the predatory overbuying period, in which the firm overbuys an input, consumers will benefit if the firm uses that increased input purchase to produce additional output, leading to a decrease in the price of the output product. That consequence is likely—and particularly beneficial to consumers—where, as here, the accused firm may have a large share of purchases in the local purchasing market but a lower share, and no market power, in the selling side of the market.[3] Suppliers of the input benefit as well—with increased demand and increased prices for their inputs, suppliers have every incentive to increase their supply and additional potential suppliers likely will be encouraged to enter the market in order to reap the extra benefit of the so-called predatory buying scheme. *See id.* at 675-76, 677.

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[3] In this regard, unsuccessful predatory overbuying benefits consumers just like predatory pricing, and can have salutary effects on consumer welfare. Overbuying enables companies (1) to keep reserves to hedge against risk (*e.g.*, oil in times of crises); (2) establish loyal customer relationships; and (3) increase scale economies and/or invest in growth. Thus, such overbuying actually encourages procompetitive behavior in the market, much like exclusive dealing arrangements encourage such behavior. *See, e.g., Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293, 306-07 (1949). The potential for this behavior to actually benefit consumer welfare is yet another reason why the Court in *Brooke Group* refused to assign liability to predatory pricing schemes without demonstrating clear harm to consumer welfare. *See Brooke Group*, 509 U.S. at 226.

It is only in the period after input purchase rivals exit the market that a firm with monopsony power can harm consumer welfare. If rivals exit, and there is only one or a few suppliers left in the market for an input *and* the market structure is such that new input purchasers will not enter, the monopsonist may then reduce its demand for the input, driving prices for the input lower, and decreasing output—harming consumers through higher prices in the output market if the defendant has market power in that market as well. Predatory overbuying, therefore, harms consumers and competition only under a narrow and specific set of circumstances. *See id.* at 676-79.

Although it is hypothetically possible for predatory overbuying to be successful in the absence of some profit sacrifice (*i.e.*, where marginal cost of the purchases does not exceed the marginal revenue anticipated to result from the defendant's sales), such a result appears extraordinarily remote. Interestingly, prior to 2003, no in-depth study of predatory overbuying had been conducted—suggesting that academics did not consider it to be a significant business strategy—and only *three* court cases alleged that such conduct violated the antitrust laws (and note, that all three were *competitor*, rather than *customer*, lawsuits). *See* John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 656-57 (2004).

This is not surprising. One would expect far fewer predatory overbuying cases alleging successful monopsonization because it is far less likely to occur than even monopolization through predatory pricing. As mentioned above, in most markets, buyers are less concentrated than sellers. Moreover, because inputs are purchased by firms competing in a broad range of output markets, monopsony is possible only when resources are specialized to just a few uses. *See* Dennis W. Carlton &

Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 117 (1989). As a result, with relatively few markets sufficiently concentrated actually to permit monopsony practices, courts should be particularly circumspect in punishing behavior that in the end is unlikely to cause monopsony conditions and harm consumer welfare. The danger of falsely identifying anticompetitive behavior—and deterring procompetitive conduct—is very high relative to the tiny universe of instances where the conduct actually could be harmful. That monopsonistic predatory overbuying is not common does not mean that the decision of the Ninth Circuit will not have profound consequences on the purchasing behaviors of companies nationwide. In fact, by sanctioning such a standardless and subjective framework by which to judge allegations of predatory overbuying, the decision threatens to chill the legitimate and procompetitive purchasing conduct of *amici* and similarly situated businesses for fear that they will unintentionally run afoul of the murky dictates in the court of appeals' decision.

Because monopsonistic predatory overbuying functions in the same manner as does monopolistic predatory pricing, is considerably more rare, and is not in any way *more* harmful to consumers, it should not be judged any more harshly that predatory selling. Applying the same standard—the *Brooke Group* standard—achieves the appropriate balance. A uniform standard ensures consistency in the courts and markets, and adequately informs the business community as to the outer limits of permissible competition.

B. Applying the *Brooke Group* standard to buyer cases is straightforward. Under *Brooke Group*, predatory buying may be condemned if, and only if, the plaintiff demonstrates that the defendant's incremental costs in making the purchases exceed its reasonably anticipated incremental revenues *and* there is a dangerous probability that the defendant will recoup

those losses and gain supracompetitive profits once the competition has been weakened or removed. *See* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2004). Calibrating Section 2 to condemn predatory overbuying only where the defendant business is objectively sacrificing profits by purchasing inputs at a level that results in a reduction in the firm's reasonably anticipated incremental revenue minimizes the risk of punishing false positives. In addition, such a standard stays true to the Court's observation in *Brooke Group* that making subjective determinations as to whether a particular purchase is predatory "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223. Employing any other standard that would attach liability where a purchaser was not foregoing profits by purchasing inputs would require a jury to determine whether a business was paying too much for an input.

Allowing courts to determine which profitable purchases to allow and which to condemn is simply not within the realm of judicial competence. *See id.* at 222. Thus, to avoid punishing such "false positives," the Court has mandated the application of an objective, cost-based test to judge such pricing behavior. Anything short of that would make the application of Section 2 unmanageable.

## IV. THE NINTH CIRCUIT'S ERRONEOUS RULING WILL HARM *AMICI* AND THE BUSINESS COMMUNITY AS A WHOLE BY DEPRIVING THEM OF CERTAINTY REGARDING THEIR UNILATERAL PURCHASING DECISIONS.

This Court has recognized that it is a fundamental precept of antitrust enforcement that courts should never "act as central planners, identifying the proper price, quantity, and

other terms of dealing" between private actors because triers of fact "are ill-equipped" to make such tenuous business judgments. *See Trinko*, 540 U.S. at 408. The court of appeals decision, however, requires triers of fact to do precisely that, by providing no clear rule by which to judge whether overbuying violates Section 2.

The uncertainty created by this case cannot be overstated. A firm may outbid its rivals for inputs, even to the point of "overpaying," for many reasons other than the desire to control a resource market unlawfully. For example, a firm may choose to pay "more than necessary" simply to ensure that the company secures access to needed or desired inputs. Companies may also want to build up an inventory of supplies based on their assessments or predictions of conditions, like bad weather, that may limit supplies in the future. Companies also may be forced to bid "more than necessary" because they have imperfect information about the price they must bid in order to secure supplies. In fact, it is not infrequently the case that suppliers will misrepresent the amount that purchasers must pay. *See generally Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69 (1979). Under the court decision below, in any one of those circumstances, *amici* or other businesses could be found liable for predatory overbidding if they were later found to have bid "more than necessary."

The decision below creates an untenable situation for producers that wish to engage in price competition on the buy side, yet at the same time wish to avoid being sued under the antitrust laws for buy-side predatory behavior. If companies like *amici* are found to have market power in a relevant purchasing market, they can no longer rely on *Brooke Group*'s bright-line rule to protect them from predatory buy-side pricing suits directed at conduct that threatens no consumer harm. The Ninth Circuit's rule places *amici* and

other producers in a position that undoubtedly will chill competition by making producers increasingly reluctant to engage in competitive activity with regard to their purchasing decisions for fear that some trier of fact will determine that they bought too much or paid too much for a critical input.

That *amici* can no longer rely upon *Brooke Group* when purchasing inputs is disquieting. *Amici* depend on the ability to compete aggressively to maintain acceptable levels of profitability and market share—the hallmark of our economy. Applying a less rigorous standard (or, as here, what amounts to no standard at all) to the buyer-side equivalent of predatory pricing exposes *amici* to both an unacceptable level of uncertainty in the market and potentially enormous antitrust liability (in the form of treble damages) for activity that, in most instances, will be procompetitive and, even if harmful to rivals, rarely could be successful in damaging consumer welfare.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* to the Court of Appeals for the Ninth Circuit should be granted. The Court may also wish to consider whether summary reversal would be appropriate given the clarity of conflict with this Court's decisions.

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Dated: October 26, 2005

(7)

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OCT 26 2005

No. 05-381

IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory pricing must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**No. 05-381**

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WEYERHAEUSER COMPANY,
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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

# BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher*, No. 04-805 (U.S., dec. pending); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, No. 04-1329 (U.S., dec. pending); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 298 (2004); *3M Co. v. LePage's, Inc.*, 124 S. Ct. 2932 (2004).

WLF believes that the object of the antitrust laws should be to promote competition and thereby provide consumers with better goods and services at lower prices. Accordingly, producers who compete vigorously -- whether by lowering their prices or offering to pay whatever price is necessary to obtain desired inputs -- should generally be applauded. The antitrust laws do, of course, prohibit "predatory" price decreases and "predatory" buying whose effect is to lessen future competition. But the types of business activities that are condemned as "predatory" must be very clearly defined, or otherwise producers will be dissuaded from engaging in vigorous price and buying competition (the very types of conduct that should be encouraged by the antitrust laws) by the threat that such conduct may cause them to incur antitrust liability. WLF fears that the Ninth Circuit's decision, if allowed to stand, will lead to just such a chill in competition because it deprives producers of any clear standards for acceptable buying behavior.

WLF has no direct financial interest in the outcome of this case. It is filing due solely to its interest in ensuring that the antitrust laws are used to promote competition, not to protect less-efficient producers against competition. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

## STATEMENT OF THE CASE

Petitioner Weyerhaeuser Co. is the dominant firm in the market defined for purposes of this case: the purchase of alder sawlogs in the Pacific Northwest. Respondent Ross-Simmons Hardwood Lumber was also a purchaser in that market until it went out of business in 2001.[2] Ross-Simmons sued Weyerhaeuser for monopolization and attempted monopolization of the market, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

Ross-Simmons alleged that, during the relevant "predation" period (1998 to 2001), Weyerhaeuser artificially increased sawlog prices to drive Ross-Simmons and other competitors out of business. As found by the courts below, the purpose of this scheme was *not* to monopolize finished hardwood lumber sales,[3] but to monopolize alder sawlog purchases. Ross-Simmons alleged that once it had driven other buyers out of the market, Weyerhaeuser planned to recoup its losses by using its monopsony power to drive down future prices paid to log suppliers. As part of its scheme, Weyerhaeuser was alleged to have used its increased supply of logs to increase production and *decrease* prices; and indeed, the Ninth Circuit found that during the alleged predation period, the price of finished lumber fell. Pet. App. 10a n.16.

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[2] Both Weyerhaeuser and Ross-Simmons operated sawmills; they purchased alder sawlogs for the purpose of processing them into finished hardwood lumber.

[3] Weyerhaeuser produces only 3% of finished hardwood lumber sold in North America. Pet. 4 n.2. The jury found that because alder competes with other hardwoods, the relevant sales market consists of *all* hardwood lumber sales. Under those circumstances, Weyerhaeuser cannot possibly exercise market power in connection with its sales.

Ross-Simmons alleged that Weyerhaeuser engaged in several types of anticompetitive conduct to carry out its scheme. However, in upholding the verdict for Ross-Simmons, the Ninth Circuit relied entirely on a finding that there was "substantial evidence" that "Weyerhaeuser engaged in anticompetitive conduct by overbidding for sawlogs." *Id.* 18a.

Weyerhaeuser argued that Ross-Simmons should not have prevailed because Ross-Simmons failed to present evidence that: (1) Weyerhaeuser paid so much for alder sawlogs that the price at which it sold its finished lumber did not cover its costs; and (2) it had a dangerous probability of recouping its losses by forcing prices down after driving other buyers out of the market. Weyerhaeuser argued that this Court established those evidentiary requirements for all predation cases in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The Ninth Circuit disagreed, holding that the *Brooke Group* requirements apply in predatory pricing cases but not in predatory buying cases. *Id.* 5a. The court reasoned that *Brooke Group* had established those strict requirements in predatory pricing cases because of its recognition that price cuts benefit consumers and foster competition and thus should almost always be encouraged. *Id.* at 8a. The court stated that, in contrast, "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 9a.

The court conceded that "in some situations rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." *Id.* 11a. But the court insisted that "at least in this case" such benefits to consumers were unlikely because, the court said, "[t]he nature

of the input supply at issue here does not readily allow for market expansion." *Id.*

The court held that the jury had been properly instructed regarding the standards for determining whether Weyerhaeuser had engaged in anticompetitive conduct in violation of § 2 of the Sherman Act. The jury was instructed that anticompetitive acts included purchasing "more logs than it needed," and paying a higher price than "necessary," in order to prevent Ross-Simmons from obtaining logs at a "fair" price. *Id.* at 14a n.30.

## REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to thousands of companies throughout the United States: whether their buying policies can be condemned as predatory under the antitrust laws despite uncontested evidence that their prices are sufficient to cover their costs. Companies know that they can engage in aggressive *price* competition without fear of antitrust repercussions, provided only that they do not sell below costs. But if the Ninth Circuit's decision is allowed to stand, that safe harbor will not extend to *buying* competition. They will be unable to design their buying activities – particularly, buying designed to facilitate expansions in capacity or to meet competition from a new market entrant – in such a way as to preclude future antitrust liability based on claims that they engaged in predatory conduct.

Review is warranted because the uncertainty created by the decision below will chill competition among producers who seek to avoid possible antitrust liability. That chill in competition cannot be good for consumers, who rely on competition to hold down prices of, and improve the quality of, the goods and services they purchase. Indeed, avoiding such a chill was a principal basis for this Court's *Brooke Group*

holding that above-cost pricing is not actionable under the antitrust laws. The Ninth Circuit has now held, contrary to the Fifth Circuit, that *Brooke Group* standards are inapplicable to predatory buying. The Court should grant review to resolve that conflict.

Review is also warranted because of the need for the Court to take steps to prevent the antitrust laws from being used as a tool by inefficient producers to protect themselves from competition from their more efficient rivals. Antitrust scholars have long warned against permitting the antitrust laws to be hijacked in this manner. WLF is concerned that the Ninth Circuit decision, by exposing firms to whole new avenues of antitrust challenge, will facilitate efforts by inefficient producers to stymie aggressive competition.

## I. THE DECISION BELOW THREATENS TO CHILL COMPETITION BY DEPRIVING PRODUCERS OF A BRIGHT-LINE RULE THAT ALLOWS THEM TO PURCHASE AGGRESSIVELY WITHOUT FEAR OF ANTITRUST LIABILITY

This Court recognized in *Brooke Group* that, as a theoretical matter, above-cost price reductions might inflict injury to competition. *Brooke Group*, 509 U.S. at 223. The Court was nonetheless unwilling to impose antitrust liability in such situations because doing so would "court[] intolerable risks of chilling legitimate competition." *Id.* The Court stated that imposing liability on a producer that was not engaged in predatory pricing is "especially costly" to competition because doing so "'chill[s] the very conduct the antitrust laws are designed to protect.'" *Id.* at 226 (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 n.17 (1986)). *See also Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 594 (1986). In essence, the Court determined that so long

as a company is covering its costs, harm from "false negatives" (failures to detect anticompetitive conduct) is far outweighed by the harm caused by "false positives" (imposing liability on non-predatory activity).

The danger is equally grave that fear of antitrust liability will chill aggressive competition in the purchase of inputs. Companies that do business in any of the nine States comprising the Ninth Circuit (and virtually every large company in this country does so) are now subject to the Ninth Circuit's amorphous predatory buying standards, which allow imposition of massive liability ($79 million in this case) based on a jury's determination that a company purchased more inputs "than it needed," or paid a higher price for those inputs "than necessary." No company can predict in advance what prices a jury will deem higher than necessary. The only rational response by a dominant firm to such standards is to cease competing aggressively in its purchases, rather than risk the possibility that a jury will determine after-the-fact that the firm was not being "fair" to its competitors.

Surprisingly, the Ninth Circuit simply ignored the potential chilling effect of its ruling. Rather, it sought to downplay the harm to competition that might be caused by its expansive antitrust liability standard, by denigrating the value of such competition in the buying context: "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a. Even accepting the validity of that assessment (an assessment not shared by leading economists, as the Petition well documents), it does not justify adoption of an amorphous liability standard that deprives companies of the ability to differentiate acceptable from unacceptable buying practices. The Ninth Circuit's assessment might justify adoption of an antitrust standard that is somewhat broader than

the one articulated in *Brooke Group*;[4] but it does not justify an antitrust standard that deprives companies of any clear guidance regarding buying practices. Review is warranted to eliminate the confusion brought about by the Ninth Circuit's amorphous standard, by replacing it with one that will allow companies to adopt buying strategies that they can be confident do not violate the antitrust laws.

The Ninth Circuit's ruling is particularly problematic because it establishes a standard that, by the court's own admission, does not necessarily apply in all predatory buying cases. The Court admitted that in *other* situations involving alleged predatory buying, an aggressive buyer's actions might have significant pro-competitive effects because they might:

> [E]ncourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements.

Pet. App. 11a. The Court insisted, however, that those pro-competitive effects were not possible in the alder sawlog market because the nature of the input supply did not "readily allow for market expansion." *Id.* Thus, rather than providing a standard applicable to a broad range of buyer activity, the Ninth Circuit hinted that its standard might be applicable this one time only -- or maybe not. *Id.* ("Therefore, the standard for liability *in this predatory bidding case* need not be as high as in predatory pricing cases.") (emphasis added). Such opaque standards only

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[4] For example, courts might decide to adopt a stricter standard regarding what it means to be selling a product above cost in a case involving predatory buying allegations than in a case involving predatory pricing allegations.

add to the confusion faced by the business community and heighten the urgency of the need for review by this Court.

## II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH ANOTHER [A]PEALS COURT DECISION AS WELL AS MOST [M]ODERN ECONOMIC THOUGHT

Review is also warranted because the Ninth Circuit's decision is badly out of step with recent decisions of this Court and the views of almost all antitrust scholars. As Petitioner aptly states, "the Ninth Circuit's repudiation of the *Brooke Group* standard in cases alleging predatory buying resurrects an antitrust dinosaur that this Court's decisions should have rendered extinct." Pet. 7.

WLF will not repeat the Petition's cogent explanation of why the Ninth Circuit's holding constitutes such a sharp departure from controlling antitrust principles. Rather, WLF wishes to add several observations regarding what it views as the court's misguided application of economic policy.

First, the Ninth Circuit was wrong to suggest that the actions of an aggressive buyer (a description that can accurately describe both a company that is acting procompetitively and one that is engaging in predatory buying) provide little if any immediate benefits to consumers. A company that overbids for inputs has every incentive to make productive use of those inputs, assuming that it is selling into a competitive market. Thus, overbidding for inputs will lead to increases in production, which in turn will tend to decrease prices – a result that is decidedly of benefit to consumers. Indeed, that is precisely what Ross-Simmons alleged happened in this case, and what the Ninth Circuit found to have happened. Pet. App. 10a n.16. The Ninth Circuit said that the price decreases might

have been caused by reasons unrelated to Weyerhaeuser's conduct, *id.*, but it is undeniable that any effect caused by Weyerhaeuser's conduct could only have been positive.

The Ninth Circuit also suggested that price decreases during the predation period may actually be bad for consumers because "a reduction in prices would place even greater pressure on competitors, thereby increasing the threat to competition arising from predatory bidding." *Id.* 10a. That mode of analysis was directly repudiated by this Court in *Brooke Group*. It is uncontested that at all times Weyerhaeuser sold its finished lumber at prices in excess of costs, however measured. Under those circumstances, it is irrelevant that price reductions may have placed "even greater pressure" on Ross-Simmons; the Court has emphatically rejected "the notion that above-cost prices that are below general market levels or the costs of a firms's competitors inflict injury to competition cognizable under the antitrust laws." *Brooke Group*, 509 U.S. at 223.

Second, the Ninth Circuit failed to acknowledge this Court's conclusion that predation schemes are "rarely tried and even more rarely successful." *Matsushita*, 475 U.S. at 589. The Court has described predation schemes as "general[ly] implausib[le]" in the pricing context, *Brooke Group*, 509 U.S. at 227, because they are "by nature speculative" and require defendants to "forgo profits that free competition would offer." *Matsushita*, 475 U.S. at 588. Moreover, even if the defendant achieves monopoly power, it may be unable ever to recoup its losses because "monopoly pricing may breed quick entry by new competitors eager to share in the excess profit." *Id.* at 589.

All the factors cited by the Court that render predatory pricing schemes unlikely to generate profits are equally applicable to predatory buying schemes. Such schemes similarly require the would-be predator to incur short-term

losses based on speculation that it might later recoup its losses by driving down the price of inputs. Success in this endeavor requires that it achieve its pricing power without attracting new competitors eager to obtain inputs at the artificially low prices.[5] Given the improbability that companies would choose to engage in such speculative ventures, there is little danger that extending the *Brooke Group* requirements to predatory buying claims will significantly increase the number of "false negatives."

Moreover, to the extent that a successful predatory buying scheme causes harm, virtually all of the harm will be incurred by the companies that supply the inputs, with consumers suffering only the indirect harms inherent in any anticompetitive scheme. A successful predatory buying scheme will reduce the predator's prices and thus increase his profits, but the scheme is unlikely to have any effect on the prices the predator charges to his customers. So long as the monopsonist is selling into a competitive market (as was true here), any harm to consumers during the recoupment period is likely to be substantially less than the amount they gained during the predatory period. *See* Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005). Review is warranted to determine whether the Ninth Circuit's refusal to apply the *Brooke Group* requirements to predatory buying schemes is appropriate in light of the unlikelihood that such schemes will cause significant harm to consumers.

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[5] We note that in this case, four new mills opened during the alleged predation period. Pet. App. 23a. If new mills were opening during the time that Weyerhaeuser allegedly was driving up the price of alder sawlogs, it seems implausible to contend that there would not have been even greater numbers of new market entrants after Weyerhaeuser began attempts to recoup its losses by driving down the price of alder sawlogs.

Finally, WLF notes that the Fifth Circuit dismissed an antitrust suit raising predatory buying allegations virtually identical to those raised here. The Fifth Circuit held that the plaintiffs could not sustain their allegations in the absence of evidence that the defendant had sold its products for less than cost. *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 515 (5th Cir. 1990). Review is warranted to resolve the conflict between the Fifth and Ninth Circuit decisions.

## III. THE DECISION BELOW INCREASES THE ABILITY OF INEFFICIENT PRODUCERS TO USE THE ANTITRUST LAWS TO PROTECT THEMSELVES FROM COMPETITION

Competition is not always welcomed by all producers, of course; while vigorous competition benefits the public as a whole, it can often harm individual producers and can even drive them out of business. Thus, a producer that is threatened by a rival's aggressive competition may well file a lawsuit claiming that price cuts or increased bids for inputs constitute predatory activity. That producer has an economic incentive to do so whether the activity is predatory or nonpredatory; as *Cargill* recognized in the context of predatory pricing, "[T]he mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition." *Cargill,* 479 U.S. at 122 n.17. Similarly, raising one's bids for inputs is the mechanism by which a firm both engages in predatory buying and stimulates competition within a buyer market.

A central focus of *Brooke Group* was establishing clear rules of conduct to ensure that antitrust law not be used to impose sanctions on legitimate price cutting. The Court explained that while price cutting "may impose painful losses on its target," that is

> [O]f no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed "for the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

*Brooke Group*, 509 U.S. at 224. By refusing to apply *Brooke Group* to buyers, the Ninth Circuit is increasing the ability of inefficient producers to use the antitrust laws as a tool to protect themselves from competition from their more efficient rivals. Review is warranted to prevent the antitrust laws from being hijacked in this manner.

Numerous commentators have noticed the tendency of producers to use the antitrust laws as a means of reducing competition. A detailed study of antitrust lawsuits alleging horizontal restraints filed in five federal district courts revealed that a significant percentage of those suits were filed by one of the defendant's competitors, rather than (as one might expect) by the defendant's customers – the group most likely to be harmed by horizontal restraints on trade. Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991). Based on their finding that a significant percentage of the cases lacked merit, the authors concluded that misuse of the antitrust laws by those seeking to reduce competition was widespread. *Id.* at 596. *See also* William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* 425-26 (8th ed. 2000) ("One problem haunting most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition. The resulting danger is that the courts will prohibit . . . acts that *appear* to be anticompetitive but really are the opposite.").

Other leading commentators have observed, "Antitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This is not merely ironic. It is very dangerous for the workings of our economy." William J. Baumol and Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. ECON. 248, 252 (1985). Baumol and Ordover recommended establishing bright-line antitrust rules to minimize the danger of misuse of the antitrust laws:

> [O]bscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition. . . . The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition.

*Id.* at 254.

*Brooke Group* was a step in the direction of certainty. It provided a safe harbor for all above-cost price competition, thereby providing producers with clear guidance regarding how to compete without running afoul of the antitrust laws. The Ninth Circuit's decision is a giant step backwards. It eliminates all bright-line buying rules for dominant firms and thereby ensures that producers can be browbeaten by their competitors' threats of lawsuits into avoiding vigorous buying competition. Review is warranted to correct this highly anti-competitive result.

## CONCLUSION

*Amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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WEYERHAEUSER COMPANY,

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v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## JOINT APPENDIX – VOLUME I

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PETITION FOR CERTIORARI FILED SEPT. 23, 2005
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (PORTLAND)

No. 3:00-cv-01693-PA

Confederated Tribes of Siletz Indians of Oregon et al.,

*Plaintiffs*,

v.

Weyerhaeuser Company,

*Defendant*.

**RELEVANT DOCKET ENTRIES**

| DATE | DOCKET ENTRY |
|---|---|
| 12/08/00 | COMPLAINT against Weyerhaeuser Company. |
| 10/31/02 | MOTION FOR SUMMARY JUDGMENT, filed by Weyerhaeuser Company. |
| 10/31/02 | MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, filed by Weyerhaeuser Company. |
| 11/12/02 | MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, filed by all Plaintiffs. |
| 11/25/02 | REPLY TO MOTION FOR SUMMARY JUDGMENT, filed by Weyerhaeuser Company. |
| 02/14/03 | PROPOSED JURY INSTRUCTIONS, filed by all Plaintiffs. |
| 02/14/03 | PROPOSED VERDICT FORM, filed by Weyerhaeuser Company. |

| DATE | DOCKET ENTRY |
|---|---|
| 02/14/03 | REQUESTED JURY INSTRUCTIONS, filed by Weyerhaeuser Company. |
| 02/27/03 | FOURTH AMENDED COMPLAINT, filed by Confederated Tribes of Siletz Indians of Oregon, Ross-Simmons Hardwood Lumber Company, Inc., Smokey Point Hardwoods Inc. against Weyerhaeuser Company. |
| 03/10/03 | ANSWER TO FOURTH AMENDED COMPLAINT, filed by Weyerhaeuser Company. |
| 04/01/03 | ORDER granting Plaintiff Smokey Point Hardwoods' MOTION TO DISMISS WITH PREJUDICE its claims against Defendant Weyerhaeuser Company. |
| 04/17/03 | MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW (DAMAGES), filed by Weyerhaeuser Company. |
| 04/17/03 | MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW (LIABILITY), filed by Weyerhaeuser Company. |
| 04/17/03 | SUPPLEMENTAL REQUESTED JURY INSTRUCTIONS, filed by Weyerhaeuser Company. |
| 04/18/03 | DRAFT JURY VERDICT FORM |
| 04/18/03 | FIRST DRAFT OF JURY INSTRUCTIONS |
| 04/18/03 | VERDICT for Plaintiff. |

| DATE | DOCKET ENTRY |
|---|---|
| 04/21/03 | COURT'S INSTRUCTIONS TO THE JURY |
| 04/21/03 | FINAL DRAFT OF THE VERDICT |
| 04/22/03 | JUDGMENT entered for Plaintiff Ross-Simmons Hardwood against Weyerhaeuser in the amount of $78,769,218.00 & for Weyerhaeuser against Plaintiffs Confederated Tribes of Siletz & STEDCO/Ross-Simmons Joint Venture. |
| 05/02/03 | RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR NEW TRIAL, filed by Weyerhaeuser Company. |
| 05/02/03 | MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL, filed by Weyerhaeuser Company. |
| 05/14/03 | MEMORANDUM IN OPPOSITION TO DEFENDANTS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL, filed by all plaintiffs. |
| 05/23/03 | REPLY TO RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL, filed by Weyerhaeuser Company. |

| DATE | DOCKET ENTRY |
|---|---|
| 07/07/03 | OPINION & ORDER denying Defendant's RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL. |
| 07/31/03 | NOTICE OF APPEAL, filed by Weyerhaeuser Company. |

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 03-35669, 03-35984[1]

Weyerhaeuser Company,

*Defendant-Appellant*,

v.

Ross-Simmons Hardwood Lumber Co.,

*Plaintiff-Appellee*.

**RELEVANT DOCKET ENTRIES**

| DATE | DOCKET ENTRY |
|---|---|
| 12/06/04 | ARGUED AND SUBMITTED |
| 05/31/05 | OPINION affirming the judgment below. Judgment entered. |
| 07/08/05 | ORDER denying appellant's petition for rehearing and petition for rehearing en banc. |
| 07/27/05 | ORDER granting appellant's motion to stay the mandate pending application for a writ of certiorari. |

[1] The relevant docket entries for both appeals are the same.

**[Defendant's Memorandum in Support of Motion for Summary Judgment (Oct. 31, 2002)]**

* * *

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## [P. 1] I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs, Confederated Tribes of Siletz Indians of Oregon, Smokey Point Hardwoods, Inc., and Ross Simmons Hardwood Lumber Co. (collectively "Plaintiffs"), are the former owners and operators of three Pacific Northwest hardwood sawmills that went out of business between 1998 and 2001.[1] Plaintiffs' sawmills primarily cut alder, which is a type of hardwood species that grows in the Pacific Northwest. The Defendant, Weyerhaeuser Company ("Weyerhaeuser"), is a diversified forest-products company. Through its Northwest Hardwoods Division, Weyerhaeuser operates hardwood sawmills throughout the United States and Canada, manufacturing hardwood lumber that it sells throughout the world. Weyerhaeuser's hardwood sawmills in the Pacific Northwest primarily cut alder, which is the most available hardwood species in the Pacific Northwest.

In this lawsuit, brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, Plaintiffs allege that Weyerhaeuser forced

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[1] Ross-Simmons Hardwood Lumber Company ("Ross Simmons") operated a sawmill in Longview, Washington. Confederated Tribes of Siletz Indians of Oregon (the "Siletz Tribe") and Ross-Simmons each owned an interest in a sawmill located in Toledo, Oregon, which was operated by Ross-Simmons in a joint venture with the Siletz Tribe. Smokey Point Hardwoods, Inc. ("Smokey Point") operated a sawmill in Arlington, Washington.

Plaintiffs out of business by monopolizing and attempting to monopolize: (1) the "submarket" for alder lumber, which Plaintiffs, Weyerhaeuser, and others manufactured and sold; and (2) the market for alder sawlogs, which Plaintiffs, Weyerhaeuser, and others purchased and used as the primary input in the manufacture of alder lumber. Plaintiffs assert that Weyerhaeuser engaged in anticompetitive conduct to drive up the price of alder sawlogs, resulting in an increase in both Plaintiffs' and Weyerhaeuser's manufacturing costs. Plaintiffs contend that because they could not economically operate at a higher level of manufacturing cost, they were in effect "forced" out of business by Weyerhaeuser. Weyerhaeuser contends that it simply operated its mills with greater efficiency and profitability.

[P. 2] Both Plaintiffs and Defendant have taken numerous depositions and have exchanged tens of thousands of pages of documents. There are several areas of factual dispute, including whether Weyerhaeuser's business decisions were made for legitimate and valid business reasons and whether Plaintiffs' business failures were the result of anything other than Plaintiffs' own poor management, outdated technology, and use of business assets and revenues for the personal, rather than business, purposes of Plaintiffs' management. Such factual disputes, of course, cannot be resolved by summary judgment. There are, however, other dispositive issues in this case that can and should resolve Plaintiffs' claims. As to these issues there is no genuine factual issue and the resolution of these issues involves only the application of settled law to undisputed facts.

As more fully discussed below, under Section 2 of the Sherman Act, a plaintiff must show: (1) that the defendant possesses monopoly power in a properly defined relevant market; (2) that the defendant obtained or maintained through predatory conduct; and (3) that causes antitrust injury to the plaintiff. With regard to the first element of Plaintiffs' antitrust claim, namely the possession of monopoly power in a

properly defined relevant market, Weyerhaeuser will show that Plaintiffs' two alternative proposed relevant markets (a "submarket" for alder lumber and a market for alder sawlogs) are legally and economically unsupportable.

Weyerhaeuser will show that the only market definition in the context of this case that can satisfy the requirements set forth in binding and authoritative Ninth Circuit precedent (i.e. the only properly defined "relevant market" under Section 2) is the market for hardwood lumber. In this market, it is undisputed that Weyerhaeuser, with a market share of less than three percent, does not possess monopoly power. In addition, and as an independent and alternative argument, it will be shown that there are no significant barriers to entry into Plaintiffs' alleged market for alder lumber. Thus, even under Plaintiffs' own market definition, Weyerhaeuser does not possess monopoly power because binding and authoritative precedent holds that there cannot be market power in the absence of significant barriers to entry. Weyerhaeuser will further show that it does not make either economic or logical sense to view sawlogs, which is an input in the manufacture [P. 3] of lumber, as the relevant market in a monopolization case brought by several manufacturers of lumber against a competing manufacturer of lumber.

With regard to the second element of Plaintiffs' antitrust claim, namely the acquisition or maintenance of monopoly power through predatory conduct, the only conduct to which Plaintiffs can point (and in which Plaintiffs can create a genuine factual issue) is the allegation that Weyerhaeuser engaged in a strategy designed to raise its rivals' costs. Plaintiffs' other allegations are immaterial because of a complete and obvious absence of any causal antitrust injury to Plaintiffs. Although Weyerhaeuser denies engaging in a strategy to raise its rivals' costs, it recognizes that under the standard applicable to summary judgment, Plaintiffs' disputed evidence is likely sufficient to at least raise a factual

issue on that matter. Accordingly, that will not be the basis of Weyerhaeuser's motion regarding this second element.

Instead, Weyerhaeuser will show that, as a matter of law, the claim of "raising rivals' costs," at least in the form that Plaintiffs present in this case, has never been accepted by any court as the basis for the predatory conduct element of a Section 2 claim, especially in the absence of proof that such conduct caused the defendant to operate at a loss or that such conduct raised the costs of the defendant's rivals disproportionately greater than it raised the defendant's own costs. Because the undisputed evidence is that Weyerhaeuser did not sell alder lumber below its costs, Weyerhaeuser did not engage in predatory conduct even if Plaintiffs' factual allegations are accepted as true. In other words, even if predatory pricing (i.e. below-cost pricing) may be considered to be predatory conduct in violation of Section 2, merely reducing one's profit margins to gain a competitive advantage while still selling at a profitable level can never be predatory conduct as a matter of law. It is merely competition. It may be hard competition, but it is lawful competition nonetheless.

Specifically, Weyerhaeuser will demonstrate that:

A. Plaintiffs fail properly to define the relevant market under Section 2 of the Sherman Act. Although Plaintiffs allege a submarket of alder lumber, they fail to present any [P. 4] "economically significant" evidence sufficient to support such a submarket under established legal precedent. Moreover, the undisputed economic evidence shows that the only properly defined relevant market is the market for hardwood lumber. In that market, Weyerhaeuser's market share of less than three percent is too small as a matter of law to support a claim of monopoly power.

B. Plaintiffs fail to establish that the market for alder sawlogs, which is an input used in the manufacture of alder lumber, is the "relevant market" under Section 2. Although Defendant's buying practices with regard to alder sawlogs

may be relevant to Plaintiffs' claim of predatory conduct, it is economically illogical and legally unsupportable to consider alder sawlogs as the relevant market for purposes of Plaintiffs' claim under the facts presented in this case.

C. Even under Plaintiffs' own market definitions, Plaintiffs cannot show that significant barriers to entry exist to prevent new entrants into the market in response to either rising prices for alder lumber or falling prices for alder sawlogs. Under established legal precedent, there can be no market power in the absence of significant barriers to entry.

D. Plaintiffs fail as a matter of law to establish unlawful, predatory conduct. Plaintiffs' theory of "raising rivals' costs" has received a great deal of criticism in the academic economic literature and no meaningful support in the federal case law. It simply is not a legally accepted theory of predatory conduct based on the facts alleged in this case.

## II. ANTITRUST LAW

### A. Summary Judgment Standard In Antitrust Cases

Summary judgment is properly regarded not as a procedural shortcut, but rather as an "integral part" of the Federal Rules. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. This principle stands with equal force in antitrust cases. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); see also *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 853 n.6 (9th

* * *

[P. 25] *54 (using the input tobacco market as the relevant market in monopsony case brought by growers of tobacco).

In this litigation, however, competitors of Weyerhaeuser in the output market (i.e. competing hardwood or alder sawmills) have brought a monopolization claim asserting that an alternative relevant market is the *input* market for alder logs. Plaintiffs contend that, because Weyerhaeuser purchases a large percentage of the alder logs consumed annually in the Pacific Northwest, Weyerhaeuser has "market power" in the market for alder logs. The fact that Plaintiffs are purchasers of logs, rather than sellers of logs, however, belies their assertion of alder logs as the relevant market in this case. Similarly, Plaintiffs allege that Weyerhaeuser has paid "too much" for alder logs, not too little. Under economic principle, claims of monopsony allege that the putative monopsonist has driven down the price of the products it purchases, not driven them up.

Unlike the typical claim for monopsonization (where the relevant market would be the input market), Plaintiffs here allege that the defendant created above-market prices in the log market. But, the monopsonist's intention is just the opposite: it wants to keep the prices below the competitive level, and that is precisely why the sellers of the input bring claims alleging the unlawfulness of such conduct. *See DeLoach*, 2001 U.S. Dist. Lexis 16909 at *25 (describing monopsony power as "the ability of buyers to lower input prices below competitive levels, which requires the ability to restrict the quantity demanded of the input"). By alleging that the relevant market in this case is the market for alder logs, the Plaintiffs have gotten both the law and the economics backwards. Although alder logs may be a *market* in which Plaintiffs and [P. 26] Weyerhaeuser both participant in as input purchasers in the production of hardwood lumber, it is not the relevant market under Section 2 in the context of this litigation.[12] Therefore, the *relevant market* can only be

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[12] Plaintiffs may attempt to rely on *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), rev'd on other

the market for lumber, which is the market in which both Plaintiffs and Weyerhacuser competed for sales.

### C. Weyerhaeuser Does Not Possess Monopoly Power For The Additional Reason That There Are No Significant Barriers To Entry

In addition, Plaintiffs' monopolization claim fails because Plaintiffs have not shown (or even alleged) that there are significant barriers to entry, which is a requirement under the law for a finding of market power. A plaintiff must show both that unnatural constraints prevent new competitors from entering the relevant market and also that existing competitors lack the capacity to expand their output to challenge the defendant's high prices. *See Rebel Oil*, 51 F.3d at 1439.[13]

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grounds, 389 U.S. 384 (1967), to support their assertion that the alder log market is the relevant market under Section 2. The facts and holding in Case-Swayne are, however, completely different than the case before this Court. In *Case-Swayne*, the plaintiff, a manufacturer of fruit juices, brought a monopoly action against a consortium of orange growers. Thus, the output manufacturer (Case-Swayne) brought an action against the input producer (the consortium of Sunkist growers) for controlling the market of "product oranges" grown by the Sunkist growers. This case would only be analogous if Plaintiffs were consumers (i.e. purchasers) of Weyerhaeuser's product. Such is not the case here.

[13] A showing of barriers to entry is essential because the harm to be avoided is that of the monopolist charging above-market prices for the production output. If the monopolist can force competitors out of the market through predatory conduct and can keep other new entrants from entering the market, it will be free to charge supracompetitive prices (*i.e.* above-market prices) for some significant period of time. On the other had, "with easy entry, a predator charging supracompetitive prices will quickly lose market share (as well as any chance of reaping monopoly profits) as new rivals enter the market and undercut its high price." *Rebel Oil*, 51 F.3d at 1439; *see also Matsushita*, 475 U.S. at 590 n.15 (stating that "without barriers to entry it would presumably be impossible

[P. 27] Because no such barriers to entry exist in the market (or have even been alleged by Plaintiffs)—even using Plaintiffs' own market definition—Plaintiffs' claims should be dismissed.

Entry barriers are either "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Western Parcel Exp. v. United Parcel Service of America*, 190 F.3d 974, 975 (9th Cir. 1999) (internal quotation marks omitted). Courts have recognized the following types of potential barriers to entry: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and (5) in some circumstances, economies of scale. *See Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 n.4 (9th Cir. 1993). Barriers to entry must be "significant," meaning, "capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting," in order to warrant judicial intervention. *Rebel Oil*, 51 F.3d at 1439 (emphasis added).

Plaintiffs have not alleged, much less shown, any barriers to entry so as to establish that Weyerhaeuser has market power under Section 2. First, there is no legal support for the argument that the cost of building an alder mill (or converting a softwood mill) is a barrier to entry. "The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds

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to maintain supracompetitive prices for an extended time"). Therefore, if no barriers to entry exist, there is no reason for the antitrust laws to intervene in the marketplace, even if it can be proven that the monopolist drove competitors from the market through predatory conduct.

than would an established firm." II Phillip Areeda, *et al. Antitrust Law*, 409e, at 303 (quoted in *Los Angeles Land*, 6 F.3d at 1428). *In Los Angeles Land*, the Ninth Circuit determined that plaintiff failed to show barriers to entry because there was no evidence demonstrating financing difficulties for potential competitors that were not also faced by existing firms. *Los Angeles Land*, 6 F.3d at 1428. Therefore, even if it is true that a new entrant into the production of hardwood lumber would have to seek financing to build a mill, this argument would fail to show a barrier to entry in the absence of any evidence indicating that "those willing to [P. 28] finance [hardwood lumber mills] impose[] higher financing costs on new entrants than on established firms."[14] *Id.*

Second, Weyerhaeuser does not control an essential or superior resource sufficient to constitute a barrier to entry. In support of the predatory conduct prong of their Section 2 claim, Plaintiffs allege that Weyerhaeuser entered into exclusive log supply contracts, required purchasers of its timberlands to give Weyerhaeuser the right of first refusal on any harvested alder, and owned large amounts of timberlands. (Third Amended Complaint, at 25 (Tab 1).) Those allega-

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[14] In their complaint, Plaintiffs allege that Weyerhaeuser's acquisition of other hardwood mills in the Pacific Northwest was predatory under Section 2. (Third Amended Complaint, at ¶ 25(a) (Tab 1).) Acquisition of competitors, however, is not a violation of the antitrust law in the absence of significant barriers to entry. *See United States v. Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1989) ("If there are no significant barriers to entry, . . . eliminating competitors will not enable the survivors to reap a monopoly profit [because] any attempt to raise the prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less. . . . Given this reality, it would be perverse to expect rivals engaged in head on competition to act like best friends; indeed, it would be cause for suspicion if they did.) (citing III Phillip Areeda, *et al.*, *Antitrust Law*, ¶ 608e, at 20-21 (1978)).

tions are appropriately analyzed under the law of exclusive contracts, which prohibits contractual arrangements "whose probable effect is to foreclose competition in a substantial share of the line of commerce affected." *Omega Evntl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (internal quotation marks omitted); *see also Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1382-83 (11th Cir. 1997) (determining that fifteen percent foreclosure was insufficient); see also 11 Areeda, supra, 1821c at 160 (stating that foreclosure percentages of less than twenty percent is harmless to competition; citing additional authority).

Plaintiffs have failed to prove that Weyerhaeuser foreclosed competition in the purchase of alder logs. At the outset, it is important to note that only control over the *stock supply* of standing timber, not the *flow supply* (harvested timber), is relevant to the analysis. (Pozdena Rpt. at 16 (Tab 21).) As Dr. Pozdena concluded, Weyerhaeuser's owns no more than 7.1 percent of the estimated standing alder timber from all timberlands in the Pacific Northwest. (*Id.*) Even [P. 29] when the alleged exclusive contracts and deed restrictions are considered, Weyerhaeuser's access to alder is "incontrovertibly too small to confer the market power alleged by Plaintiffs." (*Id.*) Thus, as a matter of law, Weyerhaeuser does not control an existing resource sufficient to create a barrier of entry to new entrants.

In short, Plaintiffs have produced no evidence whatsoever to demonstrate an essential element of their claim: that there are barriers to entry in the relevant market. Accordingly, summary judgment is proper. *See Western Parcel*, 190 F.3d at 975 (affirming summary judgment for defendant where plaintiff failed to present sufficient evidence of exclusive dealing to support contention that there were barriers to entry); *cf. American Professional*, 108 F.3d at 1154 (affirming judgment as a matter of law for defendant where plaintiff failed to establish barriers to entry).

D. Weyerhaeuser Did Not Engage In Unlawful Predatory Conduct

Plaintiffs' evidence is also insufficient to prove unlawful predatory conduct. Plaintiffs allege three types of predatory conduct. First, Plaintiffs contend that Weyerhaeuser, without regard to its own requirements or costs, bid up the price of alder logs with the intent of driving competitors from the market. (Third Amended Complaint 25(g), (h), and (i) (Tab 1).) Second, Plaintiffs assert that Weyerhaeuser, through contracts or acquisition, and again without regard to its own requirements, locked up a portion of the available supply of alder logs so that Plaintiffs could not acquire logs at a reasonable price. (*Id.* at 25(a), (c), (d), (e), (f), and (m).) Third, Plaintiffs allege that Weyerhaeuser increased its own production levels so that Plaintiffs were deprived of the additional logs being used by Weyerhaeuser. (*Id.* at 25(b) and 26(c).)

Essentially, these allegations all assert that Weyerhaeuser increased its own costs for the purpose of also raising its rivals' costs, with the intent to inflict economic harm on its rivals. Moreover, Plaintiff Ross-Simmons alleges that Weyerhaeuser sustained these higher costs over an approximate 20-year period in order to run Ross-Simmons out of business. (Nelson Rpt. at 4 [P. 30] (Tab 12).) Based on these activities, Plaintiffs allege that they were forced out of business because they could not afford to pay the same log prices that Weyerhaeuser was paying.

The problem with Plaintiffs' argument is that it does not rest upon any accepted theory of predation in the Ninth Circuit. Plaintiffs' predation theory—called "raising rivals' costs"—never been accepted in the federal courts, at least not in the form presented by Plaintiffs. Furthermore, the academics who developed this theory almost two decades ago have expressed their own doubts about its application in factual situations similar to the present case. Finally, Plaintiffs cannot establish (and do not even try to establish) that Wey-

erhaeuser has engaged in below-cost pricing, which Plaintiffs would have to show in order for their theory to even have a chance of being legally and economically plausible.

### 1. Plaintiffs Do Not Rely On A Legally Accepted Theory Of Predation

In support of their predation argument, Plaintiffs rely on a theory called "raising rivals' costs." This theory has its origins in a law review article published in 1986. *See* Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986). Although the theory has received considerable attention (and criticism) in scholarly journals, it has not received general acceptance in the federal courts. *See* E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Implications*, at 6.04[G] (3rd ed. 1998) (stating that the theory of raising rivals' costs has received "considerable attention from commentators, but scant attention from the courts").

The basic idea of the theory is that a company might choose to transact with input suppliers in such a way that the input costs of that company's actual or possible competitors are increased. This can be accomplished in numerous ways. For example, through a method called "real foreclosure," a company could acquire an "exclusionary right" over a significant portion of the supply, withhold that portion from its rivals, and, thus, drive up the price for the remainder of the input. Krattenmaker, 96 Yale L. J. at 236-38. Alternatively, through a method called "bottleneck," a company could obtain exclusionary rights from all of the lowest-cost suppliers of [P. 31] an input, leaving the company's competitors to compete for input from the higher-cost producers. *Id.* at 96 Yale L. J. at 234-36.

Krattenmaker's and Salop's ideas have been widely discussed and criticized in scholarly journals. See, e.g., Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*,

76 Georgetown L. J. 305, 314 (1987) (arguing that the authors' "work . . . does not contain a single example that would support a confident conclusion that firms raised rivals' costs in a way that permitted them to increase their own prices and profits"). One of the primary criticisms of the theory is that it tends to understate the costs of exclusion to the alleged predator and thereby exaggerate the profitability of the strategy. *See* Malcolm B. Coate & Andrew N. Kleit, *Exclusion, Collusion, or Confusion?: The Underpinnings of Raising Rivals' Costs*, 16 Res. L. & Econ. 73, 76-77 (1994) (Tab 13). Other commentators have remarked that the theory does not fully take into account counterstrategies available to the predators' competitors. See Donald J. Boudreaux, *Turning Back the Antitrust Clock: Nonprice Predation in Theory and Practice*, 13 Regulation 45, 49 & 52 (1990) ("Until they offer a plausible explanation of how predatory firms can raise rival's costs or otherwise disadvantage efficient rivals in the real world, predation theorists have not made an adequate case for government intervention.") (Tab 14).

The federal courts have given Krattenmaker and Salop's theory almost no attention in light of its departure from established precedent and lack of support from the antitrust economic community. Courts that have considered the theory of raising rivals' costs have criticized it for focusing on the effect on specific competitors rather than on the effect on competition generally. *See, e.g., Viacom Int'l Inc. v. Tele-Communications, Inc.*, 1994-2 Trade Cas. (CCH) 70,809 (S.D.N.Y. 1994) (noting that "Viacom is not able to cite to any court that has held a defendant liable, or has held that a defendant could be liable, simply for raising its rival's costs"); *see also Oahu Gas*, 838 F.2d at 370 ("The goal of the antitrust laws, . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."). The theory has been cited only once in the Ninth Circuit. In that case, [P. 32] *Forsyth v. Humana, Inc.*, the Ninth Circuit did

not rely on the theory of raising rivals' costs in the same way that Plaintiffs here present their claim. Here, Plaintiffs content that Weyerhaeuser paid more for its own sawlogs in order to increase Plaintiffs' costs for sawlogs as well. 114 F.3d 1467, 1478 (9th Cir. 1997). In *Forsyth*, the defendant did not increase its own costs at all when it allegedly raised the plaintiff's costs.

Plaintiffs cannot even meet the heightened burden set out in Krattenmaker and Salop's theory itself. Krattenmaker and Salop, though they depart significantly from traditional theory, nonetheless impose a "large burden" on plaintiffs. They write:

[Plaintiffs] should be required to show that the Overbuying was significantly in excess of what the defendant reasonably needed or, perhaps, that the input purchases were so large that significantly inefficient resource use would occur. This latter approach would require proof that, as a result of the inefficient resource use from Overbuying, the purchasing firm's marginal cost is, in effect, driven up to a level above the price it receives for its output. This burden would generally be very difficult for the plaintiff to carry; it is equivalent to the Areeda-Turner test for predatory pricing, as applied to input purchases.

Krattenmaker and Salop, 96 Yale L. J. at 282 n.228. Thus, even under the theory of raising rivals' costs, Plaintiffs would have to show that Weyerhaeuser priced its products below its cost. See *infra* subsection 2. Because no evidence exists to support such an argument, Plaintiffs claims fail as a matter of law.

### 2. Plaintiffs Do Not Allege And Cannot Prove Predatory Pricing

Predatory pricing is a type of unlawful predation in which the alleged monopolist sells its goods below cost, driving down the price of goods in the market so that neither it nor its

competitors can make a profit. Because the other market participants cannot make a profit, they are forced out of business. This leaves the monopolist free to raise prices for its product to supracompetitive levels and thereby recoup its previously-incurred losses. A party alleging predatory pricing must demonstrate both that: (a) the prices complained of are below an appropriate measure of the alleged monopolist's costs; and (b) that the alleged monopolist [P. 33] eventually has a reasonable chance of recouping the losses. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (discussing the requirements of predatory pricing and also the "general implausibility of predatory pricing"); *Rebel Oil*, 146 F.2d at 1092 (stating the test for predatory pricing).

Plaintiffs' allegations in this case essentially amount to predatory pricing on the "buying side," as opposed to on the "selling side." As stated by Dr. Pozdena, "[p]redatory bidding is the buying side counterpart to the selling side concept of predatory pricing." (Pozdena Rpt. at 23 (Tab 21).) Dr. Pozdena explains:

> It is a means of monopolization by which a firm having or wanting market power bids up input prices such that the costs of the product produced exceed the revenues received. By so doing, the predator attempts to drive rivals out of business and scare off entrants and then lower its bids for inputs and raise its output price when the rivals exit the market.

(*Id.*) Thus, instead of proving that Weyerhaeuser sold the manufactured output for too little money, resulting in a loss, Plaintiffs must prove that: (a) Weyerhaeuser sustained a loss by purchasing alder logs at prices such that Weyerhaeuser could not make a profit on their manufacture and sale as alder lumber; and (b) Weyerhaeuser has a reasonably good chance of recouping these previously-incurred losses – losses

that Plaintiffs' expert William Nelson states Weyerhaeuser has been sustaining for almost 20 years. (Nelson Rpt. at 4 (Tab 12).) Indeed, Dr. Pozdena's report shows not only that Weyerhaeuser's alder mills made profits overall, but also that incremental log purchases added to profits. (Pozdena Rpt. at 22 & Exh. 11 (Tab 21).) Thus, Weyerhaeuser's log purchase behavior survives the most stringent test of predation in that Weyerhaeuser's financial data fail to substantiate that there is any pattern, even on the margin, of Weyerhaeuser purchasing logs with the result, let alone the intention, of losing money.

The federal courts place a high burden on plaintiffs alleging predatory pricing conduct. "The Supreme Court has expressed extreme skepticism of predatory pricing claims." *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999). As stated by the Supreme Court, "the success of such schemes is inherently uncertain: the short-run loss is definite, [P. 34] but the long-run gain depends on successfully neutralizing the competition." *Matsushita*, 475 U.S. at 589. The Court in *Matsushita* further noted that "there is consens us among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* In light of such caution, "the standard for inferring an impermissible predatory pricing scheme is high." *Stearns*, 170 F.3d at 528.

Plaintiffs in this case fail to meet either element of the test for predatory pricing. First, Plaintiffs cannot show that Weyerhaeuser priced its lumber below "an appropriate level of its costs."[15] *See Brooke Group*, 509 U.S. at 222-23. In-

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[15] A number of cases have discussed what might constitute an appropriate level of costs. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1982) (discussing whether the appropriate cost measure is the defendant's variable or actual costs). Here, it is unnecessary for this Court to negotiate this issue as Weyerhaeuser's prices were not below costs by any measure.

deed, Plaintiffs fail even to allege such conduct. Second, Plaintiffs cannot show, nor do they allege, that Weyerhaeuser would have a reasonable chance of recouping the losses that would be incurred by such below-cost pricing.

With respect to the first test, Plaintiffs cannot demonstrate that Weyerhaeuser's log buying practices resulted in losses to its hardwood division. (Taylor Dec. at ¶ 9 (Tab 22).) In order to satisfy the first prong of predatory pricing, Plaintiffs must prove that "an appropriate measure" of Weyerhaeuser's costs exceeded the prices received for its lumber. *Brooke Group*, 509 U.S. at 222-23. Weyerhaeuser has consistently made a *profit* on its hardwood mill operations, including its alder mills in the Pacific Northwest. (Pozdena Rpt. at 22-23 & 23-24, Ex. 11 (Tab 21).)

Plaintiffs attempt to reduce their burden with respect to below-cost pricing. Conceding that Weyerhaeuser has not sustained losses resulting from its log purchases, Plaintiffs and their experts argue that Weyerhaeuser could have earned greater profits if only it had purchased logs at a lower price. (Deposition Transcript of William Nelson of September 12, 2002, at 77:12-78:2 (Tab 15).) This is simply not relevant. To prove predatory pricing, Plaintiffs must demonstrate that Weyerhaeuser engaged in below-cost pricing. Without this showing, Plaintiffs' predation [P. 35] argument fails as a matter of law. *See Brooke Group*, 509 U.S. at 223 ("[W]e have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws") (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

Plaintiffs also fail to prove the second element of predatory pricing. Plaintiffs must prove that Weyerhaeuser has a reasonable expectation of recouping its alleged losses. "For the investment [in below-cost pricing] to be rational, the [predator] must have a reasonable expectation of recovering,

in the form of later monopoly profits, more than the losses suffered." *Matsushita*, 475 U.S. at 588-89. Thus, unless Plaintiffs can show that there are high barriers to entry in the relevant market, sufficient to keep other competitors from entering and undercutting Weyerhaeuser's supracompetitive prices, summary judgment is proper. *See Brooke Group*, 509 U.S. at 226 ("In certain situations—for example, . . . where new entry is easy, . . . summary disposition of the case is appropriate."). As shown, Plaintiffs cannot prove the existence of significant barriers to entry. Thus, new firms can enter (and, indeed, have entered) the market to produce hardwood lumber. For example, within the past five years at least four mills have begun producing alder lumber in the Pacific Northwest. (Pozdena Rpt. at Ex. 10 (Tab 21).)

## IV. CONCLUSION

For these reasons, Weyerhaeuser's motion for summary judgment should be granted.

DATED this 31st day of October 2002.

**Respectfully submitted,**

**Respectfully submitted,**

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**[Defendant's Reply In Support of Motion for Summary Judgment (Nov. 25, 2002)]**

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## [P. 1] I. INTRODUCTION

Plaintiffs have failed to introduce any evidence showing that the proper relevant market in this case is other than the market for domestic hardwood lumber. The results of Plaintiffs' own experts' belated price correlation analysis of "first differences" (which is also the subject of Weyerhaeuser's Motion to Strike Plaintiffs' New Expert Opinions) do not even support Plaintiffs' proposed definition of an alder lumber "submarket" because those results fail to meet the Ninth Circuit's inelasticity requirement for a submarket. Regarding Plaintiffs' proposed market definition of alder logs, the cases that Plaintiffs cite in support of that market definition are inapposite to this case because they do not support defining the relevant market as the *input* market in a case between manufacturers that compete in the output market. Because Plaintiffs concede that Weyerhaeuser does not possess monopoly power in the market for the sale of domestic hardwood lumber (the only relevant market in this case), Plaintiffs have failed to create a factual issue on an essential element of their claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. Accordingly, Weyerhaeuser is entitled to summary judgment dismissing Plaintiffs' case.

Even under Plaintiffs' own putative market definitions, Plaintiffs have failed to offer specific facts showing significant barriers to entry and expansion in the alder sawmill industry. Without significant barriers to entry, Weyerhaeuser cannot possess monopoly power as a matter of law. Weyer-

haeuser is entitled to summary judgment on the separate and independent ground that, because no significant barriers to entry and expansion exist, Plaintiffs have failed to introduce evidence sufficient to allow a reasonable fact-finder to find that Weyerhaeuser possesses monopoly power in a relevant market, which is an essential element to their Section 2 claim.

In an effort to draw attention away from their lack of evidence for that essential element, Plaintiffs devote much of their brief to a recitation of the evidence supporting another element of [P. 2] their Section 2 claim, predatory conduct. They quote lengthy excerpts from deposition transcripts of several former Weyerhaeuser employees, which Plaintiffs contend establish that Weyerhaeuser has acted predatorily. Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 1-5. As acknowledged by Weyerhaeuser in its Memorandum in Support of its Motion for Summary Judgment, when the factual evidence is viewed in the light most favorable to Plaintiffs, there are admittedly disputed issues of fact regarding Weyerhaeuser's reasons for some of its business decisions. Def's Mem. Supp. Mot. Summ. J. at 2. Thus, Plaintiffs' focus on claimed evidence of predatory conduct is misdirected because to avoid summary judgment they must come forth with specific facts sufficient to create a factual issue on the essential element of monopoly power in a relevant market, on which Weyerhaeuser has demonstrated an absence of a genuine factual issue. Moreover, Plaintiffs do not meet the only argument that Weyerhaeuser makes with respect to the predatory conduct element of their Section 2 claim: even assuming that Weyerhaeuser had a strategy to drive up the price of alder sawlogs as Plaintiffs argue their evidence shows, such a strategy would not fall within any legally recognized theory of unlawful predatory conduct.

## II. DISCUSSION

### A. Summary Judgment Is Not Disfavored In Antitrust Cases

Despite Plaintiffs' suggestion that summary judgment is disfavored in antitrust cases where intent and motive are at issue, courts have often granted summary judgment in favor of an antitrust defendant where there is no genuine issue of material fact. *See* Def.'s Mem. Supp. Mot. Summ. J. at 14 n.8 (citing numerous cases in the Ninth Circuit where the court granted or affirmed summary judgment in favor of an antitrust defendant). Plaintiffs address none of the nine cases that Weyerhaeuser cites in footnote 8 of its initial Memorandum where the court granted or affirmed summary judgment in favor of the antitrust defendants. Furthermore, although intent is an element of Plaintiffs' attempted monopolization claim, it is not an element of Plaintiffs' monopolization claim. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1125, 1202 (9th Cir. 1997) ("The requirements of a § 2 monopolization claim are similar [to.

* * *

[P. 16] As to the first claimed barrier, to be a legal barrier to entry, there must be more than simply a limited raw material supply, the defendant must *control* an essential resource. *See Western Parcel*, 190 F.3d at 975 (stating that "control of an essential or superior resource" can be an entry barrier). As explained in Weyerhaeuser's initial Memorandum, Weyerhaeuser does not control the alder log stock supply. Def.'s Mem. Supp. Mot. Summ. J. at 28-29.[10] Second, the courts

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[10] Although Plaintiffs rely on *Reid Brothers*, 669 F.2d 1292, for their argument that flow supply, not stock supply, is the correct reference point for measuring Weyerhaeuser's control of the alder log supply, the discussion in that case of market definition was cursory, and largely unnecessary in light of the court's findings of

have soundly rejected the argument that a dominant and aggressive competitor is itself a structural barrier to entry. *See, e.g., Syufy*, 903 F.2d at 668-69 ("[T]he government trots out a shopworn argument we had thought long abandoned: that efficient, aggressive competition is itself a structural barrier to entry."). Third, as explained in Weyerhaeuser's Memorandum, the necessity of a large capital investment does not constitute a barrier to entry. Instead, Plaintiffs must show that a new entrant "must pay more to attract those funds than would an established firm." II Areeda & Hovenkamp, *Antitrust Law*, ¶ 409c, *quoted in* Def.'s Mem. Supp. Mot. Summ. J. at 27. Finally, Plaintiffs' argument that Weyerhaeuser's "absolute cost advantage" is a barrier to entry "because [Weyerhaeuser] can use exclusionary pricing to force competitors to lose money while Weyerhaeuser still earns a profit" combines and confuses the separate elements of monopoly power and predatory conduct and is not itself a "barrier to entry." Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 19-20; see Los Angeles Land, 6 F.3d at 1427 ("[A]nticompetitive conduct by one firm against another is not an 'entry barrier.'").

### E. Plaintiffs Have Failed To Introduce Any Evidence Of Unlawful Predatory Conduct

This Court need not consider the parties' arguments relating to predatory conduct if the Court accepts Weyerhaeuser's arguments about either market definition or barriers to entry [P. 17] because under either of those arguments, Plaintiffs have failed to show that Weyerhaeuser possesses monopoly power in a relevant market, which is an essential element of their Section 2 claim. Even if this Court finds that factual issues preclude summary judgment on these issues, however, Weyerhaeuser nevertheless is entitled to summary judgment

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*per se* violations. See the discussion of *Reid Brothers* in Section II.E below.

because Plaintiffs have failed to come forth with any evidence supporting a legally recognized theory of predation.

Plaintiffs misunderstand and do not meet Weyerhaeuser's legal argument that they have failed to allege *any* cognizable theory of monopolization or attempted monopolization. *See* Def's Mem. Supp. Mot. Summ. J. at 29-32 (arguing that Plaintiffs are alleging a theory of monopolization known in academia as "raising rivals' costs" and that no court has accepted that theory under circumstances similar to this case). Instead, Plaintiffs spend much of their brief in a lengthy recitation of alleged facts (including quotations from pages upon pages of deposition transcripts) that they contend establish that Weyerhaeuser acted predatorily. Pls.' Mem. Opp. Def ls Mot. Summ. J. at 1-5, 14-16. Plaintiffs' discourse of these facts, however, is irrelevant to any argument advanced by Weyerhaeuser in its Memorandum in Support of its Motion for Summary Judgment and does nothing to avoid summary judgment. For purposes of this motion, Weyerhaeuser has assumed that Plaintiffs' conduct allegations are true; Weyerhaeuser argues only that such allegations do not support the essential element of predatory conduct of Plaintiffs' Section 2 claim.[11]

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[11] Moreover, because Plaintiffs failed to authenticate the excerpts of deposition transcripts and the documents contained in the sealed exhibit attached to the Affidavit of Michael K. Kelley, they are inadmissible and cannot be considered on summary judgment. Fed. R. Civ. P. 56(e). Specifically, Plaintiffs failed to include the reporter's certification for each of the excerpts of deposition transcripts that Plaintiffs submitted in opposition to summary judgment. *See Orr v. Bank of Am.*, 285 F.3d 764, 774 (9th Cir. 2002) (holding that excerpts of deposition transcripts submitted without the names of the deponent and the action and without the reporter's certification are not authenticated and, therefore, are inadmissible and must be excluded from consideration on summary judgment). Additionally, Plaintiffs failed to cite the line numbers of the deposition transcripts on which they rely, which also is a

[P. 18] Plaintiffs' attempt to categorize their allegations as something other than a predatory pricing claim fails. Contrary to Plaintiffs' assertions, all their allegations amount to a claim of predatory pricing, because the gravamen of each allegation is that Weyerhaeuser improperly raised log costs, or increased its ability to raise log costs.[12] *See* Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209, 282 n.228 (1986) (stating that a plaintiff alleging that a defendant has unlawfully raised its rivals' costs by

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defect warranting exclusion of the evidence. See *id.* at 774-75 (holding that failure to cite page and line numbers of deposition transcripts warrants exclusion). As to the documents contained in the sealed exhibit attached to Mr. Kelley' affidavit, Plaintiffs have failed to lay on adequate foundation for the admissibility of those documents. *See id.* at 777 (excluding documents for lack of foundation). Accordingly, that evidence should be excluded from consideration on summary judgment.

In any event, Plaintiffs cannot rely on evidence of events that occurred before December 1996 to prove their Section 2 claim. A four-year statute of limitations, applies to actions brought under the Sherman Act. 15 U.S.C. § 15b. Evidence of alleged predatory acts occurring outside of the limitations period, therefore, is irrelevant, inadmissible, and should not be considered in ruling on a motion for summary judgment. Fed. R. Civ. P 56(e); *Orr*, 285 F.3d 773 ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment.")

[12] Although Plaintiffs list the various allegations in their complaint in support of their argument that they have alleged a theory other than predatory pricing, they do not state what other theory they are bringing. Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 31-32. Furthermore, they offer no evidentiary support for the allegations that they claim support a non-predatory pricing theory. Finally, to the extent that Plaintiffs have any admissible evidence of predatory conduct that falls outside of a predatory pricing claim, Plaintiffs cannot establish any causal antitrust injury. Def's Mem. Supp. Mot. Summ. J. at 3.

overbuying an input has the burden to carry the equivalent of the test for predatory pricing). To succeed on a predatory pricing claim, Plaintiffs must show that (1) Weyerhaeuser sustained a loss by purchasing logs at prices such that it could not make a profit on their manufacture and sale as lumber and (2) Weyerhaeuser eventually has a reasonable chance of recouping the losses. See Def.'s Mem. Supp. Mot. Summ. J. at 32-35 (discussing law of predatory pricing). Contrary to Plaintiffs' argument, neither *Reid Brothers* nor any other case excuses them from making that showing.

[P. 19] Citing *Reid Brothers*, Plaintiffs argue that, in resource-based industries like the lumber industry, liability under Section 2 is established by the mere showing that the defendant intended to drive its competitors out of business by raising the prices paid for the resource. Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 33. Plaintiffs have seriously misread *Reid Brothers*. In that case, a log supplier proved that two mills had engaged in a *price-fixing conspiracy* to depress artificially the price of logs. 699 F.2d at 1296-98. The plaintiff in *Reid Brothers* also established that the defendants had divided the timberlands into territories and had agreed not to bid against the other for logs outside of their territories. *Id.* Price-fixing conspiracies and territorial divisions are per se violations of the antitrust laws. *Knevelbaard*, 232 F.3d at 986 (price-fixing conspiracy); *Columbia Steel Casting Co. v. Portland Gen. Elec.*, 111 F.3d 1427, 1444 (9th Cir. 1996) (territorial division). By contrast, Plaintiffs here do not bring any allegations of *per se* violations of the antitrust laws. Neither "raising rivals' costs" nor predatory pricing are *per se* violations.

In discussing the extent of the defendants' price-fixing conspiracy to depress the price of logs, the court in *Reid Brothers* noted that the defendants had used threats to stop log sellers from selling to mills that were not part of the defendants' price-fixing conspiracy. 699 F.2d at 1297. The court relied on a letter from one defendant to the other stating

that a particular competitor "'was desperately in need of timber" and was "'beginning to cause [a defendant) trouble among the so-called independent loggers' by offering higher prices for logs." *Id.* (quoting letter). The court also noted that the defendants had "bid preclusively" on timber sales. *Id.* at 1297-98. Because there was direct evidence — letters between the defendants — of the price-fixing conspiracy, and because such a conspiracy was a *per se* violation of the antitrust laws, the Ninth Circuit rejected the defendants' arguments that the plaintiff must also show that the prices that they paid for logs would not cover their marginal costs on the sale of lumber. *Id.* at 1298 n.5.

Plaintiffs here allege neither a conspiracy to fix prices nor any other per se violation of the antitrust laws. Accordingly, their reliance on *Reid Brothers* is entirely misplaced. Plaintiffs have the burden of establishing that Weyerhaeuser incurred losses by purchasing logs at prices [P. 20] such that it could not make a profit and that it has a reasonably good chance of recouping those losses. This they have failed to do. Consequently, even if Plaintiffs' proposed market definitions are correct, Weyerhaeuser is entitled to summary judgment.

## III. CONCLUSION

For the reasons set forth in Weyerhaeuser's Memorandum in Support of its Motion for Summary Judgment and in this Reply, Weyerhaeuser's Motion for Summary Judgment should be granted.

DATED this 25th day of November 2002.

* * *

**[Hearing Transcript (Jan. 15, 2003)]**

PROCEEDINGS

[Tr. 2] THE COURT: Be seated. Good afternoon.

Let me have your appearances from my left to right. My right.

MR. WILDER: LeRoy Wilder for plaintiffs.

MR. KELLEY: Mike Kelley for the plaintiffs as well.

THE COURT: One minute. Just a minute. Okay.

MR. HAGLUND: Okay. Mike Haglund for plaintiffs.

MR. JOHNSON: Thomas Johnson for defendant Weyerhaeuser.

MR. SIMON: Good afternoon. Michael Simon for defendant Weyerhaeuser.

THE COURT: Why, I commend all of you gentlemen on an able presentation of this matter. I'm going to give you some rulings on the motions first so that we don't lose time. I want to concentrate on the summary judgment motion.

So get your pens handy and we'll start. I'm going to — I'll follow this up with a brief opinion order. The defendant's motion to exclude the [Tr. 3] testimony of Rasmussen, Tedder and Zerbe on the grounds of a violation of Daubert under Rule 702, I deny. I think it's pretty clear that that is not the type of testimony that the Supreme Court was considering in Daubert and I think Rule 702 allows it.

The defendant's motion to exclude the testimony of Nelson on the issue of monopoly power, while he isn't perhaps as qualified academically as others, I'm satisfied based on the statements filed that he has adequate knowledge to discuss that matter.

Defendant's Motion No. 3 to strike the new expert testimony of Rasmussen, Zerbe and Paul Ehinger is denied.

Those — while it is true they were late, this is a rather complex case, been going on a long time. The supplemental expert opinions were disclosed to the defendant on November 12th, 2002, and even though they were supposed to have been completed a little earlier than that, the trial was still two months away at that time. But this hearing was two months away at that time and the trial even longer, so there's adequate time to make up for that.

I would — I think the motion to strike the testimony of Ehinger on the separate ground that his report wasn't disclosed until then and because it allegedly addressed new issues, I'm going to deny that. Again, there's plenty of time. That was two months ago that it [Tr. 4] was disclosed. And under the circumstances I will allow those to stand.

None of this is any indication that their testimony is subject to receipt at a trial without argument. I will always hear argument on the admissibility of the testimony, the opinions, conclusions at the trial, and we'll take that up further at the pretrial conference.

I'll just point out by way of comment that the defendant's motion to exclude the expert affidavits on the grounds that they were prepared for the experts by the lawyers, that — that seems very ingenious. I can't imagine that most attorneys don't hear their experts and consider what they have to say and perhaps prepare the affidavits. So I'm not sure that's a worthwhile matter to bring up.

Also, something else here, the defendant's motions to strike the various deposition excerpts because the plaintiffs' counsel neglected to fax the court reporter's certification for each deposition. .That also is just a little bit ingenious. Perhaps that came from out-of-state counsel, but I think it's important if you. have an issue like that that you simply notify the other side if you think there's some technical violation. Unless there's a serious question about the accuracy of the deposition, which I don't see indicated.

[Tr. 5] The defendant also seeks to strike evidence concerning conduct that predates the four-year limitation period, but the *Reid Brothers* case cited by the plaintiff and many other cases I think indicate that you can go well beyond the statute of limitations to determine the wrongful nature of any conduct.

I think that covers all of the motions.

Are there any motions left that I haven't covered?

MR. SIMON: Other than substance summary judgment, no, Your Honor.

THE COURT: That's the only one. Yes. Well, that's the one I want to concentrate on. And I want to say again, counsel has submitted very excellent briefs, case citations.

There was one citation that I'll ask you to take a look at your files and see if you missed. I didn't find it in your briefs. It's the *Telcor Communications* case in the Tenth Circuit against Southwestern Bell. It involved the sale of — and the ownership of pay phone and stations against Southwestern Bell.

So-I don't need a comment on that right now, but if either of you have looked at that, it seems to me to perhaps bear on this issue.

I'm going to ask the defendants to make the [Tr. 6] first argument. Limit it pretty sharply to the relevant market area and the relevant product. That's really what I'm concerned with here now. And I'm not interested in a long argument or the repetition of what you put in your briefs, but simply a short and concise argument about why you don't think this is the relevant product or the relevant market.

If I understand the Plaintiffs' Complaint, the relevant product are logs. And there's a comment in the Complaint about the lumber — the ultimate lumber, but I see this from

everything I've seen so far as the plaintiffs' claim that the relevant product is the alder logs.

All right. Who's going to argue?

Mr. Simon.

MR. SIMON: Thank you, Your Honor.

I will respond immediately to the Court's specific inquiry, but at some point, Your Honor, I would very much appreciate having just a few minutes to talk about two other issues that are very important; namely, barriers to entry, or the lack of barriers to entry, and also the issue of raising rival's costs as not being a legally cognizable theory. I would appreciate some time to talk about those two issues, Your Honor.

THE COURT: I may let you do that on rebuttal.

[Tr. 7] I have a few questions in that regard myself of the plaintiff.

MR. SIMON: And with respect to the issue of logs, I would like to turn both to the Court's comment about *Reid Brothers* and also to the Court's inquiry about the *Telcor* case, the *Southwest* — the pay phones case. That came out about two monthsish ago or so thereabouts. am familiar with that case enough to at least talk to the Court about it.

I believe it was cited in the responsive brief by the plaintiff for a different point, not for anything to do with logs. But I think I understand what the Court's concern about that might be.

THE COURT: I think the thing that I find in that case that makes it clear that the Tenth Circuit said at least, that a monopsony was available as a remedy to the plaintiff, and 'I'm not sure there's any argument about that.

MR. SIMON: The main thing I would say about the *Telcor* case, Your Honor, is that the Tenth Circuit's decision,

as the Court saw when the Court read the appellate decision, was based upon a theory that was not argued below or presented at trial. The case that was presented at trial did not involve monopsony claims. That was not briefed below at trial. It wasn't argued at trial.

[Tr. 8] THE COURT: So you think that was dicta?

MR. SIMON: That was totally dicta, Your Honor. And, frankly, it's not well informed by the economic realities or the law that placed it.

THE COURT: You don't question but that there can be a monopsony theory by a plaintiff in some cases?

MR. SIMON: Absolutely. That is correct. As a matter of fact, Your Honor, we have cited in our reply brief in support of summary judgment a small handful of cases. But that's really all there are, called monopsony, but they all have one thing in common: They are always brought by the sellers of the product against the buyer.

THE COURT: Why should that be different?

MR. SIMON: The reason why that should be different is. because the essence of a monopsony case is where you have a buyer with alleged, you know, monopoly power on monopsony power, the equivalent or the buying equivalent that is so powerful that they are able to drive down the price of the products that they are buying from the sellers.

That's the essence of what monopsony powers — that's the evil of monopsony power if and where it exists. That the sole buyer, being the only one to turn to, can drive down the cost.

Now, what that usually takes — the context [Tr. 9] in which that usually occurs, Your Honor, is where there is usually — and it's always in the context also just from what I've seen, in the context of a Section 1 conspiracy as well as a

Section 2 tagalong claim. It's the idea where several buyers — well, not always. I'll come back to that. I'm sorry.

It's the idea that where the buyer, either individually or with other buyers, present themselves as the only source to which the seller can turn. They pay lower prices than they would otherwise pay in a competitive market to the seller. And the seller claims injury, competitive injury because they no longer have free market choices as a result of what that monopsony buyer or monopsony buyers conspiring together have done.

That is absolutely not anywhere remotely close to the allegations in this case.

THE COURT: I understand. But why — why couldn't a buyer, not saying he -did in this case, but why couldn't a buyer eliminate other possible buyers from the market through monopolistic treatment?

MR. SIMON: Because the other buyers that would be in the market by your hypothesis would be the competitors of that defendant buyer. That's presumably who the other buyers —

THE COURT: Well, that's what a monopoly usually [Tr. 10] works against is other competitors.

MR. SIMON: And what do they compete in? They compete in the output market. They don't compete for buying because nobody cares about buying a product, buying an input for the sake of buying an input. That's — you know, we're not — we're not in the business of just buying inputs.

The defendants here, the competitive defendants are in the business of making outputs and competing against each other with outputs.

And so the only correct way –

THE COURT: I gather from the papers to alder?

MR. SIMON: Pardon me?

THE COURT: These are alder mills, the plaintiffs and the defendants are Alder mills. That's - that's the argument.

MR. SIMON: I will concede that they primarily sell alder lumber. Now, I'll point out the name of Ross-Simmons. It's the Ross-Simmons Hardwood Lumber Company. It's the Smokey Point Hardwoods Company. The undisputed facts show, though, that although they do sell a range of hardwoods, or they did sell a range of hardwood lumbers, both the plaintiffs and the defendants primarily make alder lumber, a type of hardwood. So I will acknowledge that.

[Tr. 11] And so what they are doing, what this case — what this case is about is where you have companies that compete with each other in the output market. We say hardwood lumber, they say alder lumber. That's not an issue for right now.

And in order to compete in that market they need among other things inputs. In this case the logs. Now, what the plaintiffs are claiming is that Weyerhaeuser has done improper conduct, basically predatory and exclusionary conduct they allege which is what I would like to talk to you about later.

They claim that we have engaged in predatory and exclusionary conduct that had the affect of making them pay more for logs -

THE COURT: Not — supposedly-they couldn't get any logs?

MR. SIMON: That's correct. That is not an allegation. And that's why this is not a monopsony, a true monopsony case. They are not alleging that we have all of the logs and that the sellers of logs have no one to turn to but us.

They are claiming that as a competitive tactic in the market in which we compete the sale of lumber, hardwood or alder, in that market in which we compete, we have used as a competitive tactic paying more [Tr. 12] for the logs, the alder logs than we needed to pay or that we should have paid. Now, that is a conduct allegation.

THE COURT: Haven't they also alleged, though, that you actually dried up the supply —

MR. SIMON: No.

THE COURT: — with bad motives?

MR. SIMON: No. Ab — well, the motives I'll put aside for a moment. They do claim that our motives were to increase their price. They have presented evidence that obviously at trial we will dispute but they have presented evidence that our motives were to increase their costs of supply.

However, there is no evidence that we have in any way dried up supply or that all of the logs have become ours to the detriment of suppliers of logs-. Their claim is essentially a conduct claim. And if I can take a step back a moment, Your Honor, and state that for both the events of monopolization, the elements are monopoly power in the relevant market, and no significant barriers to entry. That's basically one element.

The second is that was obtained or maintained through exclusionary or predatory conduct. And then, of course, that causes — that causes injury to the plaintiffs.

On the attempted monopolization claim there [Tr. 13] also is a conduct element. There there is specific intent to become dangerous and to use exclusionary and predatory conduct and a dangerous probability of success. Both require predatory or exclusionary conduct.

The conduct that they allege in this case is that we paid more for logs in order to make their prices go up. Essentially

raising rival's costs. This is not a case where we have suppliers of a market saying "you, the defendant monopsonist, have completely deprived us of any ability to sell logs to anybody else.

Right now there are plenty of folks that can buy logs. There are — as we'll talk about when we talk about barriers to entry. There are new businesses that have come in, there are existing alder mills that have expanded. The sellers of logs can sell to us, they can sell to any of the other mills, and they are not complaining that they have no competitive choice.

All we have in this case, and this the gravamen of this case, and if it goes to trial, Your Honor, this is the claim that should go to the jury. The claim is that these particular competing alder or hardwood mills, Ross-Simmons, the joint venture program from Confederated Tribes and Smokey Point, they all claim that they could not survive in business because of predatory conduct that we engaged in. What was the predatory conduct allegedly that [Tr. 14] we caused them to pay more for logs.

Therefore, whether you viewed the correct market definition as alder lumber or hardwood lumber, or whether you conclude that there's an issue of fact on that point and let the jury decide whether it's hardwood lumber or alder lumber, that is the relevant market or the range of relevant market choices that should be submitted to the jury.

THE COURT: Those are product choices.

MR. SIMON: Product choices, correct.

And so that is my response. And if we take a look at *Reid Brothers*, as I said, it's a case where you have the sellers of logs, the suppliers of logs bringing a claim that the defendant buyers all conspired together to basically deny them any opportunity of choosing alternate prices.

Similarly with Southwest, as I mentioned, it is dicta and if you read in the Court of Appeals' decision, it was not the theory of which the case of the law was tried.

Now, that leaves us to this area. The relevant product market should either foe alder logs or hardwood logs as a matter of law, or the Court should find that it's a question of fact and the jury can decide that.

Now, my argument for — and, by the way, –

* * *

[Tr. 17] then you must include those things as well. And there is no dispute based upon their admission that they do compete in — with alder lumber.

Now, I was going to talk about some of our Daubert motion issues. I won't — I won't do that in light of the Court — in light of the Court's ruling.

THE COURT: No.

MR. SIMON: But I do submit that in light of, that admission, coupled with the statements that we have presented from the Ninth Circuit in terms of what is — you know, how one looks at the relevant product market, it should be a question of law for the Court to decide that based upon the evidence the correct market is alder lumber.

If the Court disagrees with that, then I suppose it's a question for the jury whether it's alder lumber or hardwood lumber, but I do submit that that is the right analysis, not going back to logs.

I think I have answered the two issues that the Court wanted me to address, and I trust at some point I'll be able to talk about barriers to entry and —

THE COURT: On rebuttal, yes, you probably will.

MR. SIMON: Thank you.

THE COURT: All right. For the plaintiff.

MR. HAGLUND: Mike Haglund for plaintiffs, Your Honor.

* * *

[Tr. 20] processor, against Sunkist that was vertically integrated and did everything including process.

Now, *Reid Brothers*, for the life of me I don't understand how they can make this argument that it has no applicability beyond a situation where it is a logger against the logger supplier of — of saw logs to the mill that has driven down prices.

The fact is that Weyerhaeuser's position, if you analyze it, Your Honor, really reduces it to this: They contend that *Reid Brothers* should be shoehorned into the following box: That Weyerhaeuser in the alder industry of the Pacific Northwest, which, by the way, is the only place it exists in all of the world, as the record makes clear, can drive all of its competitors' saw mills out of business through predatory tactics in the log markets primarily.

And the — and those competitors have no claim because you only focus on outputs, not what's being done in the input market, the raw material which is — the record also shows is the dominant cost in any sawmill. That the only viable plaintiffs after these mills are all gone, or the dominant firm has monopoly power, are the loggers who in Stage 2 see the price for their saw logs that they're selling go down because the monopolist is able — in the absence of mill processor competition is [Tr. 21] able to drive the price down.

*Reid Brothers* says no such thing. At the Ninth Circuit level, Your Honor, it's clear in the section that they describe as exclusion — the elimination and exclusion of competing mills -

THE COURT: Which page are you on?

MR. HAGLUND: 1297. It's clear that the Ninth Circuit actually considered the aspect of the exclusion of the competing mills.

Now, another reference in that case, Your Honor, when they get into the issue of whether the jury trial, just — it's an issue about jury demand. They note that the case was originally a companion case with four others, and this was the first one that went to trial.

This case was tried by the late Judge Dwyer when he was a well-thought-of antitrust plaintiffs' lawyer in Seattle. Judge Rothstein heard the case and 'issued an opinion that you don't find in F. Supp, but we have — it's in Westlaw and it's also in CCH, and I have a copy for the Court and a copy for opposing counsel.

If one looks at that case it's absolutely clear that Judge Rothstein found, and it was affirmed by the Ninth Circuit, that there were three different product markets, one of which was logs. And in that case she actually, referring to the — to the companion cases, [Tr. 22] there's a quote where in her conclusions of law she says quote, "The defendant monopoly power was unlawfully attained and was unlawfully exercised to the injury of, quote — this is all in quote — 'non-defendant mills and loggers in southeastern Alaska.'"

No question that as this case came up, and if you read the very comprehensive factual findings that she made, there's no question that these cases were tried as a group in effect with the first case being the key, a finder of fact against a common set of defendants. And the idea that this case doesn't have applicability because it was against two giants, who also were found to have engaged in a conspiracy in violation of Section 1 of the Sherman Act, doesn't mean it doesn't have good applicability as to the Section 2 analysis for monopolization that is set out both at the district court and the Ninth Circuit levels.

So the notion that .monopsony cases are always brought only by the sellers of the input is not correct. That is inconsistent with *Reid Brothers*, it's inconsistent with a fair reading of *Case-Swayne*, and it's inconsistent, I think, with the Tenth Circuit case that you refer to.

In that situation you have a situation where the formerly dominant — or that the dominant firm, one of the baby bells that was broken up, as — as I recall the [Tr. 23] case, in a situation where they are now poised or on the brink of having to compete for pay phone locations. And they go out in a preemptive strike effort and sign up their — as many of their existing pay phone providers, the suppliers of the pay phone locations. They're all generally leased for a share of the take from that phone.

And they went to them and used various onerous methods through contract or penalty to make it extremely hard for the new competition that was going to be able to compete for these pay — for pay phones —

THE COURT: I recall the facts.

MR. HAGLUND: — to get a foothold. That's exactly what happened in our case. We're contending that Weyerhaeuser, just like the Ketchikan Pulp in southeast Alaska used predatory practices predominately in the log market, although if you look at our Complaint we've got 16 identified items. More than just the log arena but a whole wide array of mechanisms to put out of business

Ross-Simmons which was, you know, the oldest operating alder mill in the region for over 50 years, their joint venture with the Siletz Tribe in Toledo and Smokey Point in Washington State.

So, as to the log issue, clear conflict of experts. We've got forest economists plus an antitrust economist saying it's an economically distinct market.

* * *

[Tr. 28] THE COURT: That was a new mill?

MR. HAGLUND: It was built — it was opened for alder in '96 and closed in '98.

THE COURT: Does it concern you that having opened that mill in '96, they were or should have been aware of many of these acts that you allege took place long before then?

MR. HAGLUND: Well, I think that the evidence, once we get into it in full flower in trial, will show that despite substantial efforts over a long period of time on the part of Weyerhaeuser to put Ross-Simmons out of business, Ross-Simmons had still managed to make a profit, not anywhere near the profits we now know Weyerhaeuser was making,- but it still managed to make a profit in this family-owned company that employed 200 people all the way through 1996. And had an expectation that they could continue to compete.

What Weyerhaeuser knew better than anybody else, we believe the facts will show, is that the — as we moved into this century there was going to be a greater shortage, or a constrained supply, and that as they, we believe, wanted to make sure that most of the competition was gone by the time you got to that point.

So I think they'll be able to make their argument, but the fact is Ross-Simmons and the Siletz Tribe [Tr. 29] had a reasonable basis for forming the joint venture, making the investment to reconfigure that mill and getting into this because Ross-Simmons had been an industry leader for so many years and had made profits despite the periodic and regular efforts of Weyerhaeuser to deprive them of logs or put them out of business.

And you see from Bill Nelson's declaration that, you know, he explains the sorts of things they did to try and survive during this period of time and in fact they made a profit..

The third plaintiff, Smokey Point Hardwoods, really was only in business for about six months in 1999. when they answered, were immediately absorbing 'such huge losses that they quit after six months.

I hope that responds to your question, Your Honor.

THE COURT: It does. I'll give you a few minutes.

MR. SIMON: Thank you. In light of one of Mr. Haglund's comments, if I may approach the Court's clerk, Your Honor, with something.

THE COURT: You may.

MR. SIMON: When I told the Court that the Request for Admissions submitted in the record here by Smokey Point showed that they had admitted that — and, by

* * *

[Tr. 31] Confederated Tribes' defendants in Request for Admission No. 8. They admitted that. Same as with Smokey Point. That should take care of that issue, Your Honor.

With respect to the *Reid Brothers*, I won't repeat myself other than to say that that was a case of the suppliers or the sellers of logs bringing a case against the buyers. That's where monopsony belongs.

With respect to *Case-Swayne*, all I have to say is that's not a monopsony case, that was a case where a juice manufacturer, *Case-Swayne*, claimed that it couldn't buy oranges any more from the producer of the product oranges, the Sunkist Growers.

And that was a classic case of monopoly. They said you — you control all of the oranges, you're not selling them to us, we are the buyer, we are suing you for monopoly says *Case-Swayne* against *Sunkist*. Well, that might have some applicability if these plaintiffs were ever -buying logs from

Weyerhaeuser, but there's no evidence that they ever were. So *Case-Swayne* has no applicability here.

And so I'll just reiterate that this is not a monopsony case according to any precedent that we have seen.

I do now appreciate just a few minutes to speak about the barriers to entry and then I'll close by raising rival's costs.

* * *

[Tr. 34] capital market evaluations imposing higher capital costs on new entrants or, in certain cases, economies of scale. And I'm citing the leading Ninth Circuit case Level Oil for that.

There is no evidence that any of those and no genuine issues –

THE COURT: Isn't there evidence of control of a substance, that is timber?

MR. SIMON: No. What — what — there is not evidence that there is control over an essential or superior resource such as timber in this respect. That type of entry barrier looks to be at the control over an essential supply. If all of the competitors had to come to us to get access to a particular supply or input, or logs, that would be an entry barrier.

THE COURT: Isn't that about what they've alleged and showed?

MR. SIMON: Absolutely not, Your Honor, and here's why: Because nobody had to come to us to get logs because we don't sell logs to any of the plaintiffs or any other mills. We all —

THE COURT: They're not available then. If in fact through anti-competitive practices Weyerhaeuser has made those logs unavailable, isn't that control of a resource?

[Tr. 35] MR. SIMON: No. And the reason why is we're confusing the conduct elements with the barriers to

entry elements. The undisputed facts show that of the logs that Weyerhaeuser actually has control over, it's less than 7 percent. And all of the case law says that, you know, under 20 percent is just not even an issue.

Now, what they are complaining about is that who has control over the logs. All of the sellers of the logs. The suppliers of the logs. And they go to-those suppliers and buy logs and the competitors go to suppliers, competitive mills, go to those suppliers and buy logs, and we go to the suppliers and buy logs.

And they are not complaining that we have even bought up all the logs and none are available to them. That's not even their complaint. And even then that wouldn't be control over resource because we don't control that, we just bought it in the open markets.

What their complaint is, and this is the conduct part that said what is to raising rival's costs. What their complaint is that when we all go out together into the forest to bid against each other and compete for the buying of logs, they say that we pay more than we have to, more than we need to. That raises everybody's costs up, and that causes them to have to pay higher costs for their logs. They're not claiming that they don't get logs, [Tr. 36] they're claiming that they have to pay more for the logs. Now –

THE COURT: I think I understand.

MR. SIMON: And because they have to pay more for logs, obviously so do we. And, frankly, if we buy more logs than they do, and I think that's pretty' undisputed for the record, then we're raising our own costs more than we're raising there's, and so how do they claim that that has hurt them?

They claim that that has hurt them because we are more efficient, we are more efficient producers of lumber from timber or from logs and therefore we can still make money,

we can still make a profit even if we have to pay more for logs to furnish our customers.

They say they have lower margins, they can't keep up with us and therefore they're out of the business. Now, that happens to be their allegation for these three plaintiffs: Smokey Point, Ross-Simmons and their joint venture partner, the Confederated Tribes. However, that doesn't even address the other competitors that have entered into the business, that have stayed in this business for a long time.

And that leads to the final point that I want to make, that let's assume that for purposes of summary judgment that their allegations are right. Where [Tr. 37] does that leave us? That leaves us with — first of all, it's undisputed that we don't lose money in these operations, they're just complaining — their complaint is that we could have made a higher profit.

So there's no allegation of predatory pricing, there's no allegation that we have increased our costs so much that we end up losing money when we sell the lumber. That is not in this case. It's undisputed that we don't do that.

So all they're complaining about is that we are somehow able to better afford because we're more efficient. We're better able to afford to pay more for the resource that we then get than they are. And when they had to, you know, match those prices in order to-get the logs, these particular plaintiffs had problems.

That is part of their conduct allegations, Your Honor, and I submit that there is absolutely no legal precedent that says that that is predatory or exclusionary conduct.

Especially in the case — I'll wrap it up right now, Your Honor, with these one or two points on this issue: The concept of raising rival's costs appears very infrequently in the legal literature, in the legal case law as we've identified. It appears sporadically in the economic literature, but always in

this context: Both in [Tr. 38] the law as well as in the economic literature.

If a particular party — the defendants, if a defendant can raise its rival's costs, are they without raising its own costs or without raising its own costs very much?

Some economists, and this is controversial within the economic community, some economists say that might be a predatory mechanism that the antitrust laws should prevent.

As I said, the case law has not yet gone that far. But nobody, not the economists and not the case law, has ever confronted a situation like we have with their allegation; namely, their claim that we have raised their costs of logs as well as our own. And, frankly, that. we've raised our own costs as much if not more.

But you take a look at their allegations from, I think, William -Nelson, their expert put this in, or their fact witness put this in, that he claims we've been doing this for 20 years. He claims that we have been. paying more for logs than we needed to. One of their other witnesses, one of our —

THE COURT: I'm going to have to cut you off. We've got another matter that I have to take care of this afternoon, too.

I'll give you just a couple of minutes, Mr. [Tr. 39] Haglund.

MR. HAGLUND: Yes, Your Honor..

The most fundamental point I'd like to make is that their own witness, an ex-senior executive number two person in the division, admits that they had regular monthly meetings at which the issue of using log costs, pushing them up to drive out competition was discussed; that they had ultimately decided that it was a good thing to do in the short term in order to reap much longer term profits. And that's completely

consistent with the kind antitrust claim that the law recognizes.

As to the admissions that Mr. Simon submitted. I stand corrected, those were answered in the fashion shown and — but it's not dispositive.

THE COURT: I can understand that issue.

MR. HAGLUND: Okay.

THE COURT: All right.

MR. HAGLUND: Thank you, Your Honor.

THE COURT: I thank you, gentlemen, very much for your excellent arguments. I'll give you an answer very shortly. I came into this case very recently but I'll be on top of it very soon.

MR. SIMON: Thank you, Your Honor.

THE COURT: We'll be in recess on this case. Is our other case ready to go?

[Tr. 40] (Concluded)

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature is not certified.

/s/
DENNIS R. GRUBE
Official Court Reporter

8-22-03
DATE

**[Opinion Denying Summary Judgment (Jan. 21, 2003)]**

**PANNER, J.**

Plaintiffs Confederated Tribes of Siletz Indians of Oregon, Smokey Point Hardwoods, Inc., and Ross-Simmons Hardwood Lumber Co., bring this antitrust action against Defendant Weyerhaeuser Company. The Third Amended Complaint alleges that "Plaintiffs are the owners and operators of three alder sawmills in Oregon and Washington that were forced out of business in 1998-2001 as a result of defendant's illegal anti-competitive actions." Plaintiffs seek a total of $36.6 million in compensatory damages, before trebling, plus attorney fees and costs.

Defendant has moved for summary judgment. Also pending are Defendant's Motion to Exclude Plaintiffs' Experts' Testimony, and Defendant's Motion to Strike Plaintiffs' New Expert Testimony. Defendant's reply brief also requests that certain of Plaintiffs' exhibits be stricken. All of the foregoing motions are denied.

**Defendant's Motions to Exclude and to Strike**

**1. Defendant's Motion to Exclude (Rasmussen, Tedder, and Zerbe)**

This motion seeks to exclude the testimony of Plaintiffs' expert witnesses on Daubert grounds. Rule 702 provides that:

> [P. 3] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant argues that economists Mark Rasmussen, Dr. Philip Tedder, and Dr. Richard Zerbe failed to use what Defendant believes to be the only proper methodology for defining the relevant market and showing that the Defendant possesses monopoly power. Although the Supreme Court has expanded Daubert to other expert fields, this does not appear to be what the Court had in mind when it authorized the trial courts to exclude "junk science." Rather, Defendant is arguing the merits of this antitrust case under the cloak of a Daubert motion. In deciding whether to grant summary judgment, this court is free to look beyond the expert's bottom-line conclusions. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435-36 (9th Cir. 1995). If the expert opinions fail to establish the essential elements of Plaintiffs' case, then the remedy would be to grant summary judgment, not to exclude those opinions as "unreliable."

**2. Defendant's Motion to Exclude (Nelson)**

Defendant moves to exclude the expert opinion of William Nelson on the ground he is unqualified to offer an opinion because he is not an economist by training. Nelson has over [P. 4] 25 years of experience managing alder sawmills in the Pacific Northwest. Knowledge of the local lumber market, the suppliers, their purchasing practices, historical prices, plus an understanding of the reasons why customers purchase alder (rather than some other hardwood) for a particular application, are all useful in defining the relevant market and understanding whether Weyerhaeuser possesses, or has attempted to acquire, monopoly power.

Defendant also contends this opinion should be excluded because Nelson failed to fully disclose the "methodology" underlying his conclusions, or provide the "quantitive data supporting that opinion." Instead of books and academic theories, Nelson based his opinion upon his extensive personal experience and knowledge of the timber market in this region. Under the circumstances of this case, that does not

justify excluding his opinion. *Cf. Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 768 n.3 (9th Cir. 2001) . The opinion of an expert derived from real world experience can be as valid as the opinion of an economist whose only knowledge of a sawmill comes from reading *National Geographic*.[1] Defendant may cross-examine Nelson and offer its own expert opinions. The jury will decide how much weight to give to their respective conclusions.

[P. 5] **3. Defendant's Motion to Strike New Expert Testimony (Rasmussen, Zerbe, and Ehinger)**

After Defendant moved to strike Plaintiffs' expert testimony because the experts did not analyze the data in the manner that Defendant contends is legally required, Plaintiffs instructed their experts to perform the analysis that Defendant said was missing. Defendant now moves to strike the expert affidavits of Rasmussen and Zerbe on the ground that these additional conclusions were not disclosed to Defendant until November 12, 2002. Defendant argues that any expert studies had to be completed by October 24, 2002, when expert discovery closed.

I deny the motion. The supplemental expert testimony was generated in direct response to Defendant's attack upon the original expert reports. Plaintiffs first learned of Defendant's contentions after the discovery deadline, and acted promptly to remedy the alleged deficiency. Some courts have granted a motion to strike in similar circumstances, reasoning that a Plaintiff may not wait until the Defendant files for summary judgment, and points to the holes in the Plaintiff's case, before belatedly plugging those holes with a new expert opinion. However, that rationale places undo emphasis on

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[1] That is a general principle, not a characterization of the particular expert retained by Defendant. Dr. Pozdena's report indicates that he has more than 20 years of experience researching the forest products industry.

law as a contest of skill between rival lawyers, at the expense of doing justice. At this stage of the proceedings, if there is sufficient evidence to support the Plaintiffs' case, I will not exclude that evidence simply because Plaintiffs failed to anticipate the need for it until [P. 6] the defect was pointed out by their opponent. The court is not grading a law school moot court exercise. Nor is this a situation in which the Plaintiff has completely changed the version of events he told at deposition in order to forestall defeat, *i.e.*, a "sham" affidavit. Finally, trial is not until April 2003, so there is little risk of unfair prejudice.

Defendant also moves to strike the expert testimony of Paul Ehinger, on the ground his report was not disclosed until November 11, 2002, and because it allegedly addresses a "new" issue. Plaintiffs counter that this report simply responds to Defendant's motion for summary judgment, which asserts that Plaintiffs cannot show significant barriers to entry of the relevant market, which is an essential element of their antitrust claim.

Plaintiffs should have anticipated the need for testimony on this issue, and not waited until a summary judgment motion was pending before obtaining an expert report that was necessary to establish an essential element of their case. However, I will not preclude Plaintiffs from presenting that evidence now that the deficiency has been called to their attention. In addition, Plaintiffs told Defendant on Oct. 24 that they were in the process of obtaining an expert affidavit from Ehinger, and disclosed the subject matter (though not the substance) of his testimony. Defendant was on notice that Ehinger had been retained and the general scope and purpose of his report.

[P.7] Given the time remaining until trial (Defendant received this report in early November and the trial is not until April), there is little *unfair* prejudice in allowing this testimony. Having to go to trial, instead of prevailing on sum-

mary judgment, is not unfair prejudice. If Defendant requests, I will allow Defendant to depose any new experts (or on any new opinions) and file any responsive expert disclosure reports.

**4. Defendant's Motion (in footnote 11 of its Reply Brief) to Strike Various Documents**

Defendant seeks to strike various deposition excerpts because Plaintiffs' counsel neglected to attach the court reporter's certification. That defect can easily be remedied (and, in fact, was cured almost two months before oral argument) . Defendant also complains that Plaintiffs didn't cite the specific line numbers of the testimony they rely upon, citing the page numbers instead. Again, the defect (if any) is readily curable.

Next, Defendant seeks to strike evidence concerning conduct that pre-dates the 4-year limitations period. However, evidence of events occurring more than four years prior to the filing of an antitrust complaint may still be admissible for various purposes, *e.g.*, to establish the wrongful nature and character of the defendant's conduct during the limitations period. *See Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1305-06 (9th Cir. 1983). Therefore, I deny that request.

[P. 8] Defendant raises other arguments, none of which have merit. All of Defendant's motions to strike and to exclude testimony are denied.

**Defendant's Motion for Summary Judgment**

Plaintiffs cite a handful of musty cases for the proposition that summary judgment is disfavored in antitrust cases. That is no longer true. The usual summary judgment standards apply. *See, e.g., Geneva Pharmaceuticals Tech. Corp. v. Barr Labs.*, 201 F. Supp.2d 236, 266 (S.D.N.Y. 2002) (rejecting identical argument).

The elements of a claim for monopolization under Section 2 of the Sherman Act are "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). "Monopoly power" is "the power to control prices or exclude competition" from the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The plaintiff must also show that it suffered a "causal antitrust injury." *Smilecare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).[2]

[P. 9] A claim for attempted monopolization under Section 2 of the Sherman Act requires proof of the following: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of successfully achieving market power in the relevant market; and (4) causal antitrust injury. Id.

The Third Amended Complaint, simply stated, alleges that the Plaintiffs owned alder sawmills in Oregon and Washington, but did not have their own timber supply (or at least not enough logs to keep their mills running). The plaintiffs had to buy logs on the open market. Weyerhaeuser allegedly took various wrongful actions aimed at tying up the available alder timber, intentionally raising the price that Plaintiffs had to pay for logs, and otherwise preventing the Plaintiffs from

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[2] "Causal antitrust injury" means an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield v. USA Petroleum*, 495 U.S. 328, 334 (1990). "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." Id. at 344.

obtaining an adequate supply of red alder logs, at a reasonable price, to operate their sawmills. The net effect (and intent) was to destroy competition, leaving Weyerhaeuser with a monopoly in the alder market in this region, able to dictate both the price paid to alder producers for their logs and the price paid by consumers for finished alder lumber.

For purposes of this motion only, Weyerhaeuser concedes [P. 10] that its intentions are a disputed factual question. Assuming the truth of the evidence proffered by Plaintiffs, a jury could find that Defendant has engaged in wrongful conduct aimed at destroying competition, and which might be viewed as economically irrational but for its adverse effect on competition.[3] The record also suggests that the number of non-Weyerhaeuser alder sawmills in this region has declined precipitously in recent years, though the parties dispute the reasons for (and legal significance of) that decline.

Weyerhaeuser's principal argument for summary judgment is that it does not possess a monopoly in the relevant market, properly defined. The relevant market for antitrust purposes is generally defined in terms of the "product market" and "geographic market." "[A] product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). *See also E. I. du Pont de Nemours*, 351 U.S. at 394-95 (commodities reasonably interchangeable by consumers for the same purposes constitute the product market). *But cf. Rebel Oil*, 51 F.3d at 1436 [P.

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[3] I recognize that Defendant has evidence it believes depicts a very different picture of Weyerhaeuser's actions, and the reasons why the Plaintiffs' sawmills are now out of business. However, on a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party.

11] (court must consider elasticity of supply as well as that of demand).

"Cross-elasticity of demand" between products is "the extent to which consumers will change their consumption of one product in response to a price change in another." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 469 (1992). For instance, if consumers would simply shift to Chevrolet cars in the event that Ford cars become too expensive, then the relevant market may be "cars" in a particular price range and not just the universe of "Ford cars." "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999).

The "geographic market" is the area of effective competition where buyers can turn for alternate sources of supply. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). If small changes in the price of a product in one location will cause customers to turn to alternatives available in another location, then these sources are part of the same relevant market.

The definition of the relevant market is, ultimately, a mixed question of fact and law for the jury. *See Forsyth*, 114 F.3d at 1476. Unless the Plaintiffs' market definition is wrong as a matter of law, or unsupported by the record, it is an issue for the jury to decide. *Id.* at 1477 (denial of [P. 12] summary judgment proper even though the court thought the defendant's evidence was more persuasive).

Defendant contends the relevant market is *all* finished hardwood lumber, nationwide (or perhaps even internationally), and that Weyerhaeuser controls just over two percent of this market. Plaintiffs point to two relevant markets[4]: (1) the

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[4] Plaintiffs repeatedly use the term "submarket," as do some Ninth Circuit opinions. *See, e.g., Morgan, Strand, Wheeler & Biggs*, 924

market for finished *alder* lumber, of which Weyerhaeuser allegedly has a 75 percent share, and (2) the market for alder sawlogs in the Pacific Northwest, of which Weyerhaeuser allegedly has a 65 percent share.

Red alder is harvested in commercial quantities almost exclusively in the Pacific Northwest. According to Plaintiffs' experts, sawlogs must be processed soon after cutting, and cannot feasibly be transported long distances or stockpiled indefinitely. There are special sawmills dedicated to producing alder lumber, as opposed to other species. Those mills cannot readily utilize other varieties of timber, nor are sufficient quantities of other hardwood sawlogs available in this region to keep a mill running, and it is not feasible [P. 13] to import sawlogs from other regions even if they were available. Alder is distinct from other hardwoods, both in uses, grading, and pricing. *See, e.g.*, Wheeler Declaration. Defendant's expert disputes many of these assertions, but the court cannot resolve that dispute on summary judgment.

Defendant also relies upon Plaintiff Smokey Point's response to Request for Admission No. 5[5], but the question was ambiguous. It is unclear whether Smokey Point was admitting that red alder lumber can serve as a substitute for other hardwoods – because of alder's superior qualities – or admitting that other hardwoods can readily replace alder. In

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F.2d at 1490 ("A submarket exists if it is sufficiently insulated from the larger market so that supply and demand are inelastic with the larger market.") However, the concept of a "submarket" adds little to the analysis. *See, e.g.*, Phillip Areeda, ANTITRUST LAW, ¶ 533 (2d. ed 2002) ("[s]peaking of 'submarkets' merely confuses the issue"). The task is to define the relevant market in a given case, which is a fact-based inquiry. That the relevant market may be defined more narrowly in a given case does not change the ultimate inquiry.

[5] The identical question and answer are in the requests for admissions posed to the other Plaintiffs (though numbered differently).

addition, there are varying degrees of substitutability. *See* Pozdena Report, p. 11; Wheeler Decl. *See also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975) ("where there is a *high degree* of substitutability . . . two [ products] should be considered in the same market") (emphasis added). Finally, the record indicates that particular grades of alder are used for very different purposes. It may be that other hardwood species are readily substituted for the low grade alder used to make pallets, but not for the high grade alder used to make furniture or guitars. On this record, I cannot say. The requested admission lacks essential details and cannot bear the great [P. 14] weight Defendant places upon it.

Defendant next argues that sawlogs are not the end product, and the antitrust laws exist to protect consumers, so the only relevant market is finished lumber. However, the antitrust laws apply to inputs as well as outputs. *See Telcor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1132-36 (10th Cir. 2002) (relevant market from perspective of those Plaintiffs was pay phone locations, rejecting contention that relevant market must be viewed from perspective of retail end-users, for whom cell phones could be a substitute product).

The protections of the Sherman Act are not limited to individual retail consumers. "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (citations omitted).[6]

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[6] The continuing validity of this principle was restated in *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982).

*See also American Ad Management, Inc. v. General Tel. Co. of Calif.*, 190 F.3d 1051, 1057-58 (9th Cir. 1999) (a plaintiff need not be a consumer to establish antitrust injury).

[P. 15] Much of the finished alder lumber is itself an "input" that will be purchased by other businesses and transformed into furniture, guitars, and other products. Nevertheless, the antitrust laws guard against a monopoly in the sale of those inputs. *Cf. R.C. Dick Geothermal Corp.*, 890 F.2d 139, 143-44 (9th Cir. 1989) (en banc) (relevant market was steam, which is not a final retail consumer product but merely an input to be used by other businesses); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 457 (9th Cir. 1966) (relevant market was oranges available at a reasonable price to orange juice manufacturer, even though oranges was not the final product but only an input), *reversed on other grounds*, 389 U.S. 384 (1967). Likewise, a business can also be a "consumer." If Weyerhaeuser has monopolized the market for alder sawmill logs, it is immaterial that the victims are other mills. *Cf. Case-Swayne*, 369 F.2d at 457 (immaterial that plaintiff was rival juice manufacturer rather than ultimate consumer, and market monopolized was the input and not the retail juice market).

Defendant argues that such an antitrust claim has to be asserted by a seller of timber, not a rival buyer of logs. However, the Plaintiffs in *Telcor* were not sellers of pay phone locations, but would-be competitors of Southwestern Bell unable to gain a toehold in the market because of Southwestern Bell's alleged stranglehold over pay phone locations that was perpetuated by anti-competitive practices. Likewise, the [P. 16] plaintiff in *Case-Swayne* was a rival juice manufacturer unable to obtain oranges due to Sunkist's alleged anti-competitive practices. Plaintiffs make analogous allegations here.

It also seems appropriate to limit the sawlog market geographically. From the Plaintiffs' perspective, it is of little

solace that cherry sawlogs may be available in the southeastern United States, if – as a result of anti-competitive conduct – no logs are available, at a reasonable cost, to feed their mills here in the Pacific Northwest. *Cf. Mandeville Island Farms*, 334 U.S. at 236 ("Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned.").

As Defendant acknowledges, this is an area of antitrust law on which even experts disagree. For purposes of this summary judgment motion, it is not necessary to resolve all those disagreements or to articulate a grand theory of antitrust law. I am satisfied that Plaintiffs have stated a claim upon which they may be entitled to relief, assuming the jury finds that the evidence at trial supports Plaintiffs' contentions.

Defendant next argues that there are no significant [P. 17] barriers to entry,[7] based upon the cost of opening a sawmill, and the alleged entrance of other competitors. Some of these facts are disputed. *See, e.g.*, Ehinger Decl., ¶ 10. A jury could also find other barriers to entry beyond the mere cost to outfit a sawmill, including the alleged monopolization of inputs (*i.e.*, alder sawlogs) and a history of alleged anti-competitive conduct. *Cf. Telcor Communications*, 305 F.3d 1124 (prospective competitors unable to obtain suitable locations for their pay phones, coupled with history of anti-competitive conduct by Southwestern Bell).

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[7] Entry barriers are "additional long-run costs that were not incurred by the incumbent firms but must be incurred by new entrants." *Rebel Oil*, 51 F.3d at 1439, citing *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993). Examples of such barriers include: (1) license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and (5) economies of scale. *Id.*

Defendant also asserts that "'raising rivals' costs,' at least in the form that Plaintiffs present in this case, has never been accepted by any court as the basis for the predatory conduct element of a Section 2 claim, especially in the absence of proof that such conduct caused the defendant to operate at a loss or that such conduct raised the costs of the defendant's rivals disproportionately greater than it raised the defendant's own costs." Defendant further argues that "even if predatory pricing may be considered to be predatory conduct in violation of Section 2, merely reducing one's [P. 18] profit margins to gain a competitive advantage while still selling at a profitable level can *never* be predatory conduct as a matter of law."

In *Forsyth v. Humana*, the Ninth Circuit held that a hospital's "alleged policy of funneling indigent and low-paying patients to competitors raises a factual question whether such conduct *increased the operating costs of those competitors* by imposing on them the costs of caring for indigent patients." 114 F.3d at 1478 (emphasis added). "[T]hese anticompetitive practices enabled Sunrise to, and it did, charge higher prices for hospital services. These higher prices translated into higher copayments and premium payments. Such an increase in consumer prices caused by the asserted conduct would constitute antitrust injury of the type the antitrust laws were designed to prevent." *Id.*

Forsyth may be distinguishable because the plaintiffs were employees and employers complaining about high health care premiums, rather than competitors of Humana. However, Forsyth cited other authorities. *See, e.g., Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1553 (10th Cir. 1995) (monopolist's practice of scheduling courses to conflict with competitor's course could raise competitor's costs, and therefore, "would qualify as anticompetitive conduct"); *Premier Electrical Const. Co. v. Nat'l Electrical Contractor's Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (when

defendant [P. 19] raised its rivals' costs, it raised the market price to its own advantage); T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 235-62 (1986).[8] Purposely inflating a competitor's costs can, in some instances, be anti-competitive.

Defendant is correct that, at least in the foregoing instances, the increase in costs disproportionately favored the Defendant. However, when competitors lack deep pockets, a monopolist may be willing to raise both its competitor's costs, and its own costs, in the short run, to be rid of those competitors in the long run. That is little different from predatory pricing aimed at putting the competition out of business.

In addition, Weyerhaeuser allegedly would have earned a much greater profit on alder sales, at least in the short run, but for the anti-competitive conduct complained of. I see no practical difference between predatory pricing that results in a company purposely selling a product at a loss of one cent per unit, versus selling the same product at a profit of only one cent per unit when the company would have earned a larger profit but for its anti-competitive conduct. Assuming the [P. 20] truth of the Plaintiffs' contentions, a jury could find that the conduct Weyerhaeuser allegedly engaged in would have been "economically irrational but for its adverse effect on competition." Some courts have deemed this sufficient to constitute anti-competitive or predatory conduct for purposes of proving a Section 2 violation. *See also* Pozdena Depo. at 33-34 (such conduct might be proscribed by the an-

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[8] *Cf. Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368-69 (9th Cir. 1988) (discussing when a monopolist's refusal to aid a competitor violates the antitrust laws). Clearly antitrust liability may be premised upon theories other than mere predatory retail pricing.

titrust laws if it "had no legitimate purpose" and was aimed at destroying competition).

Of course, there is a critical distinction between deliberately driving up costs for the purpose of destroying competition and letting logs rot in the yard just to keep competitors from obtaining those logs for their own mills, versus outbidding rivals for scarce resources that both companies require with any price increase resulting from normal market forces when demand exceeds supply. The former may be unlawful anti-competitive behavior, while the latter is simply business. The antitrust laws exist to protect competition, not to protect specific companies from the effects of legitimate competition. A firm may also acquire and maintain a monopoly simply by being a better competitor or having better production methods; the Sherman Act does not outlaw such monopolies nor is it intended to shield inefficient competitors from competition. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991). However, at this stage in the proceedings [P. 21] the court is unable to say, as a matter of law, that Weyerhaeuser's conduct did not violate the Sherman Act.

Defendant also argues that Plaintiffs' theory of the case is irrational, because Defendant could have bought the Plaintiffs' mills for less than it allegedly spent to drive them out of business through other means. Even assuming those figures are accurate, it does not mandate a grant of summary judgment. For one thing, this argument assumes that Defendant knew the eventual cost from the start. That is not always the case, as many a car owner has discovered after spending more money to repeatedly repair the car than it would have cost to simply replace it at the outset. A jury might ultimately find Defendant's argument persuasive, but it does not carry the day here.

Defendant advances several other arguments, but they do not alter the result. Plaintiffs have made a sufficient showing

to survive a motion for summary judgment. There are conflicting expert opinions, theories of the case, and explanations for Weyerhaeuser's conduct and the reasons why the Plaintiff sawmills went out of business. The parties also are far apart on the issue of damages, if Plaintiffs do prevail on liability.

**Conclusion**

Defendant's Motion (# 46) to Exclude Plaintiffs' Experts' Testimony is DENIED. Defendants' Motion (# 67) to Strike Plaintiffs' New Expert Opinions is DENIED. Defendant's [P. 22] additional Motions to Strike (contained in footnote 11 of its Reply brief, # 66) are DENIED. Defendants' Motion (# 42) for Summary Judgment is DENIED.

DATED this 21st day of January, 2003.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT JUDGE

**[Plaintiffs' Proposed Jury Instructions (Feb. 14, 2003)]**

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[P. 11] MONOPOLIZATION - GENERAL

Instruction No. _____

*Elements of Monopolization*

Plaintiffs allege that they were injured by defendant's unlawful monopolization of the Pacific Northwest alder sawlog market, and the finished alder lumber market in the domestic United States. To win on a claim of monopolization, a plaintiff must have prove each of the following elements by a preponderance evidence:

**First**, that defendant had monopoly power in a relevant market.

**Second**, that defendant willfully acquired or maintained that power through restrictive or exclusionary conduct;

**Third**, that defendant's activities occurred in or affected interstate commerce; and

**Fourth**, that plaintiff was injured in its business or property because of defendant's restrictive or exclusionary conduct.

If you find that the evidence is insufficient to prove any on or more of these elements, then you must find for defendant and against plaintiffs on their monopolization claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-2 (3d ed. 1999) [modified];

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[P. 12] MONOPOLIZATION - GENERAL

Instruction No. _____

*Monopoly Power Defined*

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, plaintiff need not prove that prices were raised or that competition actually was excluded, but only that defendant had the power to raise prices or exclude competition.

Further, to conclude that defendant had monopoly power, you need not find that defendant could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that defendant did [P. 13] not have the power to control prices or to exclude competition, then you must conclude that it did not have monopoly power.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-4 (3d ed. 1999) [modified];

United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 389, 391 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

[P. 14] MONOPOLIZATION - GENERAL

Instruction No. _____

*Relevant Market*

Before it can be determined whether a person has monopolized a field of competition in a particular line of trade or commerce, it must first be determined what is the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market."

Charges of monopolization can only be judged in the framework of the relevant market. Plaintiffs claim that two relevant markets apply in this case: the alder sawlog market in the Pacific Northwest, and the finished alder lumber market in the domestic United States. Plaintiffs must, therefore, prove by a preponderance of the evidence what relevant market or markets apply in this case.

In determining the relevant market, the "area of effective competition" must be determined by reference to: (1) a product market and, (2) a geographic market.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-6 (3d ed. 1999) [modified];

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451, 482 (1992); [P. 15]

Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986), cert. denied, 479 U.S. 1031 and 479 U.S. 1034 (1987).

[P. 16] MONOPOLIZATION - GENERAL

Instruction No. _____

*Relevant Product Market*

The basic idea of a relevant product market is that the products within it are reasonable substitutes from a buyer's point of view; that is, the products compete with each other. This does not mean that products must be identical to be in the same relevant product market. It means that, as a matter of practical fact and the actual behavior of buyers, the products are reasonable substitutes for the buyer's needs. In this case, plaintiffs define two relevant product markets, the alder sawlog market in the Pacific Northwest, and the finished alder lumber market in the domestic United States. Defendant denies the existence of an alder sawlog market, denies the existence of a domestic finished alder lumber market, and contends that the only relevant market is the hardwood lumber market in the domestic United States.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in the same market. You also may consider how people in the industry and the public t large view the products; whether the products have the similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are [P. 17] followed by changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market or markets, you must decide which products compete with each other. This is a practical determination. Products do not

have to be identical to be in the same relevant market, but they must compete meaningfully with each other.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-7 (3d ed. 1999) [modified];

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451, 482 (1992);

Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986), cert. denied, 479 U.S. 1031 and 479 U.S. 1034 (1987).

[P. 18] MONOPOLIZATION – GENERAL

Instruction No. _____

*Relevant Geographic Market*

The other aspect of relevant market to be considered is the geographic area within which the products compete. This relevant geographic market can be as large as the entire world, the United States, or as small as a single community.

Plaintiffs contend that the relevant geographic market for alder sawlogs is confined geographically to the Pacific Northwest, and that the relevant geographic market for finished alder lumber consists of the domestic United States. Defendant contends that the only relevant geographic market in this case is the United States domestic market for hardwood lumber.

The relevant geographic market is the area in which defendant faces competition from suppliers that are in the relevant product market, and to which a buyer can practicably turn for supplies.

To determine the proper geographic market, you may consider if changes in prices at one location have fairly direct substantial effects on prices or sales at other locations, and if the people in the industry and the public at large view sellers in the different locations as being in competition with each other. Such evidence would tend to prove that the different locations are in the same relevant geographic market.

You also may consider how readily sellers can and do shift from selling in one location to selling in another. [P. 19] Evidence that sellers shift readily among different locations in response to price changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where purchasers, as a practical matter, can and do buy the product; that is, whether buyers residing in one area buy from the same sources as

buyers residing in another area or if they buy from local sources rather than more distance sources because they find it more convenient or practical to do so. In this regard, you may consider whether an increase in prices charged by suppliers in one location would cause a substantial number of purchasers to turn to more remote sources of supply. If so, the two locations are part of the same geographic market.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-2 (3d ed. 1999) [modified];

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963);

Tanka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001).

[P. 20] MONOPOLIZATION - GENERAL

Instruction No. _____

*Relevant Market – Necessity of Proof*

If after considering all the evidence you find that plaintiffs have proved both a relevant product market and a relevaft geographic market, then you must find that plaintiffs have established the relevant market requirement and you must consider the remaining elements of their monopolization claim. If you find that plaintiffs have not proved a relevant product market, or that they have not proved a relevant geographic market, then you must find for defendant and against plaintiffs on this claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-13 (3d ed. 1999);

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[P. 21] MONOPOLIZATION - GENERAL

Instruction No. _____

*Existence of Monopoly Power*

If you find that a relevant market has been proved, you should then determine whether defendant has monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling.

For example, you have heard evidence about defendant's market share. You may infer whether or not monopoly power exists from defendant's share of the relevant market, Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that defendant's share of the relevant market is less than 50 percent, that market share by itself does not permit you to infer that the defendant has monopoly power. If you determine that defendant's share of the relevant market is 80 percent or higher, that is strong evidence of the existence of monopoly power. If you determine that defendant's market share is somewhere between 50 percent and 80 percent, you may infer the existence of monopoly power from that share, and the inference is stronger the higher defendant's market share is within that range.

You may also consider the trend in defendant's market share. A declining market share may indicate the absence of [P. 22] monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of defendant's competitors. If these are few, weak, or have small or decreasing market :shares, so that they do not offer substantial

competition to defendant in the relevant market, this may tend to indicate that defendant has monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that defendant does not have monopoly power.

You also may consider the history of entry into and exist from the market by other companies. Entry of companies into the market may indicate that defendant lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate that defendant has monopoly power.

The existence of monopoly power also may be shown by evidence that defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that defendant had profit margins that were extraordinarily high or maintained high rates of return over a long period of time.

If you find that defendant had monopoly power, then you must find that plaintiff has established this requirement and you must consider the remaining elements of its monopolization claim. If you find that defendant did not have monopoly power, then you [P. 23] must find that defendant did not violate Section 2 of the Sherman Act, and you accordingly must find for defendant and against plaintiff on this claim.-

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-14 (3d ed. 1999);

U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal merger Guidelines § 1, 10-11 (1992);

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Greyhound Computer Corp., Inc. v. International Business Machines Corp., 559 F.2d 488, 498 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978); Los Angeles Land Co., v..

Brunswick Corp., 6 F.3d 1422 (9th Cir. 1993), cert. denied, 510 U.S. 1197 (1994); Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir.), cert. denied, 488 U.S. 870 (1988); Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F..3d 1421, 1439 (9th Cir. 1995), cert. denied, 516 U.S. 987 (1995); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 19896), cert. denied, 450 U.S. 921 (1981); Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1201, 1203-04 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976).

[P. 24] MONOPOLIZATION - GENERAL

Instruction No. _____

*Willful Acquisition or Maintenance of Monopoly Power*

The next element that plaintiffs must prove is that defendant willfully acquired or maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in securing or maintaining defendant's monopoly power.

To prove defendant acted willfully, plaintiff must prove either that defendant engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of defendant in the relevant market or that this was the necessary direct consequence of defendant's conduct or business arrangements.

You may not find that a company willfully acquired or maintained monopoly power if it has acquired or maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages, such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency resulting from [P. 25] scientific research; or by obtaining a lawful patent; or because a change in cost or taste has driven out all but one supplier; or simply because the market is so limited that it is impossible to efficiently produce the product except by a plant large enough to supply the whole demand. The acts or practices that result in the acquisition or maintenance of monopoly power must represent something more

than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

If you find that defendant willfully acquired or maintained monopoly power, then you must find that plaintiffs have established this element and you must consider the remaining elements of their monopolization claim. If you find that defendant did not willfully acquire or maintain monopoly power, then you must find that defendant did not violate Section 2 of the Sherman Act, and you must accordingly find for defendant and against plaintiffs on this claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-20 (3d ed. 1999);

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Universal Analytics, Inc. v. MacNeal-Scwendler Corp., 5914 F.2d 1256, 1259 (9th Cir. 1990).

[P. 26] ATTEMPT TO MONOPOLIZE

Instruction No. _____

*Elements of Attempted Monopolization*

Plaintiffs allege that they were injured by defendant's unlawful attempt to monopolize. To win on a claim of attempted monopolization, a plaintiff must prove each of the following elements by a preponderance of the evidence:

**First**, that defendant engaged in predatory or exclusionary conduct.

**Second**, that defendant had a specific intent to achieve monopoly power in a relevant market;

**Third**, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market;

**Fourth**, that defendant's conduct occurred in or affected interstate commerce, and

**Fifth**, that plaintiff was injured in its business or property by defendant's predatory or exclusionary conduct.

If you find that the evidence is insufficient to-prove any one or more of these elements, then you must find for defendant and against plaintiffs their attempt to monopolize claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-80 (3d ed. 1999);

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[P. 27] ATTEMPT TO MONOPOLIZE

Instruction No. _____

*Specific Intent*

If you find that plaintiffs have proved a relevant market, you must then decide whether defendant had the specific intent to monopolize that market. In other words, you must decide if the evidence shows that defendant acted with the conscious object of acquiring the power to control prices or to exclude or destroy competition in a relevant market.

There are several ways in which plaintiffs may prove that defendant had the specific intent to monopolize. There may be evidence of direct statements of defendant's intent to obtain a monopoly in a relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of defendant. You must be careful, however, to distinguish between a defendant's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Even if you decide that the evidence does not prove directly that defendant actually intended to obtain a monopoly, specific intent may be inferred from what defendant did. For example, if the evidence shows that the natural and probable consequence of defendant's conduct in a relevant market was to give defendant control over prices or to exclude or destroy competition, and that [P. 28] this was plainly foreseeable by defendant, then you may infer that defendant specifically intended to acquire monopoly power.

In this case, plaintiffs argue that some of the conduct underlying their claim of attempt to monopolize also constitutes unreasonable restraints of trade, which I will define for you. If you find that particular conduct plaintiffs contend is an un-

reasonable restraint of trade has not been proved as a substantial claim of restraint of trade, you may not consider that particular conduct in deciding whether plaintiffs have proven specific-intent to achieve monopoly power. If you find that plaintiffs have proved one or more substantial claims of restraint of trade, then you may infer from that conduct that defendant had the specific intent to achieve monopoly power.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-86 (3d ed. 1999);

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992); Aspen Skiing Co. v. Aspen highlands Skiing Corp., 472 U.S. 585 (1985).

Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1192-93 (9th Cir. 1984), cert. denied, 469 U.S. 1213 (1985).

[P. 29] ATTEMPT TO MONOPOLIZE

Instruction No. _____

*Dangerous Probability of Success*

If you find that defendant had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows that next element of attempt to monopolize: namely, that there was a dangerous probability that defendant would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

**First**, the market share and power of defendant as compared to its competitors;

**Second**, whether defendant's share of the relevant market was increasing or decreasing;

**Third**, the actual or probable impact on competition of defendant's restrictive or exclusionary acts or practices; and

**Fourth**, whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

[P. 30] American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-89 (3d ed. 1999);

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); States v. Columbia Steel Co., 334 U.S. 495, 533 (1948);

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1443 (9th Cir.), cert. denied, 516 U.S. 987 (1995).

[P. 31] CAUSATION

Instruction No. _____

*Injury and Causation*

If you find that defendant has violated Section 2 of the Sherman Act as alleged by plaintiffs, then you must decide if plaintiffs are entitled to recover damages from defendant.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.

For a plaintiff to establish that it is entitled to recover damages, it must prove that it was injured as a result of defendant's alleged violation of the antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage." Proving causation does not require a plaintiff to prove the dollar value of its injury. It requires only that a plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If you find that a plaintiff has established that it was, in fact, injured you may then consider the amount of that plaintiff's damaged. It is important to understand, however, that injury and amount of damage are different concepts, and that you cannot consider the amount of damage unless and until you have concluded that a plaintiff has established that it was in fact injured.

To establish injury, a plaintiff must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that defendant's alleged illegal conduct was a material cause of that plaintiff's injury. This means that a plaintiff [P. 32] must have proved that some damage flowed to it as a result of defendant's alleged antitrust violation. A plaintiff is not required to prove that defendant's alleged antitrust violation was the sole cause of its injury; nor need a plaintiff eliminate all other possible causes of injury. It is enough if a plaintiff has proved that the alleged antitrust violation was a material cause of its injury. Injury may be established by in-

ference or circumstantial evidence. A plaintiff's burden may vary in each case, depending upon the type of antitrust violation alleged. However, if you find that a plaintiff's injury was caused solely by something other than the alleged antitrust violation, then you must find that the plaintiff has failed to prove that it is entitled to recover damages from defendant.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, F-2 (3d ed. 1999);

15 U.S.C. § 15; Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946); Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 114 n.9 (1969); Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931);

Knutson v. Daily Review, 548 F. 2d 795, 811 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

[P. 44] MONOPOLIZATION – PREDATORY PRICING

Instruction No. _____

*Elements – Predatory Pricing*

Plaintiffs have alleged that defendant acquired or maintained monopoly power through predatory pricing, which is a type of restrictive or exclusionary conduct on which a claim of monopolization or attempt to monopolize may be based. After considering all the evidence, if you find that defendant has engaged in predatory pricing, then you must find that plaintiffs have established that defendant has engaged-in restrictive or exclusionary conduct and you must consider the remaining elements of plaintiffs' claim. If you find that defendant has not engaged in predatory pricing, then you must find that defendant's pricing was not restrictive or exclusionary conduct.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-50 (3d ed. 1999);

*Brooke Group, Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993).

## [P.45] MONOPOLIZATION - PREDATORY PRICING

Instruction No. _____

*Predatory Pricing - Definition*

"Predatory pricing" means charging a price or operating a business below cost, as I will define that term for you, to drive out or injure competition and with a reasonable expectation that a higher price can be charged or the business returned to profitability once the competition has been substantially lessened or eliminated.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-51 (3d ed. 1999);

*Brooke Group, Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993);

*Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1298 & n.5 (9th Cir.), *cert. denied*, 464 U.S. 916 (1983).

* * *

[P. 52] MONOPOLIZATION - PREDATORY PRICING

Instruction No. _____

*"Predatory Purchasing Scheme" - Definition*

Plaintiffs claim that defendant engaged in exclusive or restrictive conduct called predatory pricing, which I previously defined for you. Plaintiffs claim that defendant engaged in an overall predatory purchasing scheme by paying a price for logs that is higher than market value unnecessarily to drive out or injure competition, and by delivering logs to its Longview mill at below cost. As a consequence, defendant's Longview division operated at a loss. Plaintiffs claim that defendant attempted to conceal that operating loss.

"Predatory purchasing scheme" in the context of this case means operating at a loss, as I will define that term for you, to drive out or injure competition and with a reasonable expectation that a lower price can be paid for logs once the competition has been substantially lessened or eliminated.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-51 (3d ed. 1999) (modified);

*Brooke Group, Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993).

[P. 53] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030 (9th Cir. 1981) ("*Inglis I*"), *cert. denied*, 459 U.S. 825 (1982); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1308 & n.5 (9th Cir. 1983).

[P. 54] MONOPOLIZATION - PREDATORY PRICING

Instruction No. _____

*"Predatory Purchasing Scheme" - Distinguished from "Competition"*

In deciding whether plaintiffs have proved that Weyerhaeuser's act of operating its Longview mill at a loss was part of a "predatory pricing scheme," it is important for you to consider the evidence in light of the way in which the competitive process is expected to work.

Paying a higher price for raw materials where those resources are in limited supply and legitimately needed for production is a proper means of competing with other firms for those resources. It is not unlawful or improper.

The question you must decide is whether defendant's operations were part of a "predatory purchasing scheme." In deciding this question, you must consider whether Weyerhaeuser deliberately intended to forego present income and operate its Longview mill at a loss in order to discipline competitors or drive them out of business.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-56 (3d ed. 1999) (modified);

*William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030 (9th Cir. 1981) ("*Inglis I*"), *cert. denied*, 459 U.S. 825 (1982); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1308 & n.5 (9th Cir. 1983).

[P. 55] MONOPOLIZATION – PREDATORY PRICING

Instruction No. _____

*Recoupment*

Paying a high price for raw materials while operating at a loss cannot be predatory under the antitrust laws where, at the time the raw materials were purchased, there was no reasonable chance that the buyer would be able to later reduce the amount it would pay for logs to an amount even lower than would be offered in a competitive market. In that way, a firm guilty of "predatory operations" could thereby make up its lost profits and obtain some additional gain. Making up lost profits in that way is called recoupment. In the context of this case, recoupment is the act of paying more than market value for logs, operating at a loss to do so with the intent to injure competition, while anticipating monopoly profits in the future.

For recoupment to occur, a predatory purchasing scheme, as a threshold matter, must be able to produce the intended effects on the firm's rivals, whether that is driving them from the market, causing them to operate without adequate raw materials unnecessarily or irrationally, or causing them to lose profits because they have had to meet defendant's artificially high prices for raw materials. Plaintiffs must prove that the scheme alleged would likely result in Weyerhaeuser being able to make up the losses for its Longview mill later by reducing the amount it would pay for logs after competition has been eliminated. To analyze whether damage to competition in this manner is likely to occur, [P. 56] you must evaluate whether the market is highly competitive, new entry is easy, or Weyerhaeuser has excess capacity or could quickly create or purchase new capacity to absorb the market share of its rivals.

If you find that Weyerhaeuser had a reasonable chance of recovering the profits it lost (from predatory log purchasing

and operating its Longview mill at a loss) through future log purchasing at lower than competitive levels, you must find that Weyerhaeuser engaged in predatory operations.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-53 (3d ed. 1999) (modified);

*Brooke Group, Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993).

*William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030 (9th Cir. 1981) ("*Inglis I*"), *cert. denied*, 459 U.S. 825 (1982); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1308 & n.5 (9th Cir. 1983).

* * *

[P. 62] Respectfully Submitted.

DATED this 14th day of February, 2003

HAGLUND, KIRTLEY, KELLEY & HORNGREN LLP

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**[Defendant's Requested Jury Instructions (Feb. 14, 2003)]**

* * *

Defendant, Weyerhacuser Company, requests that the Court address to the jury the following American Bar Association's pattern jury instructions, the Eleventh Circuit's pattern jury instructions, and special instructions. The pattern jury instructions of the American Bar Association and the Eleventh Circuit are referenced and approved by the Ninth Circuit. See Ninth Circuit Model Civil Jury Instructions 17 (2001). Defendant reserves the right to submit additional instructions or withdraw instructions in response to any instructions that may be submitted by plaintiffs.

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[P. ii] **INDEX**


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## [P. 1] REQUESTED JURY INSTRUCTION NO. 1.

### Purpose

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or monopolization of any business or industry, so that the consuming public may receive better goods and services at lower cost.

The goal of the Sherman Act is to protect competition, not competitors. Conduct that is competitive, even severely so, does not violate the Sherman Act; only conduct that unfairly tends to destroy competition itself violates the Sherman Act. It is the nature of our free enterprise system that fierce, aggressive competition will drive out the least effective participants in the market, providing the most efficient allocation of productive resources. The law does not guarantee success to all of those who enter into business because it also recognizes that in the natural operation of our economic system some competitors are going to lose business, or even go out of business, while others gain and prosper.

AUTHORITY: Eleventh Circuit Pattern Jury Instructions (Civil) 3.2 (2000); American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page A-2 (1999); *Los Angeles Land Co. v. Brunswick*, 6 F.3d 1422, 1426-27 (9th Cir. 1993); *United States v. Syufy Enter.*, 903 F.2d 659, 662, 668-69 (9th Cir. 1990).

## [P. 2] REQUESTED JURY INSTRUCTION NO. 2.

### Elements

Plaintiffs allege that they were injured by defendant's unlawful monopolization of the alder sawlog market or the alder lumber market. To win on their claim of monopolization, plaintiffs must have proved each of the following elements by a preponderance of the evidence:

First, that defendant had monopoly power in a relevant market;

Second, that defendant willfully acquired or maintained that power through predatory or exclusionary conduct; and

Third, that plaintiffs were injured in their business or property because of defendant's predatory or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for defendant and against plaintiffs on plaintiffs' monopolization claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-2 (1999).

## [P. 3] REQUESTED JURY INSTRUCTION NO. 3.

### Monopoly Power Defined

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, plaintiffs need not prove that prices were raised or that competition actually was excluded, but only that defendant had the power to raise prices or exclude competition.

Further, to conclude that defendant had monopoly power, you need not find that defendant could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that defendant did not have the power to control prices or to exclude competition; then you must conclude that it did not have monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-4 (1999).

## [P. 4] REQUESTED JURY INSTRUCTION NO. 4.

### Relevant Market – General

If monopoly power exists, it must be found to exist within an economically meaningful market, or what is called a relevant market.

Defining the relevant market is essential because you are required to make a judgment about whether defendant has power over prices or competition. To do so, you must be able to determine what economic forces, if any, restrain its freedom to act as it pleases. The most likely and most important restraining force will be competition from other firms and their products. This includes all firms and products that act as real and practical restraints on defendant's power to set prices as it pleases. All the firms and products that exert this restraining force are considered to be within what is called the relevant market.

There are two aspects you must consider in defining a relevant market. The first is the relevant product market; the second is the relevant geographic market.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-6 (1999).

## [P. 5] REQUESTED JURY INSTRUCTION NO. 5.

### Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes from a buyer's point of view; that is, the products compete with each other. This does not mean that products must be identical to be in the same relevant product market. It means that, as a matter of practical fact and the actual behavior of buyers, the products are reasonable substitutes for the buyer's needs. In this case, plaintiffs define two alternative relevant product markets: the alder sawlog market and the alder lumber market. Defendant contends that the only relevant product market is the hardwood lumber market.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in the same market. You also may consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are followed by changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market, you must decide which products compete with each other. This is a practical determination. Products do not have to be identical to be in the same relevant market, but they must compete meaningfully with each other.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-7 C-8 (1999).

## [P. 6] REQUESTED JURY INSTRUCTION NO. 6.

**Relevant Product Market – Supply Substitutability**

In some cases, it may be appropriate to take into account in defining the relevant market the makers of products that are not reasonable substitutes from the buyer's point of view. This is true where firms other than the defendant can readily use the production facilities, raw materials, and technology they had been using to make a product that is not interchangeable with the defendant's product to manufacture and sell a product that is identical to or readily interchangeable with the defendant's product. In such cases, the capacity being used to produce products that are not substitutes from the buyer's point of view but which could easily be shifted to the production of products that would be reasonable substitutes acts as a constraint on the defendant's power to set prices as it pleases.

An example may help. Suppose there are two pennant manufacturers, one of which makes Yankee pennants, the other of which makes Dodger pennants. Either company could probably shift to making pennants manufactured by the other in almost no time at all with very little effort or expense. Although Yankee fans would probably not buy Dodger pennants in large numbers, nor would Dodger fans flock to purchase Yankee pennants, the ability of one manufacturer readily to shift its capacity to the manufacture of pennants made by the other would prevent either of them from raising prices.

Evidence has been offered in this case that certain manufacturers have the capability to shift readily from their present manufacture of products that are not interchangeable with defendant's product to the manufacture of products that buyers could substitute for defendant's product. Defendant contends that softwood mills in the Pacific Northwest are capable of readily shifting from the production of softwood lumber to the production of hardwood and alder lumber.

Plaintiff contends that softwood mills cannot readily shift their production. If you find that an increase in the price of defendant's product would cause other manufacturers to shift into the manufacture of products that are interchangeable with defendant's product, then you should [P. 7] include in the relevant market the probable quantity [or value] of products that would be offered to buyers as a result of such a shift.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-9 C-10 (1999).

## [P. 8] REQUESTED JURY INSTRUCTION NO. 7.

### Relevant Geographic Market

The other aspect of relevant market to be considered is the geographic area within which the products compete. This relevant geographic market can be as large as the entire world or the United States or as small as a single community.

Plaintiffs contend that the relevant geographic market is the Pacific Northwest. Defendant contends that the relevant geographic market is at least the United States.

The relevant geographic market is the area in which defendant faces competition from suppliers that are in the relevant product market, and to which a buyer can practicably turn for supplies.

To determine the proper geographic market, you may consider if changes in prices at one location have fairly direct substantial effects on prices or sales at other locations, and if the people in the industry and the public at large view sellers in the different locations as being in competition with each other. Such evidence would tend to prove that the different locations are in the same relevant geographic market.

You also may consider how readily sellers can and do shift from selling in one location to selling in another. Evidence that sellers shift readily among different locations in response to price changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where purchasers, as a practical matter, can and do buy the product; that is, whether buyers residing in one area buy from the same sources as buyers residing in another area or if they buy from local sources rather than more distant sources because they find it more convenient or practical to do so. In this regard, you may consider whether an increase in prices charged by suppliers in one location would cause a substantial number of

purchasers to turn to more remote sources of supply. If so, the two locations are part of the same geographic market.

[P. 9] AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-11 C-12 (1999).

## [P. 10] REQUESTED JURY INSTRUCTION NO. 8.

### Relevant Market – Necessity of Proof

If after considering all the evidence you find that plaintiffs have proven both a relevant product market and a relevant geographic market, then you must find that plaintiffs have established the relevant market requirement and you must consider the remaining elements of their monopolization claim. If you find that plaintiffs have not proven a relevant product market, or that they have not proved a relevant geographic market, then you must find for defendant and against plaintiffs on their monopolization claim and on their attempted monopolization claim, on which I will give you instructions shortly.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-13 (1999).

## [P. 11] REQUESTED JURY INSTRUCTION NO. 9.

### Existence of Monopoly Power – Market Share

If you find that a relevant market has been proven, you should then determine whether defendant has monopoly power in that market. To determine whether defendant has monopoly power in the relevant market, plaintiffs must show that (1) defendant owns a dominant share of that market and (2) there are significant barriers to entry and that existing competitors lack the capacity to increase their output in the short run.

You have heard evidence about defendant's market share. Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that defendant's share of the relevant market is less than 50 percent, that market share by itself does not permit you to infer that the defendant has monopoly power. If you determine that defendant's share of the relevant market is 80 percent or higher, that is strong evidence of the existence of monopoly power. If you determine that defendant's market share is somewhere between 50 percent and 80 percent, you may infer the existence of monopoly power from that share, and the inference is stronger the higher defendant's market share is within that range.

You also may consider the trend in defendant's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor that you may consider is the number and size of defendant's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to defendant in the relevant

market, this may tend to indicate that defendant has monopoly power. If, on the other hand, they are numerous, vigorous, or have large [P. 12] or increasing shares in that market, this may be evidence that defendant does not have monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-14 C-15 (1999); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).

## [P. 13] REQUESTED JURY INSTRUCTION NO. 10.

### Existence of Monopoly Power – Barriers to Entry and Expansion

To establish the element of monopoly power, plaintiffs also must show that there were barriers to entry and barriers to expansion in the relevant market. A mere showing of substantial or even dominant market share alone cannot establish market power. Plaintiffs must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge defendant's high price.

Entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns. The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale.

Predatory or exclusionary conduct is not a barrier to entry and does not establish that defendant has market power. Neither is efficient, aggressive competition a barrier to entry.

You also may consider the history of entry into and exit from the market by other companies. Entry of companies into the market may indicate that defendant lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate that defendant has monopoly power.

Barriers to expansion are barriers that prevent existing competitors to increase quickly their own production in response to defendant's reduced production. Lack of excess capacity is a barrier to expansion. If existing competitors are producing at full capacity, then they may lack the ability to

increase quickly their own production in response to defendant's reduced production. On the other hand, if competitors have idle plants and can quickly respond to one firm's attempt to raise prices, then that firm would lose market share to competitors. In that instance, the firm does not have market power. In considering whether there is excess capacity, [P. 14] you should consider whether competitors have expanded production in the recent past or have the ability to expand production in the future.

If you find that defendant had monopoly power, then you must find that plaintiffs have established this requirement and you must consider the remaining elements of their monopolization claim. If you find that defendant did not have monopoly power, then you must find for defendant and against plaintiffs on their monopolization claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-14 C-15 (1999); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439-1441 (9th Cir. 1995); *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993); *United States v. Syufy Enter.*, 903 F.2d 659, 667 (9th Cir. 1990).

## [P. 15] REQUESTED JURY INSTRUCTION NO. 11.

### Willful Acquisition or Maintenance of Monopoly Power

The next element that plaintiffs must prove is that defendant willfully acquired or maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in securing or maintaining defendant's monopoly power.

To prove defendant acted willfully, plaintiffs must prove either that defendant engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of defendant in the relevant market or that this was the necessary direct consequence of defendant's conduct or business arrangements.

You may not find that a company willfully acquired or maintained monopoly power if it has acquired or maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages, such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency resulting from scientific research; or by obtaining a lawful patent; or because a change in cost or taste has driven out all but one supplier; or simply because the market is so limited that it is impossible to efficiently produce the product except by a plant large enough to supply the whole demand. The acts or practices that result in the acquisition or maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must

represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

[P. 16] If you find that defendant willfully acquired or maintained monopoly power, then you must consider whether defendant had a valid business reason for its conduct. If you find that defendant did not willfully acquire or maintain monopoly power, then you must find for defendant and against plaintiff on their monopolization claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-20 C-21 (1999).

## [P. 17] REQUESTED JURY INSTRUCTION NO. 12.

### Exclusive Contracts

Plaintiffs challenge defendant's supply contracts with Georgia-Pacific and Crown Pacific and defendant's deed restrictions as exclusive arrangements that constitute predatory or exclusionary conduct. Under an exclusive supply arrangement, a seller typically agrees to sell products for a period of time exclusively to one buyer. The supplier frequently is not allowed, for the agreed upon time period, to sell competing products from another buyer.

For defendant's supply contracts or deed restrictions to constitute predatory or exclusionary conduct, plaintiffs must have proved, by a preponderance of the evidence, that defendant's exclusive arrangements were unreasonable and substantially lessened competition in the market.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page B-113 (1999); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 856 (9th Cir. 1995).

## [P. 18] REQUESTED JURY INSTRUCTION NO. 13.

### Exclusive Contracts – Rule of Reason

To determine whether defendant's supply contracts or deed restrictions were unreasonable and substantially lessened competition in the market, you should consider the effect of the contract or deed restriction in the past, now and in the future. Only if you find that plaintiffs have proven a substantial lessening of competition in the market due to defendant's exclusive supply arrangements can you find that defendant's supply contracts or deed restrictions amounted to predatory or exclusionary conduct.

In deciding this issue, you should consider the structure of the market that defendant is in and the percentage of the market closed off by or tied up because of the exclusive supply arrangement or deed restriction. In this regard, you may consider how many companies are in the market and whether the exclusive supply arrangement or deed restriction significantly limited the opportunities for competing buyers to enter or remain in the market. If competing buyers were kept out of the market or left the market, this may tend to show the exclusive supply arrangement or deed restriction may be affecting competition in the market. On the other hand, if competing buyers are coming into the market or staying in the market, this may tend to show that the arrangement may not be affecting competition in the market.

It is not enough to look solely at the percentage of the market that is now closed to competing buyers by defendant's exclusive supply arrangement or deed restriction. Rather, you must consider the probable effect, both now and in the future, that the arrangement will have on competition in the market. If you find that defendant's exclusive supply arrangement or deed restriction does not and will not substantially lessen competition, then you must find in favor of defendant.

If you find that plaintiffs have proven that an exclusive supply arrangement has in the past, does now, or will in the future substantially lessen competition in the relevant market, then [P. 19] you must go on to consider whether the exclusive supply arrangement is nonetheless reasonable. Only unreasonable restraints of this type are unlawful.

In this regard, you should consider such factors as:

Whether competing buyers had alternative sources of supply;

The circumstances under which defendant set up this exclusive supply arrangement or deed restriction and what reasons it had for doing so;

The relative bargaining strength of the parties to the arrangement. If the parties had relatively equal bargaining strength, then the arrangement is less likely to be unreasonable;

How long in time the exclusive supply arrangement or deed restriction will be effective. If the arrangement will last a relatively short time and will not significantly limit the opportunities for competing sellers to enter or remain in the market, then it is less likely to be unreasonable; and

Any favorable effects on competition that the exclusive supply arrangement produces.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages B-114-115 (1999); *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997).

[P. 20] **REQUESTED JURY INSTRUCTION NO. 14.**

**Valid Business Reason**

If you find that defendant committed predatory or exclusionary acts or practices, then you must consider whether defendant has proven by a preponderance of the evidence that it had a valid business reason for its conduct. Examples of a valid business reason include the promotion of greater efficiency or enhanced consumer appeal. You may not second-guess whether defendant's business judgment was wise or correct in retrospect.

Plaintiffs may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.

If you find that defendant has proven that it had a valid business reason for its predatory or exclusionary acts or practices, then you must find for defendant and against plaintiffs on plaintiffs' monopolization and attempt to monopolize claim.

AUTHORITY: *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 483 (1992); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.), cert. denied, 534 U.S. 932 (2001); *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997).

## [P. 21] REQUESTED JURY INSTRUCTION NO. 15.

### Attempt to Monopolize – Elements

Plaintiffs allege that they were injured by defendant's unlawful attempt to monopolize. To win on their claim of attempted monopolization, plaintiffs must prove each of the following elements by a preponderance of the evidence:

First, that defendant engaged in predatory or exclusionary conduct.

Second, that defendant had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market; and

Fourth, that plaintiffs were injured in their business or property by defendant's predatory or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for defendant and against plaintiffs on plaintiffs' attempt to monopolize claim.

You already have been instructed on the first element of plaintiffs' attempt to monopolize claim, that the defendant engaged in predatory or exclusionary conduct. You have also been instructed regarding a valid business reason for engaging in predatory or exclusionary conduct. If you find that defendant engaged in predatory or exclusionary conduct and had no valid business reason for its conduct, then you should consider the remaining elements of plaintiffs' attempt to monopolize claim. If you find either that plaintiffs have failed to prove that the defendant engaged in predatory or exclusionary conduct, or that defendant engaged in predatory or exclusionary conduct but had a valid business reason for doing so, then you must find for defendant and against plaintiffs on plaintiffs' attempt to monopolize claim.

You also have already been instructed on two parts of the second element of plaintiffs' attempt to monopolize claim, monopoly power and the relevant market. If you find that plaintiffs [P. 22] have failed to define a relevant market, you must find for defendant and against plaintiffs on plaintiffs' attempt to monopolize claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-80 (1999); *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 483 (1992); *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997).

## [P. 23] REQUESTED JURY INSTRUCTION NO. 16.

### Specific Intent

If you find that plaintiffs have proven a relevant market, you must then decide whether defendant had the specific intent to monopolize that market. In other words, you must decide if the evidence shows that defendant acted with the conscious object of acquiring the power to control prices or to exclude or destroy competition in the relevant market.

There are several ways in which plaintiffs may prove that defendant had the specific intent to monopolize. There may be evidence of direct statements of defendant's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of defendant. You must be careful, however, to distinguish between a defendant's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Even if you decide that the evidence does not prove directly that defendant actually intended to obtain a monopoly, specific intent may be inferred from what defendant did. For example, if the evidence shows that the natural and probable consequence of defendant's conduct in the relevant market was to give defendant control over prices or to exclude or destroy competition, and that this was plainly foreseeable by defendant, then you may infer that defendant specifically intended to acquire monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-86 C-87 (1999).

[P. 24] **REQUESTED JURY INSTRUCTION NO. 17.**

**Dangerous Probability of Success**

If you find that defendant had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that defendant would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

First, the market share and power of defendant as compared to its competitors;

Second, whether defendant's share of the relevant market was increasing or decreasing;

Third, the actual or probable impact on competition of defendant's predatory or exclusionary acts or practices; and

Fourth, whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-89 (1999).

* * *

[P. 33] DATED this 14th day of February, 2003.

* * *

**[Defendant's Proposed Verdict Form (Feb. 14, 2003)]**

* * *

We, the jury, unanimously find as follows:

[P. 2] **RELEVANT MARKET**

**QUESTION 1:**

Do you find from a preponderance of the evidence that the plaintiffs have proven a relevant market?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 1 is "No," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 1 is "Yes," proceed to answer Question 2.

**QUESTION 2:**

Place an "X" next to the product description that you find by a preponderance of the evidence to be the relevant product market in this case.

**ANSWER:**

A, Alder logs: _____

B. Alder lumber: _____

C. Hardwood lumber: _____

Proceed to answer Question 3.

**MONOPOLIZATION**

**QUESTION 3:**

Do you find from a preponderance of the evidence that there are significant barriers to both entry and expansion in the relevant market?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 3 is "No," proceed to answer Question 7, omitting Questions 4, 5, and 6.

If your answer to Question 3 is "Yes," proceed to answer Question 4.

[P. 3] **QUESTION 4:**

Do you find from a preponderance of the evidence that the defendant has monopoly power in the relevant market?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 4 is "No," proceed to answer Question 7, omitting Questions 5 and 6.

If your answer to Question 4 is "Yes," proceed to answer Question 5.

**QUESTION 5:**

Do you find from a preponderance of the evidence that the defendant has willfully acquired or maintained monopoly power in the relevant market through predatory or exclusionary acts or practices?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 5 is "No," proceed to answer Question 7, omitting Question 6.

If your answer to Question 5 is "Yes," proceed to answer Question 6.

**QUESTION 6:**

Has the defendant proven a valid business reason for the acts or practices challenged by the plaintiffs?

**ANSWER:** _____ (Insert "Yes" or "No")

Proceed to answer Question 7.

[P. 4] **ATTEMPTED MONOPOLIZATION**

**QUESTION 7:**

Do you find from a preponderance of the evidence that the defendant has engaged in predatory or exclusionary acts or practices?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 7 is "No," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 7 is "No," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 7 is "No," and your answer to Question 6 is "No," proceed to answer Question 11, omitting Questions 8, 9, and 10.

If your answer to Question 7 is "Yes," proceed to answer Question 8.

**QUESTION 8:**

Do you find by a preponderance of the evidence that the defendant had a specific intent to achieve a monopoly in the relevant market?

**ANSWER:** _____ (Insert "Yes" or "No)

If your answer to Question 8 is "No," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 8 is "No," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

[P.5] If your answer to Question 8 is "No," and your answer to Question 6 is "No," proceed to answer Question 11, omitting Questions 9 and 10.

If your answer to Question 8 is "Yes," proceed to answer Question 9.

**QUESTION 9:**

Do you find by a preponderance of the evidence that there was a dangerous probability that the defendant would achieve its goal of monopoly power in the relevant market?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 9 is "No," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 9 is "No," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 9 is "No," and your answer to Question 6 is "No," proceed to answer Question 11, omitting Question 10.

If your answer to Question 9 is "Yes," proceed to answer Question 10.

**QUESTION 10:**

Has the defendant proven a valid business reason for the acts or practices challenged by the plaintiffs?

**ANSWER:** _____ (Insert "Yes" or "No")

If your answer to Question 10 is "Yes," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

[P. 6] If your answer to Question 10 is "Yes," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 10 is "No," proceed to answer Question 11.

**INJURY AND DAMAGES (IF ANY)**

**QUESTION 11:**

Do you find that any plaintiff was injured in its business or property because of the defendant's predatory or exclusionary conduct?

**ANSWER:**

A. Plaintiff Ross-Simmons Hardwood Lumber Co.:

_____ (Insert "Yes" or "No")

B. Plaintiff Confederated Tribes of Siletz Indians of Oregon:

_____ (Insert "Yes" or "No")

C. Plaintiff Smokey Point Hardwoods, Inc.:

_____ (Insert "Yes" or "No")

If your answers to all parts of Question 11 are "No," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If you answered "Yes" to any part of Question 11, proceed to answer Question 12 for only that plaintiff that you found was injured because of the defendant's predatory or exclusionary conduct.

[P. 7] **QUESTION 12:**

State the amount of damages, if any, caused by the defendant's predatory or exclusionary conduct.

A. Plaintiff Ross-Simmons Hardwood Lumber Co.:_____

B. Plaintiff Confederated Tribes of Siletz Indians of Oregon: _____

C. Plaintiff Smokey Point Hardwoods, Inc.:_____

**SO SAY WE ALL UNANIMOUSLY.**

DATED _____

_____

Presiding Juror

**[Fourth Amended Complaint (Feb. 27, 2003)]**

* * *

I. FIRST CLAIM: MONOPOLIZATION.

INTRODUCTION

1. This is an action under the federal antitrust laws, specifically Section 2 of the Sherman Act, which prohibits [P. 2] monopolization in any segment of U.S. commerce. Plaintiffs are the owners and operators of three alder sawmills in Oregon and Washington that were forced out of business in 1998-2001 as a result of defendant's illegal anti-competitive actions.

JURISDICTION AND VENUE

2. This court has jurisdiction over the federal antitrust claims in this action pursuant to 28 U.S.C. §§ 1331 and 1337. Venue in this district is proper under 28 U.S.C. § 1391, as the defendant transacts business and maintains offices within this district, and a substantial part of the events giving rise to plaintiffs' claims occurred within this district.

PARTIES

3. Plaintiff Confederated Tribes of Siletz Indians of Oregon (Siletz Tribe) is a federally recognized Indian Tribe headquartered in Siletz, Oregon and the successor in interest to the Siletz Tribe Economic Development Commission (hereafter "STEDCO"), which owns an alder sawmill in Toledo, Oregon that was operated as a joint venture in 1996-98.

4. Plaintiff Smokey Point Hardwoods, Inc. (Smokey Point) is a Washington corporation that owned and operated an alder sawmill in Arlington, Washington that closed in 1999.

5. Plaintiff Ross-Simmons Hardwood Lumber C. (Ross-Simmons) is a Washington corporation that owned and oper-

ated an alder manufacturing plant at Longview, Washington and was a 50% owner of a joint venture with the Siletz Tribe in an alder sawmill in Toledo, Oregon.

6. [P.3] Defendant Weyerhaeuser Company is a Washington multinational corporation that is one of the largest wood products companies in the world. Weyerhaeuser owns and operates six alder manufacturing plants in Oregon and Washington through its Northwest Hardwoods Division and operates a seventh alder sawmill in Vancouver, British Columbia through its Canadian subsidiary, Weyerhaeuser Canada Ltd. Weyerhaeuser is by far the largest private holder of forest land in the Pacific Northwest, owning or leasing 9.9 million acres in Oregon, Washington and British Columbia.

RELEVANT PRODUCT MARKETS:

ALDER SAWLOGS AND FINISHED ALDER LUMBER

7. Red alder (alnus rubra) is a tree species that is native to the Pacific Northwest and is the only species of alder that grows to a sufficient size to permit commercial timber production and lumber manufacture. Red alder grows predominantly in the western thirds of Oregon, Washington and British Columbia.

8. The market for alder sawlogs is economically distinct and confined geographically to the Pacific Northwest. Even within the Pacific Northwest including Oregon, Washington and British Columbia, the alder sawlog market is distinct from any other sawlog market. Alder sawlogs are segregated from other species during harvesting in the woods and trucked to production facilities specializing in the production of alder lumber products.

[P. 4] 9. The manufacturing facilities specializing in the manufacture of products from alder sawlogs are all located in the Pacific Northwest. Because of the transportation costs associated with hauling heavy logs, alder sawlogs are generally not manufactured in a sawmill further than 100

miles from the place of timber harvest. Alder sawlogs are susceptible to stain or discoloration within weeks after harvest. Lumber manufactured from stained alder sawlogs sells at a substantial discount to alder lumber without stain. Hence, significant volumes of alder sawlogs are not transshipped long distances to other regions of the U.S. or exported overseas.

10. The market for finished alder lumber, which is defined to include kiln dried and surfaced alder lumber products, is an economically distinct submarket within the larger market for hardwood lumber in the United States.

11. The market for U.S. hardwood lumber breaks down into submarkets based primarily on the characteristics of individual hardwood species in the U.S. Generally, each hardwood species has its own color, grain and workability characteristics and is priced differently from other U.S. hardwood species.

12. The submarket for finished alder lumber is economically distinct from the submarkets for other U.S. hardwoods for several reasons. First, alder has a set of workability characteristics that make it superior to other hardwoods in a number of applications. Second, finished alder lumber has a unique grading system, which includes many more grades than typical for other [P. 5] U.S. hardwoods. This alder-specific lumber grading system demonstrates industry recognition of important differences between alder and other U.S. hardwoods. Third, the pricing for finished alder lumber operates in a manner that is distinct from the pricing for other U.S. hardwoods.

## WEYERHAEUSER POSSESSES MONOPOLY POWER IN THE MARKETS FOR ALDER SAWLOGS AND FINISHED ALDER LUMBER

13. As of the fourth quarter of 1995, Weyerhaeuser possessed monopoly power in the market for alder sawlogs, con-

trolling 65% or more of the alder sawlog market. As of December 31, 2001, Weyerhaeuser's share of the alder sawlog market exceeded 75%.

14. As of the fourth quarter of 1995, Weyerhaeuser possessed monopoly power in the market for finished alder lumber, a submarket of the U.S. hardwoods market, controlling 65% or more of the finished alder lumber market. As of December 31, 2001, Weyerhaeuser's share of the market for finished alder lumber exceeded 75%.

1980-2001: WEYERHAEUSER'S WILLFUL ACQUISITION OF MONOPOLY POWER

15. In 1980, a year in which approximately 40 alder sawmills operated in Oregon and Washington, Weyerhaeuser entered the alder lumber market by acquiring Northwest Hardwoods, Inc., which owned and operated alder sawmills in Arlington and Centralia, Washington.

16. In 1985-86, Weyerhaeuser converted one of its softwood sawmills, located in Longview, Washington, into an alder sawmill.

17. During the 1980's, Weyerhaeuser made substantial capital investments in its alder sawmills at Arlington, Centralia and Longview which dramatically increased the manufacturing capacity at each of those facilities.

18. Also during the 1980's, Weyerhaeuser aggressively promoted the proprietary grading system for finished alder lumber developed by Northwest Hardwoods, Inc., which greatly expanded the number of alder lumber products in comparison to the historic grading system. Efficient production of the 10 or more Weyerhaeuser proprietary grades required significant economies of scale.

19. As Weyerhaeuser's marketing of its proprietary grading system gained acceptance in the market, many smaller alder mills throughout the Pacific Northwest closed. The

number of operating alder sawmills dropped from approximately 40 in 1980 to approximately 27 in 1990.

20. In the face of the revolutionary impact of Weyerhaeuser's proprietary grading system on the market for finished alder lumber, some of Weyerhaeuser's remaining competitors attempted to replicate Weyerhaeuser's proprietary grading system in their own facilities in an effort to compete with Weyerhaeuser..

21. In 1995, Weyerhaeuser acquired two of its largest competitors: Goodyear-Nelson Lumber Co. with an alder manufacturing plant at Sedro Woolley, Washington and Diamond [P. 7] Lumber Co.,-with alder sawmills, in Eugene and Garibaldi, Oregon and a chipping and log merchandising facility at Coos Bay, Oregon.

22. With the 1995 acquisitions of Goodyear-Nelson and Diamond Lumber, Weyerhaeuser's share of the markets for alder sawlogs and finished alder lumber exceeded 65%, a level of market power generally recognized as constituting a monopoly.

23. In September, 2000, Weyerhaeuser outbid its competition and acquired Coast Mountain Hardwoods, Inc., the only substantial producer of finished alder lumber in British Columbia and the owner of five forest licenses with the rights to most of the alder harvest on public lands in British Columbia. With this acquisition, Weyerhaeuser's shares of the markets for alder sawlogs and finished alder lumber exceeded 75%.

## WEYERHAEUSER'S PREDATORY AND EXCLUSIONARY ACTS AND PRACTICES TO ACQUIRE AND MAINTAIN ITS MONOPOLY

24. During the last two decades, Weyerhaeuser through its Northwest Hardwoods Division has pursued a course of conduct calculated to acquire monopoly power in the markets for alder sawlogs and finished alder lumber. This course of

conduct has included predatory or exclusionary practices as alleged below.

25. To acquire and maintain monopoly control in the market for alder sawlogs, Weyerhaeuser used and continues to use the following exclusionary, anti-competitive practices:

a. Systematic acquisition of competitors to obtain and/or maintain a dominant presence in each of the geographic submarkets for alder sawlogs in Oregon, Washington and British Columbia;

[P. 8] b. Continually increasing capacity at its alder sawmills in the Pacific Northwest, which increased Weyerhaeuser's consumption of alder sawlogs and its share of the sawlog market;

c. Entry into exclusive alder sawlog purchasing agreements with major industrial forest landowners in Oregon and Washington;

d. Entry into exclusive log trading arrangements under which Weyerhaeuser trades certain grades and species of softwood logs to another large industrial forest landowner in Oregon, Washington or British Columbia and receives, in addition to a trade of other softwood logs, a commitment on the part of the other industrial forest landowner to supply its alder sawlogs to Weyerhaeuser alder mills;

e. Requiring the purchasers of Weyerhaeuser timber sales or of parcels of Weyerhaeuser industrial forest land to sign contracts requiring the delivery of alder sawlogs harvested from the involved timber sale or forest land to Weyerhaeuser alder mills;

f. Acquisition of exclusive dealing contracts with the Province of British Columbia under which Weyerhaeuser holds the long-term rights to most of the alder harvested from public lands in British Columbia;

g. Using its dominant position in the alder sawlog market to drive up the prices for alder sawlogs to levels that severely reduced or eliminated the profit margins of Weyerhaeuser's alder sawmill competition;

h. Stockpiling large quantities of alder sawlogs in an effort to deprive competitors of raw materials even though this stockpiling resulted in substantial log degradation and stain which significantly reduced the value of finished lumber products produced from stained logs;

i. Utilizing the practice of communicating to sawlog suppliers in Oregon and Washington that Weyerhaeuser was prepared to exceed the log prices of its competition without regard to any ceiling price and/or insisting on the opportunity to have a "last look" and make the last bid;

[P. 9] j. Using false representations in public testimony before the Oregon State Forester to secure a special exemption from the State of Oregon's log export substitution rules in order to enable Weyerhaeuser to maintain its dominant position in the purchase of alder sawlogs from state forests in Oregon while at the same time exporting softwood logs from its own industrial forest lands in Oregon;

k. In 1997, threatening Grant Wheeler, president of Westwood Industries, then a substantial Northwest Hardwoods' customer, with the termination of that customer relationship in the event Westwood Industries proceeded with plans to build an alder sawmill near Coos Bay, Oregon;

l. Developing and implementing a proprietary log grading system unique to Weyerhaeuser with significant elements of subjectivity and opportunity for manipulation;

m. Successfully pursuing a hostile takeover of Willamette Industries, which added 600,000 acres of forest land including a significant standing alder component in western Oregon to Weyerhaeuser's ownership;

n. Using false representations in public testimony in 1990 before the Office of the Governor of the State of Washington to secure a special exemption from the State of Washington's log exports substitution rules in order to enable Weyerhaeuser to maintain its dominant position in the purchase of alder sawlogs from state forests in Washington while at the same time exporting softwood logs from its own industrial holdings in Washington; and

o. Deviating from its standard practice of transferring alder sawlogs harvested from Weyerhaeuser timberlands to defendant's alder sawmills at market value and instead providing large volumes of alder sawlogs at below market value to defendant's Longview mill to subsidize its effort throughout the second half of the 1990s to drive Ross-Simmons out of business. For the year 2000, if the substantial log subsidy is eliminated and other accounting manipulations are corrected, defendant's Longview sawmill operated at a substantial loss, thereby engaging in predatory pricing against plaintiff Ross-Simmons.

[P. 10] 26. To acquire and maintain monopoly control in the market for finished alder lumber, Weyerhaeuser used and continues to use the following exclusionary, anti-competitive practices:

a. Using vertical integration, specifically through dominance in the alder sawlog market as alleged in paragraph 26;

b. Aggressively promoting finished alder lumber as a distinctive submarket of U.S. hardwoods with greater price stability than other U.S. hardwoods; and

c. Putting financial pressure on its competitors by continuing to increase lumber production and accumulate large volumes of inventory in soft markets, particularly during the period of 1997-2000.

27. The unlawful acts and course of conduct of Weyerhaeuser in monopolizing the markets for alder sawlogs and

finished alder lumber occur in and substantially affect interstate commerce.

SILETZ TRIBE/ROSS-SIMMONS JOINT VENTURE

28. The Confederated Tribes of Siletz Indians of Oregon once owned 1.1 million acres of prime timber and recreational land encompassing a 120-mile-long, 20-mile-wide strip of coastal land constituting over 30% of the Oregon coast. In the second half of the 19th century, between unratified treaties, executive orders and forcible removals, the Siletz Tribe lost most of its aboriginal lands which were contained within the Coast Reservation.

29. In 1956, the Siletz Tribe was terminated by the federal government. Following substantial efforts over many years, Congress in 1977 passed the Siletz Restoration Act, which reinstated the federal government's recognition of the Siletz [P. 11] Tribe as a recognized sovereign tribal nation within the United States.

30. The Siletz Tribe did not regain any parts of its former reservation lands by the 1977 Act. Instead, the Secretary of Interior was-directed to report back to Congress within two years for the creation of a reservation for the Tribe. In 1980, approximately 3,600 acres of public domain timberlands in Lincoln County were transferred to the Siletz Tribe along with 36 acres in the City of Siletz to be utilized for a tribal headquarters, cemetery and other purposes.

31. At the time of the transfer of public lands to the Siletz tribe, the established federal Indian policy was one of promotion Indian tribal self-sufficiency. The government intended for Indian tribes to assume a larger financial responsibility for tribal government operations and programs. The lands transferred to the Siletz Tribe were primarily forest lands. These lands were recognized as sufficient to achieve the government's purpose only if the lands were managed prudently and the revenues from the sale of timber invested in other

profitable ventures. The lands were never intended, in and of themselves, to provide economic self-sufficiency solely from timber sales.

32. Throughout the second half of the 20th century, the majority of the high wage jobs held by Siletz tribal members on the Oregon coast were in the wood products industry. After securing the return of 3,630 acres of aboriginal forest land in Lincoln County, the Siletz Tribe embarked upon a program of [P. 12] managing those forest lands to provide logging jobs for tribal members and to generate funds to assist in the overall effort to secure economic self-sufficiency.

33. In 1994, President Clinton's Northwest Forest Plan dramatically reduced the volume of timber produced from national forests in the Pacific Northwest including the Siuslaw National Forest that encompasses large parts of Lincoln County. One effect of this public policy change was to reduce work opportunities for Siletz tribal members associated with logging in the Siuslaw National Forest.

34. The Siletz Tribe's forest lands include a significant component of alder. A long-term goal of the Siletz Tribe was to move beyond logging and log sales from its forest lands to production of finished lumber and other value added wood products. As part of this effort to produce jobs and greater economic self-sufficiency, the Siletz Tribe entered into a joint venture with Ross-Simmons Hardwood Lumber Co. to convert a softwood sawmill in Toledo, Oregon into an alder sawmill. The Siletz Tribe pursued this effort through its economic development agency, STEDCO.

35. As part of the effort to mitigate the impact on timber dependent communities of massive withdrawals of public land from any commercial timber harvest, the Northwest Forest Plan made available grants and loan monies to enterprises that would manufacture or remanufacture logs available from private lands. The Siletz Tribe invested over $1 million, including grant monies from the federal government,

to purchase a closed sawmill in [P. 13] Toledo, Oregon and then, along with Ross-Simmons, invested substantial additional funds in converting that facility into an alder sawmill to be operated as a joint venture.

36. The Siletz Tribe entered into the joint venture with Ross-Simmons because of that company's reputation, experience and expertise in the manufacture of finished alder lumber. Ross-Simmons had owned and operated an alder sawmill complex at Longview, Washington since 1962, which, until its closure in May, 2001, made it the longest running alder manufacturing plant in the Pacific Northwest.

37. Based upon extensive analysis preceding the decision to enter into the joint venture, the Siletz Tribe and Ross-Simmons believed there was a more than adequate alder lumber supply within a 100-mile radius of Toledo, Oregon to supply the new facility. The Siletz Tribe and Ross-Simmons anticipated that significant alder volume would be generated from Georgia Pacific's adjacent forest lands, a volume that historically had been made available on a competitive bid basis.

38. However, just as the Siletz Tribe/Ross-Simmons Joint Venture was starting up operations in early 1996, Weyerhaeuser entered into an unprecedented exclusive dealing arrangement with Georgia Pacific, which removed most of that company's alder timber from the competitive marketplace.

39. Also in early 1996, Weyerhaeuser's log buyers immediately raised the price for logs in reasonable proximity to Toledo, Oregon by 30% or more, all in an attempt to monopolize the [P. 14] log market in the area and to drive the Siletz Tribe/Ross-Simmons Joint Venture out of business.

40. Weyerhaeuser's tactics severely disrupted the lag supply available to the Siletz Tribe/Ross-Simmons Joint Venture and imposed artificially high log prices on the raw materials that the Joint Venture was successful in securing.

As a result of Weyerhaeuser's predatory and exclusionary behavior, as alleged in paragraphs 25, 26, 38 and 39, the Joint Venture lost money in 1996, 1997 and the first half of 1998 before shutting down in August, 1998.

41. In the second half of 1998, Weyerhaeuser sold approximately 4,200 acres of forest land with significant alder inventory to third parties, all of which was located within a reasonable haul distance of Toledo, Oregon. With the intent to exclude the alder on those lands from the market until 2002 or later, Weyerhaeuser included in all sales transactions a deed restriction limiting the volume of alder harvest on any parcel in any one year and requiring its delivery and sale to Weyerhaeuser's Eugene mill at below market prices. The effect of these restrictions was to virtually guarantee that the alder so restricted would not be harvested by a prudent landowner until the restriction expired in January 2002.

42. The Siletz Tribe's alder sawmill facility has lain idle since its closing in 1998, but has been maintained intact in the hope that market conditions would allow a return to the business of wood products manufacturing. Since the mill's 1998 closure, [P. 15] however, Weyerhaeuser's control of the alder sawlog market within a reasonable haul distance of Toledo, Oregon and its maintenance of artificially high alder sawlog prices from 1998-2001 have made a return to the alder sawmill business by the Siletz Tribe financially infeasible.

43. Between its lost investment, operating losses and loss of reasonably anticipated profits, the Siletz Tribe/Ross-Simmons Joint Venture suffered approximately $6.5 million in damages in 1996-98.

SMOKEY POINT HARDWOODS, INC.

44. In July, 1996, the alder sawmill operated by Smokey Point Hardwoods, Inc. in Arlington, Washington burned to the ground. Efforts to rebuild the plant occurred throughout

parts of 1997 and 1998, but were delayed due to lack of capital.

45. The plant was completed by early 1999 and Smokey Point re-entered the alder log market with the intention of producing finished alder lumber. However, in anticipation of Smokey Point's re-entry into the market, Weyerhaeuser in late 1998 or early 1999 secured an exclusive dealing arrangement with the area's single largest forest landowner, Crown Pacific Ltd. This action removed from open market competition Crown Pacific's significant quarterly alder log production in Whatcom and Skagit Counties and on the Olympic Peninsula.

46. In addition to locking up the raw material available from Crown Pacific, Weyerhaeuser log buyers in Northwest Washington intentionally bid up the price for the remaining alder [P. 16] log production by more than 30% above historic highs, all in an effort to force its competition out of business.

47. The combination of Weyerhaeuser's exclusive dealing arrangement with Crown Pacific, its orchestration of an unprecedented run-up in alder log prices in northwest Washington and its use of other exclusionary practices as alleged in paragraphs 25 and 26 rendered Smokey Point's operation so unprofitable that the mill was shut down in late 1999.

48. Between its lost investment, operating losses and loss of reasonably anticipated profits, Smokey Point suffered damages of approximately $2.6 million.

ROSS-SIMMONS HARDWOOD LUMBER CO.

49. Ross-Simmons Hardwood Lumber Co. owned and operated an alder sawmill complex at Longview, Washington from 1962 to May, 2001, when the facility was permanently closed.

50. Over the course of two decades ending in 2001, Weyerhaeuser pursued a course of conduct designed to force

Ross-Simmons out of business as alleged in paragraphs 25 and 26 above.

51. Weyerhaeuser's predatory and exclusionary conduct over the course of two decades caused Ross-Simmons to suffer significant financial losses and ultimately forced the permanent closure of the mill in May, 2001.

52. Between its lost investment, operating losses and loss of reasonably anticipated profits, Ross-Simmons Hardwood Lumber Co. suffered damages of approximately $27.5 million.

[P. 17] HARM TO COMPETITION

53. Over the last 20 years, Weyerhaeuser's aggressive acquisition of its competition and its intentional use of anti-competitive, exclusionary actions as alleged above have caused a substantial loss of competition in the alder industry, including the loss of plaintiffs' operations.

54. Weyerhaeuser's past behavior shows that sawlog prices will drop significantly once defendant secures complete control of the alder sawlog supply in any regional submarket.

55. Unless checked by a court action, additional competitors of Weyerhaeuser will be forced out of the alder sawmill business, and Weyerhaeuser will be in a position to force sawlog prices down significantly. This will result in substantial losses in the value of standing alder timber on both public and private lands throughout the Pacific Northwest.

56. There is market evidence that Weyerhaeuser's monopoly in the alder industry is already causing industrial and small woodland owners not to plant alder seedlings because of the expectation that alder sawlog prices will fall as Weyerhaeuser gains complete control of the alder manufacturing capacity in the region. This is a loss to the ecosystem as well because alder is native to the region, fast growing, a natural nitrogen fixer and appropriate for certain soil types through-

out the Pacific Northwest, including the standing alder on the Siletz Tribe's forest lands in Lincoln County, Oregon.

[P. 18] II. SECOND CLAIM: ATTEMPTED MONOPOLIZATION.

57. Plaintiffs reallege paragraphs 1 through 56.

58. Weyerhaeuser is attempting to monopolize the markets for alder sawlogs and finished alder lumber through the use of the predatory and exclusionary practices alleged in paragraphs 25 and 26 above.

59. If Weyerhaeuser is allowed to continue the unlawful acts and course of conduct alleged in paragraphs 25 and 26 above, there is a dangerous probability that Weyerhaeuser will successfully secure monopoly power in the markets for alder sawlogs and finished alder lumber.

CONCLUSION

60. The Siletz Tribe, Smokey Point Hardwoods, Ross-Simmons Hardwood Lumber Co. and a declining number of other alder sawmill operators have competed with Weyerhaeuser for the supply of alder sawlogs and the opportunity to manufacture finished alder lumber in the Pacific Northwest.

61. Weyerhaeuser possesses monopoly power, or has a dangerous probability of possessing monopoly power, in the markets for alder sawlogs and finished alder lumber.

62. Weyerhaeuser's conduct, as set out above and in particular in paragraphs 25 and 26, injured plaintiffs. As a direct and proximate result of this illegal anti-competitive conduct, plaintiffs are no longer engaged in the alder sawmill business and suffered substantial lost investment, profits and operating losses.

[P. 19] REQUESTED RELIEF

63. The Siletz Tribe and Ross-Simmons Hardwood Lumber Co. on behalf of the Siletz Tribe/Ross-Simmons Joint Venture seek damages of $6.5 million, which under the federal antitrust laws are trebled to $19.5 million.

64. Smokey Point Hardwoods, Inc. seeks damages of $2.6 million, which under the federal antitrust laws are trebled to $7.8 million.

65. Ross-Simmons Hardwood Lumber Co. seeks damages of $27.5 million, which under the federal antitrust laws are trebled to $82.5 million.

WHEREFORE, plaintiffs pray for judgment on their Sherman Act antitrust claims against Weyerhaeuser for treble damages in the amount of $109.8 million, and for their reasonable attorney's fees and costs.

DATED this 27th day of February, 2003.

HAGLUND, KIRTLEY, KELLEY & HORNGREN LLP

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**[Stipulated Glossary of Terms (Apr. 1, 2003)]**

* * *

The parties to this lawsuit stipulate to the following definitions of terms related to the forest products industry.

## I. TERMS RELATED TO FOREST PRODUCTS

**Abrasive Planer.** A planer that utilizes a sanding belt as opposed to knives to plane the lumber.

**Band Saw.** A saw consisting of a continuous piece of flexible steel with teeth on one or both sides, used to cut logs into cants and also to rip lumber. Not all manufacturers utilize a band saw to rip lumber.

[P.2] **Barker (also known as a Debarker).** A tool or machine used for removing the bark from logs before the logs are processed.

**Bin Sorter.** A mechanical system in which lumber is sorted by length, width and/or thickness by dropping or ejecting pieces of lumber into individual bins or compartments.

**Board Foot.** A basic unit of measurement for lumber. One board foot is equal to a 1 inch board, 12 inches in width and 1 foot in length.

**Camp Run.** The total log output of a logging operation, unsorted by grade.

**Cant.** A large slab cut from a log at the head rig usually having one or more rounded edges and designed for further processing by other saws.

**Chip.** A specified small piece of wood without bark used to make pulp. Chips are generally of a uniform size and are larger and courser than sawdust.

**"Come Along" Species.** A species within a stand of timber that is typically cut as a consequence of a harvest of a dominant species.

**Conifers.** Trees that bear cones. Includes most commercial lumber species: Douglas fir, spruce, cedar, pine, hemlock. Also called softwoods and evergreens.

**Cruise.** A survey of a forest to sample the quantity, size, species, and quality of trees present, as well as to note terrain, soil conditions, drainage, and other data relevant to forest management.

**Deciduous.** Trees that lose their leaves, usually broadleafed and usually classified as hardwoods.

**Deck.** The piles where logs are stored in the Log Yard.

**"Direct Selling."** Selling direct to the end user rather than through an intermediary such as a lumber broker or wholesaler.

**Dominant Species.** The species that is perceived as having the primary value and volume within a stand of timber.

[P.3] **Douglas Fir.** A softwood found throughout the western United States and Canada, that grows most abundantly in the Pacific Northwest.

**Dry Kiln.** A chamber in which wood products are seasoned by applying heat and withdrawing moist air.

**Edger.** A piece of sawmill machinery used to saw slabs or cants, squaring the edges and ripping the cants into lumber.

**Face.** The side of a piece of lumber showing the better quality or appearance.

**Fall Down.** A piece of lumber that lacks yield to qualify for finished lumber grading.

**Grade.** The designation of the quality of a manufactured piece of wood or of logs. Within the hardwood industry, grade is determined by a set of criteria related to appearance of the lumber or log that differentiates between higher and lower quality products.

**Grade Yield.** The grade mix of lumber that is produced from the process of manufacturing logs into lumber.

**Grain.** The direction, size, arrangement or appearance or quality of the fibers in wood or lumber.

**Green.** Freshly sawn or undried lumber.

**Green Chain.** A moving chain or belt on which green lumber is transported from saws in a mill. The lumber is typically pulled from the chain by workers and stacked according to size, length, species or other criteria.

**Hardwood.** A term referring to any variety of broad-leafed deciduous tree, and the lumber produced from those trees.

**Head Rig.** The principal saw in a sawmill in which logs are first cut into cants before being sent on to other saws for further processing.

**Indigenous.** In wood technology, a species of wood native to a particular area or region.

**"KD."** Typically referring to kiln-dried lumber which has been seasoned in a kiln to a predetermined moisture content.

[P.4] **Kerf.** The width of a saw cut.

**Landing.** The place to which logs are yarded or collected for sorting, loading and transportation from the woods.

**Log Scaling.** The act of measuring log volume.

**Log Stacker.** A machine used to stack logs in piles.

**Log Staining.** Discoloration on or in logs caused by decreased internal moisture levels. The potential for staining can be minimized for a time by submerging the logs in water or sprinkling the logs with water. The staining process in logs is slower during the colder winter months and faster in the warmer summer months.

**Log Yard.** The portion of a sawmill devoted to the storage of logs prior to processing.

**Lumber.** A wood product of a sawmill.

**Lumber Broker.** A person who acts as an intermediary between a lumber seller and buyer, usually charging a commission.

**Lumber Stacker.** A person who stacks lumber in piles. Also used to refer to a machine used to stack lumber in piles.

**Lumber Wholesaler.** A distributor who purchases lumber from a lumber manufacturer for sale to a lumber retailer, furniture manufacturer, or other end user of the lumber.

**MBF.** The standard abbreviation for one thousand board feet.

**MMBF.** The standard abbreviation for one million board feet.

**Optimization.** Refers to increasing lumber recovery from the log.

**Pallet.** A wood or metal platform on which material can be stacked to facilitate mechanical handling, moving, and storage.

**Pallet Stock.** Lumber used to make material-handling pallets.

**Per Thousand.** Short for per thousand board feet (often abbreviated as MBF), a unit of measurement for timber and finished products.

**Planer.** A machine used to surface rough lumber using a series of knives.

[P.5] **Proprietary Grades.** Designations of the quality of manufactured lumber as determined by utilizing a particular company's or a particular mill's own set of grading criteria.

**Pulpwood.** Wood usually converted to chips for manufacturing pulp and paper products.

**Raft.** Floating assembly of logs bound together for storage or transport by water.

**Recovery (also known as Overrun).** In the context of the manufacture of lumber, Recovery refers to the measurement of the volume of lumber produced divided by the volume of logs used to produce that lumber. For example, if 1,000 MBF (1 million board feet) of logs are manufactured into 1,500 MBF (1.5 million board feet) of lumber, the Recovery is 1.5 (1,500 MBF lumber divided by 1,000 MBF logs).

**Red Alder.** A deciduous tree that grows in Alaska, California, Coastal Canada, Idaho, Oregon, and Washington. Different species of alder besides red alder exist in other parts of the world.

**Rip / Ripping.** To cut a board on two sides to remove imperfections, which could include wane, splits or knots.

**Round Saw.** A circular piece of flexible steel with a series of teeth used to rip lumber.

**S2S.** Lumber that has been planed to provide two smooth sides.

**Sander.** A machine designed to smooth wood and remove saw and lathe marks and other imperfections.

**Scale.** A measure of the volume of wood in a log or logs, usually expressed in board feet.

**Scribner.** A measure of volume of potential board feet in logs, usually expressed in board feet.

**Seasoning.** Removing moisture from green wood to improve its manufacturing serviceability.

**Shook.** See Pallet Stock.

**Softwood.** A general term referred to any variety of trees having narrow needle-like leaves, generally conifers.

[P.6] **Sorter.** A mechanical device that sorts lumber for thickness, width or length by dropping or ejecting pieces of lumber into separate compartments.

**"Square Up."** To cut lumber at a ninety degree angle creating square edges.

**Stand.** An identifiable group or trees or a section of timber occurring in a particular area.

**Standing Timber.** Trees that have not been cut.

**Sticker.** A narrow strip of wood placed between layers of lumber to help air circulate in drying the lumber either in a kiln or by air seasoning.

**Stumpage.** Standing timber.

**Transfer Price.** The price at which intra-company trades are consummated.

**Trim.** The amount of extra length allowed when bucking logs or sawing green lumber to compensate for end checking and damage in transit, and for "squaring up" in the mill.

**Trim Saw.** A piece of equipment used to "square up" the edges of the lumber.

**"Thick and Thin."** Lumber which is cut to a thickness that does not meet the required specifications.

**Veneer.** A thin sheet of wood, rotary cut, sliced or sawed from logs and used as interior ply or decorative face.

**Wane.** Bark or lack of wood on the edge or corner of a piece of lumber.

**Yarder.** A machine used to bring logs from the cutting area to the landing.

* * *

**[Stipulated Facts (Apr. 1, 2003)]**

* * *

The parties to this lawsuit stipulate to the following facts.

**Parties**

1. Plaintiff Ross-Simmons Hardwood Lumber Co. ("Ross-Simmons") is a Washington corporation that owned and operated a hardwood manufacturing facility in Longview, Washington from 1962 through May 2001.

2. Plaintiff Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe") is a federally recognized Indian tribe headquartered in Siletz, Oregon. The Siletz Tribe is the successor in interest to the Siletz Tribe Economic Development Commission ("STEDCO") which [P. 2] owned a softwood sawmill in Toledo, Oregon ("the Toledo mill") that was converted to manufacture hardwood lumber in late 1995.

3. Defendant Weyerhaeuser Company is a Washington corporation. It was founded in the Pacific Northwest in 1900 by Frederick Weyerhaeuser and is headquartered in Washington state. Weyerhaeuser's business known as "Northwest Hardwoods" is one of the largest manufacturers of hardwood lumber in the world.

4. Through its Northwest Hardwoods business, Weyerhaeuser currently owns and operates thirteen hardwood sawmills in nine states and British Columbia, Canada, including seven hardwood sawmills in Oregon, Washington, and British Columbia.

**Hardwoods Compared to Softwoods**

5. There is a difference between hardwood trees and softwood trees. Hardwoods are one of the botanical groups of trees with broad leaves that fall during the autumn and winter months. Softwoods, also known as conifers, have needlelike leaves that do not fall on a seasonal basis. Pine

trees are an example of a softwood and maple trees are an example of hardwood.

6. Hardwood logs are converted by mills into hardwood lumber, chips, and other products. Softwood logs are converted by mills into softwood lumber, chips, and other products.

7. Throughout the United States, there are several species of hardwoods manufactured into lumber including (in alphabetical order): alder, aspen, basswood, beech, black walnut, cherry, cottonwood, hard maple, hickory, gum, red elm, red oak, soft maple, tulipwood, walnut, white oak, willow, and yellow birch.

8. Hardwood lumber manufactured in the United States is sold throughout the United States and also throughout the world for international consumption. Hardwood lumber manufactured internationally is also imported into the United States for domestic consumption.

9. Hardwood lumber can be used for a variety of end uses, including pallets, furniture, cabinetry, millwork, molding, and specialty wood products including picture frames, paint brush handles, and musical instruments.

[P. 3] **Hardwood Lumber Production in the Pacific Northwest**

10. In the Pacific Northwest, there is production of the following types of hardwood lumber, including: red alder, maple, birch, and oak.

11. Red alder is the predominant type of hardwood lumber produced in the Pacific Northwest.

12. During harvest in the Pacific Northwest, hardwood logs, including alder, maple, and others, are typically sorted from softwood species and then trucked to facilities specializing in the production of hardwood lumber, chips, and other products.

13. Weyerhaeuser's hardwood mills in the Pacific Northwest are designed to process hardwood logs into lumber, chips, and other products. During the parties' years of operation, Ross-Simmons, STEDCO and Weyerhaeuser's processing of alder logs took place only in the Pacific Northwest.

14. Red alder trees are typically, but not always, harvested within 100 miles of the sawmill in which it is processed into hardwood lumber, chips, and other products.

15. On an annual basis since 1995, less than 1% of the alder sawlog harvest in the Pacific Northwest has been exported for international consumption and processing.

**Operational History of Ross-Simmons**

16. Prior to its shutdown in May 2001, a sawmill had operated at the Ross-Simmons industrial site since 1948. Ross-Simmons began operation as a company in 1962 following the purchase of L.R. Smith Lumber Company by the Ross and Simmons families, who owned Ross-Simmons on a 50-50 basis.

17. As reported in its financial statements, Ross-Simmons Hardwood Lumber Company's lumber sales (MBF), revenues, net worth, pretax income, taxes, and net income after tax for the period of 1967 through December 31, 2001, are listed below:

# [P. 4] Ross-Simmons Hardwood Lumber Company

| Fiscal Year | Lumber Sold (MBF) | Revenue | Net Worth | Pretex Income | Tax | Net Income After Tax |
|---|---|---|---|---|---|---|
| Yr. Ended 2/29/1967 | 13,069 | $1,524,529 | $382,765 | unavail. | unavail. | $123,346 |
| Yr. Ended 2/29/1968 | 10,046 | 1,310,502 | 445,736 | $103,934 | $39,000 | 64,934 |
| Eleven Months Ended 1/31/1969 | 10,779 | 1,594,285 | 535,044 | 161,741 | 72,396 | 89,345 |
| Eleven Months Ended 12/31/1970 | 8,997 | 1,782,155 | 712,881 | 205,682 | 92,557 | 113,125 |
| Twelve Months Ended 1/31/1971 | 9,921 | 1,946,552 | 678,027 | 228,693 | 102,911 | 125,782 |
| Yr. Ended 1/31/1972 | 12,212 | 2,477,473 | 809,418 | 287,052 | 125,661 | 161,391 |
| Yr. Ended 1/31/1973 | 13,371 | 2,944,227 | 958,801 | 271,172 | 121,789 | 149,383 |
| Yr. Ended 1/31/1974 | 13,735 | 3,677,373 | 1,032,029 | 287,628 | 0 | 287,628 |
| Yr. Ended 1/31/1975 | 11,276 | 4,517,469 | 1,233,113 | 381,482 | 0 | 381,482 |
| Yr. Ended 1/31/1976 | 12,278 | 5,529,110 | 952,718 | 201,087 | 0 | 201,087 |
| Yr. Ended 1/31/1977 | 12,950 | 6,457,302 | 1,060,690 | 257,972 | 0 | 257,972 |
| Yr. Ended 1/31/1978 | 13,128 | 6,916,801 | 996,862 | 49,144 | 5,000 | 44,144 |
| Yr. Ended 1/31/1979 | 13,908 | 8,213,076 | 1,254,900 | 408,038 | 150,000 | 258,038 |
| Yr. Ended 1/31/1980 | 12,722 | 8,816,925 | 1,370,519 | 136,888 | 21,269 | 115,619 |
| Yr. Ended 1/31/1981 | 9,167 | 7,805,996 | 1,712,710 | 548,186 | 205,995 | 342,191 |
| Yr. Ended 1/31/1982 | 9,020 | 6,997,693 | 1,663,585 | -94,925 | -45,800 | -49,125 |
| Yr. Ended 1/31/1983 | 7,657 | 7,942,699 | 1,764,302 | 148,647 | 37,236 | 111,411 |
| Yr. Ended 1/31/1984 | 13,212 | 9,622,115 | 654,957 | 18,251 | -7,404 | 25,655 |
| Yr. Ended 1/31/1985 | 21,987 | 14,447,464 | 748,416 | 72,459 | -21,000 | 93,459 |
| Yr. Ended 1/31/1986 | 18,449 | 11,882,292 | 405,814 | -373,746 | 31,144 | -342,602 |

| Fiscal Year | Lumber Sold (MBF) | Revenue | Net Worth | Pretex Income | Tax | Net Income After Tax |
|---|---|---|---|---|---|---|
| Yr. Ended 1/31/1987 | 26,066 | 15,029,315 | 388,181 | 277,263 | 0 | 277,263 |
| Yr. Ended 1/31/1988 | 24,642 | 16,282,049 | 527,297 | 191,844 | 0 | 191,844 |
| Yr. Ended 1/31/1989 | 27,855 | 18,592,946 | 804,669 | 630,875 | 196,161 | 434,714 |
| Yr. Ended 1/31/1990 | 29,953 | 18,832,086 | 1,486,295 | 965,409 | 246,100 | 719,309 |
| Eleven Months Ended 12/31/1990 | 27,025 | 14,993,132 | 1,591,216 | 132,421 | 27,500 | 104,921 |
| Yr. Ended 12/31/1991 | 30,278 | 19,923,711 | 2,175,274 | 903,727 | 319,669 | 584,058 |
| Yr. Ended 12/31/1992 | 35,920 | 21,111,506 | 2,560,112 | 586,481 | 201,641 | 384,840 |
| Yr. Ended 12/31/1993 | 40,044 | 24,209,115 | 3,772,241 | 2,110,928 | 738,799 | 1,372,129 |
| Yr. Ended 12/31/1994 | 45,949 | 28,789,198 | 3,996,701 | 1,142,742 | 478,282 | 664,460 |
| Yr. Ended 12/31/1995 | 52,723 | 36,897,685 | 5,735,019 | 2,584,545 | 822,227 | 1,762,318 |
| Yr. Ended 12/31/1996 | 58,607 | 38,193,330 | 5,978,690 | 604,603 | 132,782 | 471,821 |
| Consolidated 12/31/1997 | 47,064 | 37,204,420 | 6,816,977 | 1,287,880 | 449,593 | 838,287 |
| Consolidated 12/31/1998 | 36,380 | 23,623,180 | 4,604,892 | -2,212,085 | 0 | -2,212,085 |
| Consolidated 12/31/1999 | 37,644 | 23,664,950 | 1,098,687 | -1,333,982 | 0 | -1,333,982 |
| Yr. Ended 12/31/2000 | 34,000 | 22,479,138 | 172,676 | -926,009 | 0 | -926,009 |

[P. 5] 18. In 1997, Ross-Simmons borrowed approximately $1.5 million to pay legal expenses related to the estate of Mr. Sidney Simmons and to fund the buyout of some of the Simmons family, which resulted in John Simmons becoming the 100% owner of Ross-Simmons either directly or through a trust. John Simmons signed a promissory note to the company for approximately $1.5 million. In 1999, Ross-Simmons cancelled that promissory note owed by John Simmons to Ross-Simmons.

19. In 1996, the Ross-Simmons' payroll was $6.3 million. In 2000, Ross-Simmons employed 170 workers in Cowlitz County. Northwest Hardwoods' Longview mill employed 187 workers in Cowlitz County.

20. Ross-Simmons shut down permanently in May 2001.

21. Much of Ross-Simmons' equipment was sold at auction on September 20, 2001. The auction generated net proceeds of $469,408. As of November 1, 2001, Ross-Simmons owed U.S. Bank approximately $2.25 million. As of August 31, 2001, Ross-Simmons owed unsecured creditors a total of $1,795,120. Ross-Simmons still owns the industrial site on which its mill was located.

22. In approximately September 1999, Global Ventures, a consulting firm, was hired by Ross-Simmons to help with their operations or to locate a possible buyer. Global Ventures was involved with Ross-Simmons until its closure in May 2001.

23. In 1999, Ross-Simmons had discussions with Washington Alder LLC about the possibility of merging with that company and jointly participating in the acquisition of Coast Mountain Hardwoods. Although such a transaction was never completed, that was not because of anything done by Weyerhaeuser.

**Operational History of Ross-Simmons/ STEDCO Joint Venture**

24. In August 1995, the Siletz Tribe and Ross-Simmons began negotiations relating to the formation of a joint venture to operate a hardwood sawmill on land owned by the Siletz Tribe [P. 6] in Toledo, Oregon. A Joint Venture Agreement between Ross-Simmons and STEDCO, the economic development arm of the Siletz Tribe, was signed in November 1995.

25. The Joint Venture Agreement, which had an initial term of five years, included provisions for division of profits and for termination of the agreement.

26. The Joint Venture was terminated in September 1998.

27. The Siletz Tribe owns the assets previously owned by STEDCO, which has been dissolved. The Siletz Tribe has not operated the facility as a sawmill since the Joint Venture shut down in August 1998.

**Operational History of Northwest Hardwoods**

28. Northwest Hardwoods, headquartered in Portland, began operations in 1967. In 1980, Northwest Hardwoods became part of Weyerhaeuser Company. As a business of Weyerhaeuser, Northwest Hardwoods has retained its name and general management structure.

29. Northwest Hardwoods currently operates thirteen hardwood sawmills in nine states or provinces in two countries. At its mills, Northwest Hardwoods produces over fifteen types of hardwood lumber, including red oak, elm, white oak, soft maple, cherry, ash, yellow poplar, red alder, pacific coast maple, pacific coast birch, cottonwood, basswood, hickory, and walnut.

30. Northwest Hardwoods operates five sales offices in the United States, including offices in: Portland, Oregon; Titusville, Pennsylvania; Federal Way, Washington; Dor-

chester, Wisconsin; and Little Rock, Arkansas. Northwest Hardwoods operates other sales offices in Europe and Asia.

31. The Northwest Hardwoods hardwood sawmills in the Pacific Northwest are located in: Delta, British Columbia; Sedro Woolley, Washington; Arlington, Washington; Centralia, Washington; Longview, Washington; Garibaldi, Oregon; and Eugene, Oregon.

32. In 1980, Weyerhaeuser acquired Northwest Hardwoods, Inc., which then owned and operated hardwood sawmills in Arlington and Centralia, Washington.

[P. 7] 33. In 1985-86, Weyerhaeuser converted a softwood sawmill that it owned in Longview to manufacture hardwood lumber.

34. As of the date of its initial production of hardwood lumber in 1986, Weyerhaeuser had invested approximately $3.1 million in conversion and other related improvements at its Longview sawmill.

35. In 1995, Weyerhaeuser purchased three hardwood sawmills from two of its competitors: Goodyear-Nelson Lumber Company and Diamond Lumber Company. At the time of these acquisitions, Goodyear-Nelson was operating a hardwood sawmill in Sedro Woolley, Washington, and Diamond Lumber Company was operating hardwood sawmills in both Eugene and Garibaldi, Oregon.

36. In September 2000, Weyerhaeuser acquired Coast Mountain Hardwoods, Ltd., a hardwood sawmill located in Delta, British Columbia. With the acquisition, Weyerhaeuser acquired five forest licenses with rights to a portion of the alder and other hardwoods harvested from a portion of provincial forest lands in British Columbia. The five forest licenses cover the Fraser, Sunshine Coast, Kingcome, Strathcona and Arrowsmith timber supply areas in British Columbia. Four of the forest licenses have original terms of 15 years; one (Fraser) has an original term of 20 years.

These licenses expire on: January 1, 2009; July 4, 2011; December 31, 2011; August 8, 2011; and May 24, 2011, respectively.

37. Weyerhaeuser refers to the Coast Mountain facility as its Delta sawmill. Delta is a town just south of Vancouver, British Columbia.

38. During the late 1960s and early 1970s, Northwest Hardwoods began developing a proprietary grading system for its finished alder lumber products.

39. From 1995 through 2001, Northwest Hardwoods produced less than 5% of the total volume of hardwood lumber produced in the United States.

[P. 8] 40. Weyerhaeuser operates a business called "Western Timberlands" which manages timberlands owned by Weyerhaeuser in the Pacific Northwest. Weyerhaeuser supplies hardwood logs from these company-owned timberlands to its hardwood sawmills in the Pacific Northwest.

41. From 1990 through 2000, Weyerhaeuser made the following capital investments in its hardwood sawmills in the Pacific Northwest:

| Year | Arlington | Centralia | Eugene | Garibaldi | Sedro W | Longview |
|---|---|---|---|---|---|---|
| 1990 | $ 914,552 | $ 471,352 | | | | $ 1,247,718 |
| 1991 | 345,900 | 333,777 | | | | 653,309 |
| 1992 | 673,021 | 432,271 | | | | 191,201 |
| 1993 | 632,160 | 1,164,352 | | | | 747,648 |
| 1994 | 1,678,979 | 2,415,332 | | | | 1,115,282 |
| 1995 | 844,678 | 3,751,960 | $ 125,840 | | $ 802,188 | 3,296,928 |
| 1996 | 6,783,821 | 2,113,539 | 6,026,647 | $1,252,421 | 1,094,057 | 2,779,401 |
| 1997 | 898,488 | 3,082,295 | 3,810,091 | 2,583,592 | 2,909,876 | 2,790,965 |
| 1998 | 677,483 | 1,142,563 | 619,071 | 768,149 | 2,979,861 | 1,626,220 |
| 1999 | 834,052 | 1,115,750 | 2,511,777 | 17,504 | 1,229,349 | 2,012,708 |
| 2000 | 387,609 | 227,590 | 508,031 | 31,750 | 251,933 | 1,260,162 |

42. For the period of 1990 through 2001, the annual lumber production in thousand board feet (MBF) at Weyerhaeuser's hardwood sawmills in the Pacific Northwest is set out below:

| Year | Arlington | Centralia | Eugene | Garibaldi | Sedro W | Longview | Delta | Total |
|---|---|---|---|---|---|---|---|---|
| 1990 | 48,622 | 46,342 | | | | 54,876 | | 149,840 |
| 1991 | 48,288 | 47,633 | | | | 57,333 | | 153,254 |
| 1992 | 50,627 | 53,337 | | | | 61,853 | | 165,817 |
| 1993 | 51,765 | 54,765 | | | | 67,428 | | 173,958 |
| 1994 | 57,526 | 55,298 | | | | 68,645 | | 181,469 |
| 1995 | 57,416 | 58,178 | 12,754 | 4,873 | 12,316 | 76,158 | | 221,695 |
| 1996 | 55,552 | 59,519 | 51,558 | 20,858 | 19,105 | 61,252 | | 267,844 |
| 1997 | 59,403 | 58,205 | 51,865 | 24,925 | 22,696 | 55,863 | | 272,957 |
| 1998 | 53,178 | 54,836 | 52,527 | 31,356 | 24,291 | 45,362 | | 261,550 |
| 1999 | 54,881 | 62,234 | 58,843 | 35,578 | 27,771 | 53,742 | | 293,049 |
| 2000 | 54,325 | 59,221 | 63,647 | 33,290 | 33,167 | 55,383 | | 308,645 |
| 2001 | 52,082 | 57,963 | 61,899 | 27,988 | 31,346 | 55,185 | 40,150 | 326,613 |

43. In 1996, Georgia-Pacific sold 4.16 million board feet of hardwood logs to Weyerhaeuser's Eugene mill, which accounted for 12% of the annual log consumption of that mill.

[P. 9] 44. In 1997, Georgia-Pacific sold 2.66 million board feet of hardwood logs to Weyerhaeuser's Eugene sawmill, which accounted for 7% of the annual log consumption of that mill.

45. In 1998 and 1999, Weyerhaeuser and Georgia-Pacific entered into one-year log contracts under which Weyerhaeuser agreed to sell softwood pulplogs to G-P's pulp mill in Bellingham, Washington and G-P agreed to sell hardwood sawlogs to Weyerhaeuser's Eugene and Garibaldi sawmills.

46. In 1998, Georgia-Pacific sold 3.2 million board feet of hardwood logs to Weyerhaeuser's Eugene sawmill, which accounted for 9% of the annual log consumption of that mill. A portion of these sales was subject to the log purchase agreement described in paragraph 47.

47. In 1999, Georgia-Pacific sold 5.03 million board feet of hardwood logs to Weyerhaeuser's Eugene sawmill, which accounted for 13% of the annual log consumption. A portion of these sales was subject to the log purchase agreement described in paragraph 47.

48. In 1995, Weyerhaeuser acquired approximately 9,500 acres of forest land in Oregon as part of its acquisition of Diamond Wood Products.

49. During 1997 through 1999, Weyerhaeuser sold the 9,500 acres acquired as part of the agreement with Diamond Wood Products to a number of different individuals and entities. On sales of approximately 4,200 acres, beginning in December 1998, the parties to the individual agreements committed that Northwest Hardwoods would have, for a period of three years, a right of first refusal to any sale of hardwood logs originating from these lands.

50. Westwood Lumber Company opened a hardwood sawmill in 1998 near Reedsport, Oregon. Construction on this sawmill began in 1997, and the mill began purchasing hardwood sawlogs in 1998.

[P. 10] 51. Washington Alder LLC is a hardwood sawmill located in Mt. Vernon, Washington. It began purchasing hardwood logs in late 1998 and producing hardwood lumber in early 1999.

DATED this 1st day of April, 2003

**Respectfully submitted,**

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# EXCERPTS OF RELEVANT TRIAL TESTIMONY IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (PORTLAND)

**[Vol. 1-A (Apr. 8, 2003)] [Plaintiffs' Opening Argument]**

* * *

[Tr. 58] 1980 to 2001, as falling into three different time periods. That's how I think – that's a helpful way to examine the evidence from both sides that you will hear in this case.

Now, what are those three time periods? I told you that Weyerhaeuser went from 0 to 75-plus in this time frame, but let's break it down so you understand some of the key building blocks to their monopoly position.

The first time period is 1980 to 1994. That's a time that I'll describe in more detail in a bit where the competitive landscape of the alder industry was relatively healthy.

Weyerhaeuser was getting a lot bigger, but Ross-Simmons and another company in Oregon called Diamond Lumber were strong competitors and No. 2 and No. 3, Diamond No. 2 and Ross-Simmons No. 3 in terms of production, profitability, good, strong players. And the industry had a good number of competitors and no one firm, Weyerhaeuser included, had a dominant share of the market.

1995 is the second time frame. In 1995 we have a watershed year. That is the year that Weyerhaeuser bought two of its larger competitors, one in Washington with a mill in Sedro Woolley; and they bought the No. 2 in the industry, Diamond Lumber, with alder sawmills in Garibaldi as well as Eugene. The No. 2 in the industry in terms of production.

Then the third time frame is 1996 to 2001. The [Tr. 59] important thing about '95 is this is where Weyerhaeuser grew to six sawmills with the kind of regional spread from north to south in Oregon and Washington and gained the kind of market share, 75 percent in lumber, that they now had the power to really exert influence, strong influence, power, over the log and lumber markets.

This is the time when we see some of the worst of the anticompetitive activity, not that they hadn't engaged in some before. The log hoarding incidents were worse in '89 and '93. But in '96 to '01 is when they had the kind of market power with the kind of market share that would be able to be brought to bear on the log market in a way that killed my two clients.

Now, let me go through each of these three time frames in more detail. First, 1980 to 1994. This is when Weyerhaeuser entered the sawmill market, buying Northwest Hardwoods with two alder sawmills in Centralia and Arlington.

They tried to buy some others, including to try to buy Ross-Simmons in 1983. John Simmons and his family were able to block that deal. And what did Weyerhaeuser do, within two years after losing that deal to buy Ross-Simmons, they converted a softwood sawmill in Longview, right down the street literally, literally a stone's throw from Ross-Simmons.

* * *

**[Vol. 1-B (Apr. 8, 2003)] [Testimony of William Nelson]**

* * *

[Tr. 81] A. We were an alder, we cut products from four to eight inches, from four quarter to eight quarter, plus pallet.

Q. And the finished lumber that you referred to, was that kiln dried?

A. Yes, all kiln dried.

Q. Could you briefly describe the facilities that were in place at Ross-Simmons Longview mill.

A. We put a double cut Salem band mill and we put in a Ukiah thin saw edger, and we put in a thin saw board edger. We had barkers, chippers. When I took over, we had a canter already in to cant logs.

Q. Now, during the 1990s, how many shifts were operating at the Longview Ross-Simmons mill?

A. We operated two shifts.

Q. Approximately how many employees?

A. About 165, 168.

MR. HAGLUND: Now, may I be handed Exhibits 2 and 3.

THE COURT: Is that all the exhibits you want or did you give us the list?

MR. HAGLUND: I've got the list right here.

THE COURT: Let's give it to my clerk and he'll have them ready for you.

MR. HAGLUND: Thank you.

BY MR. HAGLUND:

[Tr. 82] Q. Mr. Nelson, this is Exhibit 2. Do you recognize this aerial photograph?

A. Yes, I do.

Q. Could you describe what can be seen in this photo?

A. This part right here is our log yard, Ross-Simmons log yard. This area right here is our mill area.

Q. We see several buildings in the mill area. What would they consist of?

A. There is a storage shed, dry kilns, series of dry

kilns, planer building and sawmill in this area.

Q. That's in the separately-marked area to the –

A. Pardon me?

Q. That's in the separately outlined area adjacent to the log yard?

A. The sawmill is right there.

Q. Okay. And how many acres in this industrial site altogether?

A. 26.3 or something like that.

Q. Now, I'd like to put Exhibit 3 on the screen. This is a slightly higher view. Can you see the Ross-Simmons mill in this aerial photograph?

A. Yes, I do.

Q. Would you outline the Ross-Simmons facility?

A. (The witness complies.)

That's the general area of it.

[Tr. 83] Q. Okay. And that includes the same log yard and sawmill

that you showed on the other photograph?

A. Yes, it does.

Q. Now, can – can you also point out where the Northwest Hardwoods Longview mill is located?

A. (The witness complies.)

That surrounds it.

Q. And is there a street on which both companies were located?

A. Yes. Industrial Way goes right down here.

Q. Now, would log trucks – where was your office for the sawmill at Ross-Simmons?

A. Approximately right there at the end of that little line, that black spot.

Q. Okay. And is that office right on Industrial Way?

A. Yes, it is.

Q. If log trucks were to deliver logs to the Northwest Hardwoods mill there in Longview would they have to travel along Industrial Way?

A. That's correct.

Q. Was it a regular practice to observe those trucks going by at Ross-Simmons?

A. Yes, it was.

Q. And could you point out the Northwest Hardwoods log yard?

[Tr. 84] A. (The witness complies.)

Q. Okay. What body of water is it that we see in this aerial?

A. That's a mill pond on the lower side that used to be the International Paper log pond. This one here is the Cowlitz River.

Q. Okay. And both of these companies are in the City of Longview?

A. Yes, they are.

Q. I'd like to ask a few general questions about your experience in the hardwood industry and sawmilling generally. When it comes to a sawmill, Mr. Nelson, what is the largest cost?

A. Logs.

Q. Could you give the judge and jury some sense of where it will range in terms of percentage total cost of a sawmill?

A. Depending on what type of logs you buy, from 60 to 75 percent of your total cost is log cost.

Q. Now, in your experience, Mr. Nelson, what would you identify as the keys to success in the sawmill business?

A. Well, there's quite a bit of things. You've got to have good equipment that can cut it. You got to have a good crew and good management and a good program for selling your wood.

[Tr. 85] Q. Where does the resource fit in the keys to success?

A. Well, you have to have that or you don't have a sawmill. That's the number one thing.

Q. Logs is number one, in your opinion?

A. Yes, it is.

Q. Now, what type of success did Ross-Simmons experience in the first several years after you took over as general manager?

A. We had very good profits and we continued to raise production.

Q. Did you increase production in the period of '93 through '95?

A. Yes, we did.

Q. How did – how was accomplished? Did you make improvements in the mill?

A. Yes. We made some improvements. We moved the trim saw, we moved the bunkers. We put unscramblers in. We changed the green chain on our pallet and we put in a shook machines which takes in lineal pallet, cuts it into short links for pallet stock.

Q. Do you recall setting any types of production goals after you took over as general manager in '93?

A. Yes. I think we cut about 36 million, was the biggest we cut. And the first meeting I had with the management, we set a goal to cut 50 million within two years.

[Tr. 86] Q. When you say "50 million," are you referring to 50 million board feet of total production?

A. Yes. 50 million board feet total production, pallet and shop lumber.

Q. Was Ross-Simmons able to achieve that goal?

A. I think that in three years we hit over 50 million twice.

Q. As you'll recall, in the mid-'90s, where would that have placed Ross-Simmons in terms of a company behind Northwest Hardwoods in terms of total production?

A. Probably second. Third, if you want to count Diamond. I think of Washington in my market, so we were probably third behind Diamond.

Q. So before Weyerhaeuser bought Diamond, if it's two mills in Oregon in '93, '94, you would have been number two?

A. Number two, yes.

Q. I mean number three.

A. Number three counting Diamond, an Oregon mill.

Q. Okay. In 1995, you had over 50 million board feet?

A. Yes.

Q. And do you recall when Northwest Hardwoods or Weyerhaeuser purchased Diamond?

A. In '95, September of '95.

Q. So as you ended 1995, what position in terms of total production would Ross-Simmons have been in relative to the [Tr. 87] industry?

A. I think we would have been in second place at that time.

Q. Okay. Now, as you entered the year 1995 and then into 1996, did the company have expansion plans?

A. Yes, we did.

Q. Could you describe those.

A. In '95, we wanted to expand and put in a small 17-inch barker and another cut-off saw to handle smaller logs for our canter side.

Q. Did the company also secure additional facilities in terms of kiln drying and planing?

A. Yes. In early '95 we were shipping – actually, '94 and the early part of '95, we were shipping lumber to Oregon to be dried, and we started looking around for dry kilns because we could not dry our capacity that we were advancing to in the Longview area.

At that time, we took on Ridgefield, Port of Ridgefield had dry kilns they wanted to lease out and we took those on to handle our expansion.

Q. And how far was that from your Longview mill?

A. Probably 35 – 37 miles, I think.

Q. So how many kilns there?

A. There was seven down there is what I recollect.

Q. And you leased them?

* * *

[Tr. 95] Venture with the tribe?

A. Yes. I spent about two weeks down there.

Q. And what conclusions did you come to regarding the available log supply for the Toledo operation you were contemplating with the tribe?

A. That there was quite a bit of available timber in the area. All this isn't tributary to that area, but there's quite a bit there.

Q. Okay. Now, at the time that you were in these negotiations, who was the major competition in Oregon for that Toledo mill?

A. Diamond Lumber Company in Eugene.

Q. When did you learn that Weyerhaeuser had announced that it was buying Diamond?

A. Some time in the latter part of September of '95.

Q. Was that before you signed your agreement for the Joint

Venture?

A. Yes, it was.

Q. Why did you proceed with the Joint Venture after learning that Weyerhaeuser had bought Diamond Lumber?

A. There's several reasons. One, we had an agreement with GP verbally to exchange logs for chips, and the volume

of logs that they produced a day was eight to thirteen of the eight and up logs that we needed for our mill, and that would just about make one shift of what this mill would cut.

[Tr. 96] We were 125 miles from Eugene, so we're quite a ways out of the range of Eugene, and besides that a lot of timber is beyond us so we'd be more than that. And –

Q. Let me stop you right there because I think you said one thing a little too quick. You said there was eight to thirteen. What did you mean?

A. GP produced eight to thirteen loads of eight and up logs per day.

Q. Okay. So eight to thirteen log truckloads?

A. Yes.

Q. And what was the diameter?

A. Eight inch and up, what they call saw logs, what Diamond calls saw logs.

Q. And what type of – was there any particular type of alder saw log that Toledo mill was going to be offering?

A. It worked best on ten and up, but eight and up was where we were going to operate.

Q. So at the point where you signed the Joint Venture, did you think you had a deal with Georgia Pacific?

A. Yes, I did.

Q. Did you learn later that there was not going to be a deal?

A. That's right.

Q. What did you learn was actually going to happen with the Georgia Pacific volume?

[Tr. 97] A. We went down, the guy that worked for us at the mill went down and met with the GP guy, Larry Bray, to

form up a contract, and he said that he had traded the logs to Weyerhaeuser for fir – they were going to go to the Diamond mill, which was a Weyerhaeuser mill, in exchange for fir logs from Weyerhaeuser land to go to there Philomath fir sawmill.

Q. So before the Joint Venture started, the Georgia Pacific volume became unavailable?

A. That's correct.

Q. Now, just a quick question regarding some of your terminology. What is a saw log, an alder saw log?

A. It's anything eight and up.

Q. Eight inches in diameter and up?

A. Yes. You can grade them for quality, but it's an eight and up log.

Q. Okay. And this is a fresh sawn log that hasn't stained?

A. Yes, that's correct.

Q. And the eight inches you're referring to the small end diameter?

A. That's correct.

Q. Okay. Now, had that Georgia Pacific contract actually gotten written up and signed, what – what portion of the Toledo Joint Venture's annual needs would it have covered?

* * *

[Tr. 102] A. No.

Q. So at Toledo, the logs would be sawn and it would produce green lumber?

A. Yes.

Q. And where did the green lumber then go to be dried and surfaced?

A. We'd haul the green lumber up to our Ridgefield plant where we dried Ross-Simmons lumber.

Q. And at Ridgefield, what facilities did you have besides the kilns?

A. I think we had about eight or nine dry kilns and a planer and a sticker stacker to stack the lumber for dry kilning.

Q. Now, some of the little detail regarding some of these little pieces of equipment we'll leave for you to cover when you narrate a film which is one of our exhibits. I think it will be easier to understand when the Court and jury can actually see the equipment operational.

I'd like to turn now to some questions about what actually happened in the log market in and around Toledo when you started up. You started in early 1996?

A. Yes.

Q. When did you start buying logs, to the best of your recollection?

A. Actually, we were out trying to buy logs in November [Tr. 103] and December.

Q. You'd lost the Georgia Pacific contract?

A. Yeah.

Q. So what do you recall happening in the log market in and around Toledo in that first year of operations?

A. When I originally went down there in the early part of the year to investigate the timber supply down there, log prices were 250 to $400 a thousand. When we started buying logs, they adjusted to 400 to $550 a thousand for the same logs.

Q. So they went up 100, 150 bucks?

A. Yes, they did.

Q. And when you say, "$400 a thousand," you're using the shorthand that's heard in the industry. A thousand means per thousand board feet?

A. A thousand board feet, yes.

Q. Okay. And what did you observe in the year 1997?

A. The price stayed up high continually.

Q. Did you, based on your observations in the market, what was the reason, in your opinion, that the log market went up so much in 1996?

A. Northwest pushing the price high. We don't know why they pushed it high.

Q. When you say, "Northwest," are you referring to Weyerhaeuser?

[Tr. 104] A. Weyerhaeuser's Diamond mill.

Q. Did the same condition persist then in 1997?

A. Yes.

Q. What problems did these high log costs cause for the Toledo Joint Venture, in your experience, in '96 and in '97?

A. We couldn't get a high enough quality log to run the mill. We started cutting a lot of smaller logs, paid too much for them just to get them to have something to run through the mill. We were cutting off smaller, less quality logs at a higher price.

Q. Backing up a second, in terms of the number of shifts that were you going to run at Toledo, what was your plan for '96?

A. In '96, the latter half, we hoped to get to two shifts. We never did get to two shifts in that year.

Q. In 1997, did you have plans to go to two shifts originally?

A. Yes, we did.

Q. So at worse you thought you would get up to two shifts at the beginning of '97?

A. At the latest, yes.

Q. Okay. That was the plan originally before you entered into the Joint Venture?

A. Yes, it was.

Q. Okay. How many employees per shift approximately?

* * *

[Tr. 106] doing in Longview to match the market that we had.

Q. Let me ask you some specifics about that. You said the market fell off in 1998. Are you referring to the log or the lumber market?

A. The lumber market.

Q. So the lumber market fell off in terms of the price you were getting for lumber?

A. Yes. And we couldn't sell as much as we were selling before, so we switched to four days.

Q. What do you remember was the reason that the lumber market fell off?

A. Well, everything. The Asian flu, as it's been called here in you guys' summations, but the market in Asia went bad, the market in Europe backed off. We backed off to try to match what we could sell.

Q. You did observe then a down turn in the alder lumber market that was partly caused by this Asian economic crisis in late '97 –

A. Yes, sir.

Q. – and into '98?

A. It actually started in late '97 for us.

Q. Okay. And you mentioned a couple of things, but you did it so quickly I am not sure it was understood. What actions did Ross-Simmons take at its Longview mill to deal with that situation?

[Tr. 107] A. We curtailed to four days a week.

Q. Can you keep your crews to four days a week in tough times?

A. First we curtailed to four nines, which is 36 hours. Then we went to four eights.

Q. Did you take any steps to change the situation in Toledo in '98?

A. Yes. We went to four days. We kept them at five days as long as we could, and then we switched to four days sometime early – sometime in '98, we switched to four days.

Q. Were you ever able to go two shifts in '98?

A. No. I don't know whether we could have or not. We were getting just about enough logs for five days, but we couldn't sell it, so we cut to four days, cut to four days and tried to hold the logs back. There was five days logs but there was never 10 days logs.

Q. Now, as you encountered this decline in the lumber in late '97, and throughout your time into '98, did you see log prices decline as well?

A. No.

Q. They were high?

A. They continued to stay up.

Q. Both in Toledo and Longview?

A. Yes.

Q. Now, Mr. Nelson, you've been in this business for 40 [Tr. 108] years. In your experience, is there generally a relationship between the lumber market and the log market?

A. Yes, pretty much so. They go parallel to each other.

Q. How would you – which follows which?

A. The lumber price goes up, the log price goes up.

Q. Did the log price follow the lumber market?

A. Yes, it does.

Q. Prior to the late 1990s, have you ever seen a situation where the alder log market was not following the lumber market?

A. Not on a long-term basis.

Q. By long term, you mean a matter of months?

A. Yes, less than a month.

Q. Based upon your observations in the industry is the same principle, the log market follows the lumber market, true for softwoods?

A. Yes, it is.

Q. Now, you've mentioned that the Toledo mill was unable to procure enough logs to run two shifts. Did Ross-Simmons, the Longview plant, provide any help in connection with the log supply situation with the Toledo mill?

A. Yes, we did.

Q. What did you do?

A. We hauled logs from Longview all the way down there. I could find them in Longview and haul them cheaper down

* * *

[Tr. 110] in prices. We didn't anticipate the drastic one that went up, but there would have been a raise anyhow. And I projected that in one of my studies that I had given to the Simmons family.

Q. Based upon your observations, did the 100 to 150 dollar increase in price bear any relationship to what you expected?

A. No.

Q. What did you observe about the activities of Northwest Hardwoods or Weyerhaeuser log buyers in and around the Longview area?

A. In what way?

Q. What did they do in the log market from what you observed in '96 and '97?

A. They kept the price fairly high as things started to climb in late '97. While the market was declining, it did the same thing there.

Q. So the log market was going up while the lumber market was coming down?

A. Yes.

Q. And the six to $800,000 that you mentioned was a conservative projection?

A. For STEDCO?

Q. For the Joint Venture.

A. Yes.

* * *

[Vol. 2-A Tr. 36] to volume and scribner of the logs going into the mill for Ross-Simmons?

A. Yes, I think so.

Q. Even though some of that log has gone into chips, you are still getting as much, under the measuring system, lumber out the end because of the difference in the way in these measuring systems?

A. Yes, the scale. We recover more than the scale said was in the log.

Q. Now, during this time frame that you were running Ross-Simmons, how would you characterize the log supply?

A. Adequate.

Q. Relatively stable?

A. Stable and a lot more than we needed.

Q. Now, I would like to put on the screen an exhibit that has been marked as Exhibit 98.

Now, it is a little busy, and we will try to solve that in a minute. But are you familiar with this exhibit, Mr. Nelson?

A. Yes, I am.

Q. Have you reviewed the data from Weyerhaeuser that went into making up this graph?

A. Yes, I have.

Q. Is this the log inventory for the Weyerhaeuser alder sawmills in Oregon and Washington over about an 11-year [Tr. 37] period?

A. Yes, it is.

Q. Which color is for the Longview mill?

A. Green.

Q. And which color for the Arlington, Washington, mill?

A. Blue.

Q. Which color for Centralia?

A. Red.

Q. And those were the Weyerhaeuser alder mills up until 1995 when they acquired three other mills. Is that right?

A. Yes.

Q. Now, let me ask you a few questions about the inventory levels. First off, we see the other three mills coming in where I put that arrow. Is that correct?

A. That's right.

Q. Now, based upon your background and experience, Mr. Nelson, what level of log inventory should the Weyerhaeuser Longview mill have been running at to process efficiently on two shifts but avoid log staining?

A. Four to five weeks, six weeks at the most.

Q. If you were to convert that into millions of board feet of logs per month, what would it be?

A. Somewhere between 4- and 5-, 6 million.

Q. That would be this area here, 4- to 6 million?

A. Yes.

[Tr. 38] Q. We have a line going across at 6 and a line going across at 4. Is that right?

A. Yes.

Q. And this graph shows on this axis thousands of board feet, but you can convert it into millions just by using the first number. Is that right?

A. That's right.

Q. So we have got the 6 million mark up here, 16 up here. Is that correct?

A. That's right.

Q. All right. Now, were you at Ross-Simmons during this entire '89 through '98 time frame?

A. Yes, I was.

Q. I would like to call your attention to some real spikes in the log inventory at Longview in '89 and '93. Do you remember those years?

A. Yes, I do.

Q. And at inventories at the Weyerhaeuser Longview mill?

A. Yes, I do.

Q. What do you remember happening in those two particular years?

A. Those two particular years they went out to buy every log they could get.

Q. Did it appear they were trying to deprive Ross-Simmons of logs?

[Tr. 39] MR. SIMON: Objection, leading.

THE COURT: Objection overruled.

THE WITNESS: That would be my assumption. I saw no other reason to build that kind of inventories in the summer.

BY MR. HAGLUND:

Q. Now, if one looks carefully at the bottom axis, can you see little gradations of the scales so you can track where this inventory was built in the given year in terms of summer or winter?

A. Yes.

Q. Generally the other spikes that you see for Longview, as you look at this Exhibit 98, where are they building the inventory, leaving out '89 and '93?

A. Normally in the fall.

Q. Is that fairly standard?

A. Yes. It is usually, September, October we start building inventory for the winter.

Q. Why do alder mills do that?

A. Scarcity of some alder logs. The volume in the wintertime, because of the adverse conditions of the logging and the wet ground.

Q. So whether it is alder or Douglas fir, there is less logging in the wet winter months?

A. There is a little bit less. Basically we get it [Tr. 40] because if there is an adverse weather condition for two or three weeks and it snows or ices or whatever, logging is not as big in the wintertime, but it is consistent production coming out every month.

Q. All year round?

A. Yes.

Q. But somewhat lower in part of the winter?

A. Yes, it is. The small logger quits logging in the winter completely basically.

Q. Is there any reason in the alder industry why you do not build log inventories large in the summer?

A. Because it stains so fast. It picks up a stain from the heat and moisture and turns it blue. It is a defect. Stain is a defect.

Q. Does the industry grade for that defect?

A. Well, we didn't – we used to drop the grade tremendously until Northwest started having so much trouble with stain. They developed what is known as paint 1 and 2, clear paint, sold it at a lot less money. The stain was sound, but you couldn't use it in clear, pretty furniture. You had to paint it. So they developed a grade to cover for stain in these kind of spikes.

Q. So when you use the term "paint grade," what does that mean? The end user has to deal with the stained piece of lumber that is called a paint grade?

[Tr. 41] A. Basically has to paint it some dark color that does not show the wood. Shellac varnishes. Lacquer. Most of it went into lacquer furniture. It is in Chinese-type furniture that is highly lacquered and covers the wood completely. It looks like plastic, at least the stuff I saw looks like plastic.

Q. Did that fetch a lower price than the same piece of wood without stain?

A. Yes.

Q. Now in '89 and in '93 were these inventories built beginning in either the summer or the spring?

A. Early spring.

Q. And did you observe these buildups of inventory at Ross-Simmons in '89 and '93?

A. At Ross-Simmons or Weyerhaeuser?

Q. While you were at – thank you. While you were at Ross-Simmons in these two years, did you observe this runup in inventory?

A. Yes, we did.

Q. In your opinion, Mr. Nelson, was there an unusually high volume of pulp wood in those inventories in those two years?

A. No, it wasn't.

Q. How do you know that?

A. I watched them go right by my door. I watched them [Tr. 42] being dumped in the water. They started dumping in the water when the yard got full. They weren't all pulp. At most they were half pulp and less than that. I would have sawed everything on those trucks.

Q. These were sawlog loads coming in predominantly?

A. That's what I would call them. There was more pulp in the stuff that went into the water but not the stuff that went into the mill.

Q. At the log yard did you see an unusual quantity of pulpwood compared to the inventories in other years for Northwest Hardwoods?

A. No, not an appreciable amount.

Q. Did you observe stain problems at the Longview Weyerhaeuser mill in these two years?

A. Yes, I did.

Q. Was it significant?

A. I would be – for me it would. I would say it was significant.

Q. Is '89 when the paint grade term first surfaced?

A. That's when I recall it first surfacing, yes.

Q. It was a sales mechanism for selling this stained lumber?

A. Yes, it was. It was a good one, too.

Q. But it still was at a lower value?

A. Yes, it was.

[Tr. 43] Q. Now, I would like to shift – one other question. We don't see those kinds of inventory peaks at the other Northwest Hardwoods' mills where the large spike is built in the summer months on this chart, do we?

A. No. The rest of them show pretty much fall or winter.

Q. And generally much fewer, significant fewer peaks for the other five mills? Is that right?

A. Yes. Normal amounts except for the one at Arlington in '97.

Q. Now, Exhibit 89, Mr. Nelson, tries to make it a little less busy by pulling out only the Longview log inventories. Again, do my arrows point out the '89 and '93 spikes?

A. Yes, they do.

Q. Do you know, Mr. Nelson, of any legitimate business reason for Weyerhaeuser to have built those levels of log inventory at its Longview mill in '89 and '93?

A. The amount of sawlogs in those bundles were only to take them away from somebody else.

Q. Because they stained on the ground?

A. Yes.

Q. What did you see happen in the Columbia River?

A. A lot of the rafts sunk. They took a barge out to pick them back up. I took a boat out and watched them do it. They picked up silt out of the Cowlitz River. It set there too long.

[Tr. 44] Q. If log rafts sink and pick up silt on the river, is that a problem for manufacturing them into lumber?

A. No. It makes more cost to get them to the mill. A log under water preserves it.

Q. The logs in the river were not staining, but they were there so long they sank?

A. Yes. They didn't stain unless – when you take them out, it stains real fast. I'm sure they processed them pretty fast. They know how to fix it.

Q. Okay. Mr. Nelson, I would like to ask some questions about log bidding practices in the alder industry. Could you describe for the jury the typical situation that log buyers in the industry experience when a logger or a landowner is

going to harvest some timber in a given year and wants to sell the alder that is coming from their stand. What typically happens in your experience?

A. Normally that logger – there is four mills within the range of Ross-Simmons including Ross-Simmons. Two Ross-Simmons – two Northwest mills, Ross-Simmons and Cascade. Normally that logger would go around to every mill to get a price.

Q. So he will typically make phone calls?

A. Yes. Or come in person.

Q. Now, in your experience does the logger just go get one set of prices from the mills that are buying alder sawlogs [Tr. 45] within reasonable haul radius of his location?

A. No, he doesn't. He wants to get the highest price he can.

Q. In your experience what's the typical practice by that logger or landowner?

A. I might see a logger two or three times.

Q. What's he telling you during this bidding process?

MR. SIMON: Objection. That does call for hearsay, Your Honor.

THE COURT: Objection will be overruled. Rule 701 allows a lay witness to testify within his own perception. I will permit him to testify.

THE WITNESS: Would you repeat the question, please.

MR. HAGLUND: Certainly.

BY MR. HAGLUND:

Q. Please describe what you are hearing from the logger or landowner as they go through this process?

A. That somebody else paid more – offered more.

Q. They are inquiring whether you will increase your bid?

A. That's correct.

Q. You have been in the industry for 40 years now. Is that a standard operating procedure by gyppo loggers in the industry?

A. Gyppo loggers. Landowners and forestry consultants who [Tr. 46] represent other clients.

Q. They don't just take one oral bid from a company and get one from everybody and make a decision?

A. I can't speak for everybody, but most of them know. They shop it. They shop their wood all over.

Q. When it comes to the largest landowners in the region, do they tend to follow a different practice?

A. Some of them do, yes.

Q. Could you describe that.

A. Companies like Campbell who represents large timber. Plum Creek and others, Champion, they put their timber up by the quarter. You make a bid on it on the projected volumes coming out from that mill for the next three months.

Q. So with somebody like – you referred to the Campbell, the Campbell group that manages quite a bit of forest land in this region?

A. Yes.

Q. A large landowner like that will make a projection of their total volume that will be harvested in a given three-month period. Is that right?

A. That's correct.

Q. They will send that information out to all the mills?

A. Yes.

Q. And ask you to submit a written sealed bid by a certain date?

[Tr. 47] A. Yes.

Q. So when you look at Ross-Simmons' range of suppliers, did you compete for those sealed bid quarterly volumes?

A. Yes, we did.

Q. If you were to characterize your mix of suppliers, how would it break down overall between those quarterly volume sealed bid type deals and what you got from loggers and landowners on an oral bid basis?

A. Somewhere between 15 and 30 percent.

Q. Those percentages you used would cover what category, the sealed bid?

A. Just the sealed bids, yes.

Q. So we are talking 75 to 85 percent is in the other category?

A. No, not for Ross-Simmons. Probably 50 percent is in the other category because we had a commitment from Longview Fiber that gave us about 15 to 20 percent of our logs. 50 percent of the logs are in the immediate outside area.

Q. Now, I want to break that up because it is clear how Ross-Simmons covered its log supply. Was this your experience during your entire time with Ross-Simmons, from '84 through '98 by and large?

A. Yes.

Q. So we have got 15 to 25 is the sealed bid quarterly volume?

[Tr. 48] A. Yes.

Q. Then what percentage did you say was from Longview Fiber?

A. About the same.

Q. About 15 to 25 percent?

A. Yeah.

Q. What kind of a relationship did your company have with Longview Fiber?

A. We sold Longview Fiber chips and bought logs back from them.

Q. And did Weyerhaeuser make efforts to buy logs from Longview Fiber?

A. Continually.

Q. Who got Longview Fiber's work?

A. We got 90 percent of it. Weyerhaeuser was able to get one small tree farm out of the Astoria area.

Q. Why was that?

A. I think they were concerned of putting all their eggs in one basket. Longview Fiber was a hundred percent to us. So they sold one tree farm to Northwest Hardwoods Company.

Q. Why did you get such a high percentage of their wood?

A. Originally before Northwest built the mill we got a hundred percent.

Q. Northwest Hardwoods of Longview mill came in '86?

A. Yes.

[Tr. 49] Q. So after that you were getting about 90 percent of it?

A. Yeah, we got a hundred percent for a while. After a few years, one tree farm went to them. They made sure we got their logs. They wanted to make sure we stayed in business.

Q. Why did they want to make sure you stayed in business?

MR. SIMON: Objection.

THE COURT: Overruled.

THE WITNESS: They didn't want one buyer in the area and one chip supplier.

BY MR. HAGLUND:

Q. We covered in these two categories sealed bid volume and Longview Fiber, 40 to 35 percent of supply in a given year. The balance was coming from these loggers and landowners?

A. Yes, smaller people.

Q. And that was on an oral bid basis?

A. Yes, it was.

Q. Now, what would your – once you made – got to the end of this bidding process and you got the deal from the landowner or logger, was there any paperwork that was sent out?

A. Yes. We made a purchase order with price volumes, duration.

Q. Is this typically a pretty simple, one-page document?

[Tr. 50] A. Yes, it is.

Q. It lists the prices for the various diameters?

A. Specs, yes.

Q. And it has a duration so it lays for a certain amount of time?

A. Yes.

Q. Is that standard in the industry, those purchase orders?

A. Yes.

Q. Now, there will be testimony in this case, Mr. Nelson, from Weyerhaeuser log buyers serving the Centralia and Longview mills that they never would increase their original bid to loggers or landowners above what they – above – in the face of a competing bid from Ross-Simmons. If that's what they say, are those true statements?

MR. SIMON: Your Honor, that misstates what the evidence will be. I object to the form of the question.

THE COURT: As long as it is a hypothetical by the question at the end, if that's what they say, I will allow it. Rephrase the question.

MR. HAGLUND: Okay.

BY MR. HAGLUND:

Q. I want to ask you a hypothetical question, Mr. Nelson. If Weyerhaeuser log buyers from Centralia and Longview testify that it was their personal practice never to [Tr. 51] increase their original bid to a logger or landowner in the face of a competing bid, would those be true statements?

A. I would have to say no.

MR. SIMON: Your Honor, I would like to interpose the objection that there is no way that this witness could possibly have a basis to answer that question unless he is basing it upon what other loggers have told him and there is no way to know whether those statements to be true or not, and I'm not going to have an opportunity to cross-examine those loggers or sellers unless called as witnesses.

THE COURT: Restate your question on how he knows that. The objection will be sustained.

BY MR. HAGLUND:

Q. Mr. Nelson, during your time as head log buyer at Cascade Hardwoods in Chehalis and Ross-Simmons in Long-

view, did you have frequent contact with loggers and landowners who wanted to sell wood?

A. Yes, I did.

Q. Did you also as part – did you as part of those discussions learn from them what was happening from Northwest Hardwoods or Weyerhaeuser's log buyers as they went through this bidding process?

MR. SIMON: Your Honor, I object that he could not possibly have learned from them what was happening. He might have been told by them what was happening. We have no

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[Tr. 56] A. You mean in the way of production of what we were selling?

Q. Production, sales, and mix of logs you were running on?

A. I didn't change the logs. I started sawing them and making more low grades. I went from chips to higher value lumber.

Q. Were you processing a generally small or lower end quality of log?

A. Yes, we were.

Q. So you were not producing as much of the finished lumber on a percentage basis as they would have been at that time?

A. No. We were producing a much finished lumber. We weren't producing as much higher grade.

Q. So overall lower mix of the grades because you were sawing lower quality and smaller logs?

A. Yes.

Q. As a higher percentage of your total production –

A. Yes.

Q. – compared to Northwest Hardwoods?

A. I think the things that I saw, that Northwest was about 40 percent pallet and 60 percent shop lumber, which is almost the same as Ross-Simmons was volume-wise. But grade we were way below them.

Q. Okay. I want to make sure your testimony is clear [Tr. 57] here, Mr. Nelson. When you used the word shop lumber, is that another word for finished alder lumber?

A. Finished kiln dried lumber.

Q. Now, within the shop category, you were producing the same percentage, roughly shop as you understood Weyerhaeuser was at Longview but less of the highest grades as a percentage?

A. Yes. That's what I was told.

Q. Now, if you look at page 4 again of the stipulated facts, I want to call your attention to the pretax profit column. Do you see that?

A. Yes. Okay.

Q. Did your strategy in '93, '94 and '95 generate good profits for the company?

A. Yes, it did.

Q. Now, there were a few questions I forgot to ask right after the movie or the film. That equipment, to the untrained eye, looks big and somewhat dangerous. What kind of safety record did Ross-Simmons have?

A. We had a pretty good safety record, one of the highest in the industry.

Q. And how would you characterize the skill of the crew that you had at Ross-Simmons?

A. Very good.

Q. And in terms of the maintenance, did you hire that out?

[Tr. 58] A. No. We had our own maintenance crew. Maintenance is one of the things that we worked really tough on to get production through the mill to make sure it ran.

Q. What type of approach did you take to quality control?

A. Quality control was in our sawing, our grading, planing, every phase of the business, how we sawed the log, how we trimmed it. We had green graders in the mill. We had lots of graders around to handle it.

Q. Did you have any outside inspections?

A. Yes, we did. We had our lumber inspected by the PLIB Bureau once a month.

Q. Now, did Ross-Simmons export some of its lumber?

A. Not directly, but some of our lumber went overseas through brokers.

Q. And did you periodically receive feedback from the overseas customers where your lumber was sold?

A. Yes, we did.

Q. I am putting up on the screen Exhibit 28. Are you familiar with this document?

A. Yes, I am.

MR. SIMON: Your Honor, my notes say that this page from this letter was excluded by the Court's ruling and that only the later documentation came in. We are talking about Exhibit 28.

MR. HAGLUND: Your Honor, it is my understanding

* * *

[Tr. 66] A. Yesterday is the first time I have seen him since three days before he fired me. He didn't terminate me. He had his son do it.

Q. You suffered a heart attack the month before?

A. Yes.

Q. Now, are you being paid to give expert testimony in this case?

A. No, I'm not.

Q. When Ross-Simmons shut its doors in May of 2001, were you owed anything?

A. I had a pension coming for ten years.

Q. And have you filed a claim to be a creditor of Ross-Simmons for that pension?

A. Yes, I have.

Q. And could you tell the jury what the amount is that is still owing to you approximately?

A. Between 65- and $70,000.

Q. You were fired in 2001. You are owed money. Why are you testifying in this case, Mr. Nelson?

A. I fought Weyerhaeuser ever since I have been in the business. I don't think the way they run the business is right.

Q. Now, in preparing to give expert testimony in this case, did you review log cost data for both Ross-Simmons and Weyerhaeuser mills in Oregon and Washington for the period [Tr. 67] of the '90s through 2001?

A. Yes, I did.

Q. When Weyerhaeuser acquired three mills in 1995, Goodyear Nelson, Diamond Lumber, a total of three mills, do you have an opinion about Weyerhaeuser's ability – let me rephrase that. Poor question.

As of the end of 1995, after Weyerhaeuser had acquired the Sedro Wooiley, Goodyear Nelson, and the Garibaldi and Eugene mills of Diamond Lumber, do you have an opinion about the approximate share of the alder industry that they owned?

A. I would say approximately 75 percent.

Q. In your opinion, does that percentage – let me back up a second. What does that mean in terms of the percentage of the sawlog, the alder sawlog volume that they will be consuming in a given year after the beginning – after 1995?

A. It would have to be 75 percent of it.

Q. Do you have an – in your opinion, does that give Weyerhaeuser the ability to control the price of alder sawlogs?

A. I would think it would.

Q. Why do you say that?

A. Because they got the huge volume. They are the biggest buyer in the industry.

Q. Again, have you observed evidence of their ability to [Tr. 68] influence the alder sawlog market in this '96 to 2001 time frame?

A. Yes.

Q. Have you seen that exerted in ways designed to put pressure on competitors?

MR. SIMON: Objection, Your Honor.

THE COURT: Objection overruled.

THE WITNESS: Yes, I have.

BY MR. HAGLUND:

Q. Did you observe it specifically against Ross-Simmons?

A. Yes.

Q. Did you observe it against the Joint Venture in Toledo?

A. Yes.

Q. What is your opinion, sir, about the percentage of the finished alder lumber market that Weyerhaeuser controlled as of the beginning of 1996?

A. Probably 75 percent.

Q. Was there any transaction that occurred in 2000 that actually increased it above that level? Was there any subsequent acquisition by Weyerhaeuser?

A. They bought Coast Mountain somewhere in that time in Canada, but I'm not exact on the date they bought it.

Q. Assuming it is a stipulated fact that Weyerhaeuser bought the Coast Mountain Hardwoods mill in British Columbia in October or September of 2000, would that have increased

* * *

[Tr. 71] Q. Did you observe in the last part of this decade any change in the historic profitability of the Longview mill?

A. Yes, I did.

Q. What happened?

A. It went down.

Q. Did you also observe a change in the way certain overhead was allocated to the Longview mill during that last couple of years?

A. Yes, I did.

Q. And I'm going to highlight the selling and general – G & A, general and administrative allocations between 1999 and 2000. Did they drop off considerably?

A. Considerably.

Q. So let me ask you this, Mr. Nelson. If you were to evaluate the performance of the Longview mill in 2000 and have cost allocations similar to what had prevailed before 2000, what would have happened to the $2.8 million profit shown there for the year 2000?

A. Might have had a loss.

Q. Now, yesterday you were asked some questions about the log market and the lumber market. Did the relationship between the log and lumber market change in a way that was unexpected in '97 through 2001 for the alder industry?

A. Yes, it did.

Q. What was that?

[Tr. 72] A. They usually go parallel, up and down. In those later years, lumber prices went down and log prices went up. They were exactly opposite of the historic trends.

Q. Have you also in preparing for this testimony examined the log prices that were paid by Weyerhaeuser for its Longview mill over a 10-, 11-year period?

A. Yes, I have.

Q. I'm displaying what has been marked as demonstrative Exhibit 115. Does this display prices for logs paid by the Longview mill over a '94 through 2000 time frame?

A. That's what it says, yes.

Q. And the lines cover different diameter classes for the Longview logs for Weyerhaeuser. Is that right?

A. Yes.

Q. And the blue line at the bottom here, if one looks at this carefully, is for the 1 to 5-inch high-quality logs. Is that right?

A. That's what it says.

Q. And we move up one diameter class to the purple and that's the 6- to 7-inch high-quality sort?

A. Yes.

Q. And is it standard that the price is going to be higher the wider the diameter of the log?

A. Yes.

Q. Now, have you also looked at the data that underlies [Tr. 73] this graph?

A. Yes.

Q. In your opinion, Mr. Nelson, is there something that happened in this last couple of years that are shown on this graph relative to the gap between the prices paid for the wider diameter logs compared to the lower diameter logs?

A. Yes. The lower diameter log that Ross-Simmons used started to climb in a falling market for lumber.

Q. Does that make sense in terms of the historic relationship you should have seen between log and lumber markets?

A. Doesn't make sense at all.

Q. What, in your opinion, ultimately caused Ross-Simmons to shut its doors in May of 2001?

A. A large amount of it was the high price of logs they had to pay when the lumber prices dropped.

Q. And was the bread and butter a part or a significant part of what Ross-Simmons had historically done, at least under your tenure, these lower or smaller diameter logs moving up in price during this time frame?

A. Yes, it was.

Q. Now, I would like to turn to another subject. That is the Simmons family. When you were managing Ross-Simmons from 1993 through May of 1998, did the Simmons family interfere with your ability to manage the sawmill?

* * *

[Tr. 85] BY MR. HAGLUND:

Q. Mr. Nelson, I want you to assume that the $20 million figure from the Novak letter was used as the basis for scenario A of the damages calculated by Mr. Rasmussen, okay?

MR. SIMON: Your Honor, I will object. It assumes facts not in evidence.

THE COURT: Objection overruled.

BY MR. HAGLUND:

Q. You have reviewed Mr. Rasmussen's expert witness statement in this case?

A. I have.

Q. Are you familiar with the figures that are shown on what is Plaintiff's Exhibit 126 that is shown here in full size?

A. Yes, I am.

Q. And is the $20 million number the basis for the scenario A calculation?

A. Yes.

Q. What's your understanding about – let me do it this way. Scenario A is this first one, correct?

A. Yes.

Q. And the dollars per thousand board foot column right there lists numbers in thousand board feet. Is that correct?

A. That's right.

[Tr. 86] Q. Let's take 1998. The memo was written in March of 2001 and discusses the past two to three years, correct?

A. Yes.

Q. Is this $89 the amount per thousand board feet that the Weyerhaeuser alder division log costs would have gone down across the whole division as an average if you divided their total consumption into that $20 million?

A. Yes.

Q. Is that then just multiplied by Ross-Simmons' consumption each year?

A. Yes.

Q. To derive the amount of reduced cost or lost profit for that year?

A. That's correct.

Q. So just so that the jury understands the calculation – we won't go through each one – but very simply it just derives the reduced Northwest Hardwoods or Weyerhaeuser log costs, given $20 million and their consumption in that year in 1998, that was $89, you multiply it by what Ross-Simmons actually consumed in terms of logs. 35.1 million board feet and the dollar value is $3,128,439?

A. That's correct.

Q. And do we see the same calculation made for the next three years?

A. Yes.

[Tr. 87] Q. Again, using Weyerhaeuser's actual consumption to derive the impact of a $20 million savings?

A. Mike, I did this on my own. I come up with a few dollars higher than those figures but very close to what he has got. Your statement is correct.

Q. And the total then, using this scenario, the $20 million figure from Mr. Novak's memo shows a total lost profit associated with this log cost increase over the four years of $9.67 million?

A. Yes. If we had been able to buy the logs at that price, yes.

Q. Okay. Would that – if your log costs go down, does it flow right to the bottom line?

A. Yes.

Q. You don't have any – you just have a reduced input cost?

A. That's correct.

Q. Now, let's talk about scenarios B and C. You reviewed Mr. Rasmussen's expert witness statement?

A. Yes, I did.

Q. Are these based upon different projections of profits – historic profit levels by the alder division of Weyerhaeuser?

A. By what? Excuse me?

Q. Are they based upon different historic profit levels [Tr. 88] projected forward for Northwest Hardwoods?

MR. SIMON: Your Honor, I would like to have an objection, a continuing objection to this testimony subject to it being linked up with appropriate testimony with Mr. Rasmussen.

THE COURT: Most of these are hypothetical questions.

MR. SIMON: Thank you.

THE COURT: Restate the question.

BY MR. HAGLUND:

Q. You reviewed Mr. Rasmussen's material?

A. Yes, I did.

Q. It is scenario B. I want you to assume that scenario B is based upon Mr. Rasmussen's analysis and he projected B and C based upon looking at the historic profitability of

Northwest Hardwoods before 1996 and then trending it forward from '97 through '01 had they made a similar level of profit, and further that he uses –

A. Mike, Mike, Mike, can I disagree with you?

THE COURT: Yes, you can.

THE WITNESS: This is the profit – the volumes for Ross-Simmons. If I recall – and I redid all of Mr. Rasmussen's figures from the information you gave me – this scenario is the five years of Longview prices or ten years there. I think the one below we can't see is five [Tr. 89] years of Longview's prices.

Q. That's correct.

A. So if Longview had taken this $20 million cut, their share of it would have been those log prices I think is what we came up with, but Longview on its own, with its volume, I think.

Q. We will let Mr. Rasmussen go into this in detail.

A. I did it a little different than him but come up with the same thing.

Q. Let me ask you a couple of quick questions. You have reviewed Mr. Rasmussen's approach and you came up with numbers that are very similar. Is that correct?

A. That's correct.

Q. So under scenario B, we are looking at a $12 million lost profit in four years?

A. Yes.

Q. And under scenario C it is 12.7?

A. Yes.

Q. We will get into more of the detail with Mr. Rasmussen who prepared this when he is called probably tomorrow.

Now, had Ross-Simmons had the log costs that are reduced to the levels shown in any one of these three scenarios, would Ross-Simmons have been profitable in '97, '98, '99, 2000 and 2001?

A. I would have to say yes.

* * *

[Tr. 94] you find the year end profit and loss statements for the Weyerhaeuser alder mills from 1997 through 2001?

A. Yes.

Q. And you looked particularly at the Longview mill. Is that right?

A. That's right.

Q. And on the cover page, I want to blow it up here. Let's look at 1997 and 1998. The middle column, this volume is in thousand board feet?

A. Yes.

Q. And third party, right here, what does that refer to?

A. That's all the people they bought logs from other than Weyerhaeuser.

Q. So these are the logs they would have purchased on the open market?

A. Yes.

Q. In 1997 that was 28.08 million board feet?

A. Yes.

Q. The average price per thousand board feet for those logs was $459?

A. That's correct.

Q. Then we have Weyco here in the second line. What does that refer to?

A. That's the amount of logs that come off Weyerhaeuser fee land, land that they own.

[Tr. 95] Q. So company land?

A. Company land.

Q. Are there large – does Weyerhaeuser have significant land holdings in southwest Washington tree farms?

A. Well over a million acres.

Q. So in 1997 17.5 million board feet was delivered from company lands, and the average cost is shown at $330 per thousand?

A. That's correct.

Q. And the difference is 129 bucks and the total difference is 2.25 million?

A. Yes.

Q. Does this summary show the same calculation for 1998 and succeeding years?

A. Yes, it does.

Q. Now, in your opinion, Mr. Nelson – well, let's look at '98 for a second. Is that a year when the company lands provided well over half of the total needs of the Longview mill for Weyerhaeuser?

A. Yes, it is.

Q. The 25.6 million compared to 19.9?

A. Yes.

Q. And the difference was actually higher in that year at $165 a thousand?

A. Yes.

* * *

[Tr. 110] Q. That was part of your severance agreement with Ross-Simmons?

A. That's correct.

Q. A severance agreement is not a contract?

A. It is a contract, but it is not my regular contract. It was something negotiated separate.

Q. You had a separate negotiated contract with Ross-Simmons and that contract prohibited you from working in the industry for three years?

A. Within 150 miles of Longview.

Q. That contract expired in 2001, correct?

A. Yes.

Q. May 2001?

A. Yes.

Q. After that you started working as a consultant for a new hardwood mill, correct?

A. No. For a new company but not a new hardwood mill.

Q. A new company that was bringing back an old mill, am I correct?

A. Yes. Pacific Hardwood.

Q. And the new company that you were consulting for was at the Willapa Bay Company?

A. Willapa Bay Hardwood Company.

Q. I'm sorry. Willapa became incorporated in 2001, am I correct?

[Tr. 111] A. Yes.

Q. They cut alder logs?

A. Yes.

Q. The main owner and president of Willapa Bay is Mr. Jamie Webber?

A. Yes. Hold on. You said main owner. What did you say?

Q. Main owner?

A. No, he is the president.

Q. Who is the main owner?

A. There is no main owner. There is 22 stockholders. Not more than one person owns more than 5 percent.

THE COURT: What does this all have to do?

MR. SIMON: New entry into alder mills. This is a new entry that came up in 2001.

THE COURT: What difference does it make?

MR. SIMON: It goes to market power.

THE COURT: You're going to show another company came into business?

MR. SIMON: Yes.

THE COURT: Let's get to it.

BY MR. SIMON:

Q. What we have in 2001 is a new company called Willapa Bay Hardwood Company that began in 2001, correct?

A. Yes. They took over the old sawmill that was shut down.

[Tr. 112] Q. They took over an old mill that had been shut down, and they now used that mill to make, to cut alder lumber?

A. Yes.

Q. That happened in 2001?

A. Yes.

Q. The president is Jamie Webber?

A. Yes.

Q. You are one of the owners of that company?

A. No, I'm not.

Q. You were offered stock?

A. I have a stock option to buy.

Q. That company considers one of its competitors to be Northwest Hardwoods, correct?

A. Not really.

Q. Does Northwest Hardwoods cut and sell alder logs?

A. Yes.

Q. Willapa Bay cuts and sells alder logs?

A. We cut pulpwood.

Q. Does Northwest Hardwoods cut pulpwood?

A. Not really. They cut a better log.

Q. Does Northwest Hardwoods make hardwood chips out of pulpwood?

A. Yes, they do.

Q. Does Willapa Bay cut and make alder chips out of pulpwood?

[Tr. 113] A. Not very many. We saw them into lumber.

Q. There are a number of hardwood associations in the United States, correct?

A. Yes.

Q. You are familiar with the Northwest Hardwood Association?

A. Yes, I am.

Q. The Western Hardwood Association?

A. They are the same.

Q. The National Hardwood Association, is that different?

A. That's National.

Q. The Hardwood Lumbermen's Association, is that different?

A. Yes.

Q. The Appalachian Hardwood Association, is that different?

A. Correct.

Q. The San Diego Hardwood Association, different?

A. Yes.

Q. The Los Angeles Hardwood Association?

A. Yes.

Q. The New England Hardwood Association?

A. Yes.

THE COURT: Let's make a list of those and submit them with a stipulation. Let's move ahead.

* * *

[Tr. 117] "QUESTION: What were you dissatisfied with respect to Gary Nelson's performance?

"ANSWER: I didn't think he could do his job right.

"QUESTION: Did you fire him?

"ANSWER: I couldn't fire him.

"QUESTION: Why not?

"ANSWER: John Simmons wouldn't let me."

Did I ask you those questions and did you give me those answers?

A. Yes, I did. That doesn't mean I wanted to fire him, though.

Q. Did Ross-Simmons have an optimized board edger?

A. No, we didn't.

Q. Did Ross-Simmons have a stereo scan on its head rig?

A. No.

Q. With respect to the gang saw at Ross-Simmons, will you tell me what the width of the saw cut – the width of the saw cut made by that gang saw was?

A. I can't tell you that. It was 90 plate. We had it on the saw. That's pretty thin.

Q. In the 1990s through 2000, did the quantity of alder lumber sold in the United States increase, decrease or stay the same?

A. All alder lumber – alder lumber or hardwood?

* * *

[Tr. 122] decreasing?

MR. HAGLUND: During what period?

MR. SIMON: 1990 to 2000 period.

THE WITNESS: Stayed about static. It was bigger in the first part of the '90s; went down and stayed static with that.

BY MR. SIMON:

Q. On page 61 of your transcript from September 12th, 2002, we had just been talking about the time period of the

past ten years. I took your deposition in 2002. Begin on page 61, line 24, continuing through page 62 on line 4. Did I ask you these questions and did you give me this answer on that very topic?

"QUESTION: Do you have any understanding of whether the supplies of harvestable alder timber has been increasing or decreasing?

"ANSWER: It has been decreasing."

Why is that?

A. Mostly for environmental reasons. But the harvest stayed about the same. The harvestable wood out there has been going down. Most of it we couldn't use anyhow.

Q. For how long a time period had the quantity of [Tr. 123] harvestable alder timber been dropping?

A. Pardon me?

Q. For how long a time period had the quantity of harvestable alder timber been dropping?

A. Probably since the mid '90s. I am guessing now, without having the figures in front of me. You must have them in front of you. Can you tell me?

Q. That's exactly what you said.

A. Okay. Yeah.

Q. You were on the Washington Hardwood Commission, correct?

A. Yes, I was.

Q. You did an aerial survey of the hardwood in western Washington?

A. Yes, I did.

Q. After you got that done, you got it computerized?

A. Yes.

Q. You added in ecological setbacks of fisheries. As a result you saw harvestable alder timber drastically drop, correct?

A. Yes.

Q. If I may approach the clerk with a list of exhibits I will be using.

Mr. Nelson, I take it from your testimony of Mr. Haglund you had, when you were Ross-Simmons, keeping track of what the competitors had been doing – .

A. Excuse me. Would you repeat that, please.

Q. When you were at Ross-Simmons, you had been keeping

* * *

[Tr. 130] Q. What's the relevance of whether or not a company has small log conversion capabilities in the good management of an alder mill? How is it relevant?

A. How is it relevant in the management of it?

Q. How is it relevant in the running of the business?

A. A smaller log, you can efficiently cut. The better you can do your job.

Q. It helps improve the efficiency of the mill then?

A. Correct.

Q. Did Ross-Simmons/STEDCO Joint Venture have small log conversion capabilities?

A. No, we hadn't got there yet.

Q. While you were at Ross-Simmons, Longview Fiber sold almost all of its alder logs to Ross-Simmons, correct?

A. About 90 percent.

Q. You had a supply relationship with Longview Fiber. They would supply you with about 90 percent of their alder logs; you would supply them with chips, correct?

A. At times we sold them, chips, yes, whenever they wanted them.

Q. That was a long-term relationship that Ross-Simmons had with Longview Fiber?

A. Yes. It happened long before I got there.

Q. It continued while you were there?

A. All the way through it, yes.

[Tr. 131] Q. All right. Ross-Simmons had other supply relationships with other suppliers, correct?

A. What are you talking? Logs or chips now?

Q. Logs.

A. Yes. We had a few small loggers that always came to us.

Q. Olson & Burk was always committed to selling Ross-Simmons logs while you were there?

A. On one series of a three- or four-year period when they were in a heavy land buying basis and logging.

Q. But Olson & Burk had committed to you to sell Ross-Simmons all of its hardwood logs?

A. At that particular time, yes.

Q. An exclusive contract?

A. It could be, yes. I might agree to that.

Q. Let's talk a little bit about the proprietary lumber grading system. Did Ross-Simmons follow the Weyerhaeuser proprietary alder lumber grading system for its alder lumber?

A. I would say we were close to it. I can't be absolutely sure of that. But that was started by Juel Sheldon who had came from Northwest, and he agreed with Arnold's grade or Northwest's grade, and I think we followed it pretty darn close.

Q. There has been talk about Juel Sheldon and he has been

* * *

[Tr. 135] Diamond became part of Weyerhaeuser? Do you believe that Northwest Hardwoods faced much competition for the purchase of alder logs, say, in the Eugene area?

A. No, I don't.

Q. Did Northwest Hardwoods face much competition for the purchase of alder logs, say, around the Longview area?

A. Yes, they did.

Q. At least Ross-Simmons?

A. Ross-Simmons and Cascade and Centralia competed against their own mill.

MR. SIMON: I apologize for not setting this up before, Your Honor, but may I bring over the butcher paper?

THE COURT: You may.

MR. KELLEY: Your Honor, may we approach the exhibit?

THE COURT: You may.

BY MR. SIMON:

Q. Mr. Nelson, based upon your experience, I am going to ask you some additional hypothetical questions. Mr. Haglund asked you some hypothetical questions. I am going to do the same.

Assume that we have three areas: Area A, area B, area C. In one area there is only one company buying alder sawlogs. It is not facing much competition in the sense that you and I were talking about?

[Tr. 136] A. Yes.

Q. In area C there is one company buying alder sawlogs, not facing much competition in the areas that you and I talked about – in a way that you and I talked about.

In area B there is at least three competitors competing to buy alder saw logs. Are you following me?

A. Yes.

Q. Which area would you expect to find the highest alder log prices, A, B or C?

A. B.

Q. Why?

A. Because of competition. But I would say one other thing, Mr. Simon, if you had three mills in that area, there would be a lot more timber in that area.

Q. Regardless of the amount of timber, where there is more competition, one would expect to see prices higher, correct?

A. That's correct.

Q. There has been some talk about Ridgefield. I want to make sure we are all understanding the various facilities that Ross-Simmons was involved in. The main sawmill for Ross-Simmons was in Longview, correct?

A. Yes.

Q. And later we have the Joint Venture that had entered into with the Confederated Tribes in Toledo, Oregon?

A. That was later, yes.

* * *

[Tr. 148] A. I wouldn't say that, but what we meant there in comparison to the two prices. I wouldn't say acceptable or not. It says they are cheaper than what we were getting them in Longview.

Q. Sir, I asked you that same question on page 82 of your transcript from the deposition taken on May 15, 2002, page 82, line 3 through line 7. Did I ask you this question and did you give me this answer on that very topic.

Sir, did I ask you this question and did you give me this answer on page 82, lines 3 through 7:

"So you had an adequate supply of logs at an acceptable price for the Longview mill and that's why you didn't come to Toledo for logs?

"ANSWER: I would say that's correct."

THE COURT: That's not impeachment. That's exactly what he said. Let's get on.

BY MR. SIMON:

Q. Did that continue to be the case, Mr. Nelson, that you had an adequate supply of logs at an acceptable price for the Longview mill up until the time you left in May of 1998?

A. Are you asking me that or are you reading that to me?

Q. I'm asking the question right now. If you give me the answer you gave me there, I won't read it.

A. I would say we did, and we kept going.

MR. SIMON: Your Honor, I'm now about to move into

* * *

[Vol 2-B Tr. 14] I have to admit that.

Q. Yes, sir. We can now move to the end of this clip and see the end of that. And there it goes down to the chipper?

A. That goes to a chipper, yes, to a chain that drags it to the chipper.

Q. Which means it doesn't get sold as saleable lumber?

A. No, it's turned into chips.

Q. And obviously you get more value and money from saleable lumber than chips?

A. That's correct, about three to one.

Q. Take a look at Clip 15, which also was not included in what you showed.

Stop here for a moment.

What was this gentleman doing?

A. That was shown in the film. That is one of our graders pulling the dry lumber back and trimming it back for grade.

Q. In your judgment, was he trimming too much off?

A. I can't say anything about it until I see the whole board.

Q. Also let me ask you before we see it, is it ever appropriate to trim two boards stacked together?

A. I wouldn't think so, no, unless it's just the end of it and we trim them to eight feet.

Q. All right. As we look through the rest of this film, when you look out to see if there were two boards stacked on

* * *

[Tr. 22] A. Yes.

Q. You were asked some questions about the harvestable supply of alder, and I just have a couple of questions here. You were on the Hardwood Commission and it did a study of the available alder supply in the region in the late '90s; is that right?

A. That is correct.

Q. And that was an analysis of the alder trees that would be available for harvest in the region?

A. Yes.

Q. And certain set asides or riparian areas adjacent to rivers and streams was reducing the volume of harvestable alder available if you look at the 100 percent of it that there is in the region; is that right?

A. That's correct.

Q. Now, I want to ask you a question about the different – those were questions about the standing timber and what would be available for harvest. My question for you, sir, is between 1996 and 2001, how would you describe the actual supply, what was harvested and came into the market? Was it relatively steady, was it increasing, was it falling?

A. I think it was steady at that point. It had already dropped a little bit in volume, but it was steady.

Q. From '96 to 2001?

[Tr. 23] A. I would think so, yes.

Q. Thank you. You were asked about some contracts with Longview Fiber and Olson and Burke. Did you ever have a written – formal written agreement with Longview Fiber?

A. I think we did, but it changed, so I don't know that we had it in effect all the time.

Q. Did you ever have a formal written agreement with Olson and Burk?

A. No, not to my knowledge.

Q. The Indian lands that Mr. Simon asked you about, were you – when you went into the Joint Venture with the Siletz Tribe, was a key part of the Ross-Simmons' decision

to pursue that Joint Venture based upon the expectation that the Federal Government would give or grant the tribe another 20,000 acres?

A. No, it wasn't.

Q. It was only a possibility and it never came to pass?

A. I thought it was a pipe dream.

Q. Lastly, regarding that film, was there anything you were trying to leave out that you didn't want the jury to see?

A. No.

Q. We were only trying to be more efficient in the presentation.

A. The film was actually two hours long.

* * *

**[Vol. 2-B (Apr. 9, 2003)] [Testimony of Grant Wheeler]**

* * *

[Tr. 24] THE COURT: Further questions?

You may step down.

Call your next witness.

MR. HAGLUND: Your Honor, we were planning to call – use the videotape of David Weyerhaeuser, but we've got four witnesses we'd like to get on –

THE COURT: All right.

MR. HAGLUND: – in rapid fashion.

THE COURT: Call them.

MR. HAGLUND: Grant Wheeler.

GRANT WHEELER

Was called as a witness on behalf of the Plaintiffs, was duly sworn and was examined and testified as follows:

THE CLERK: Please state your name, and spell your last name for the record.

THE WITNESS: Grant Wheeler, W-h-e-e-l-e-r.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Wheeler, I understand that you have three years of college, two at OSU in forest engineering and one at the University of Oregon in business; that you, in 1980, [Tr. 25] purchased your family business called Westwood Industries from other family members, a company that had been in business since 1946 remanufacturing alder lumber into various products; and that in 1998, you also started a company that you are the president of called Westwood Lumber that operates an alder sawmill in Reedsport, Oregon.

Is that all correct?

A. Yes, it is.

MR. HAGLUND: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. HAGLUND:

Q. Mr. Wheeler, I'd like to ask you if you could – if you would, to come down from the jury – or the witness box there, and I just want to bring you a few pieces of product and ask you to explain what they are.

A. This is a product that we make. It's a guitar body blank for Fender Musical. We make all of their guitar body blanks. This is a veneered alder core. Inside is alder. It has a P grade. This is for a Mexico product. It is a little less expensive guitar than the one that Mr. Haglund is holding there.

And this would be machined. We don't do the machining. We make this blank, and then Fender machines them into the body itself. And those are a couple more [Tr. 26] bodies. Those are both American guitars made in their facility in Corona, California. This is a little higher end guitar body blank. That's an alder color-matched product. Again, that's for American – probably a more expensive guitar, also for Fender.

Q. Now, the blank that I'm holding here, is it made up of multiple pieces of alder lumber?

A. Four, yes.

Q. And how are they attached?

A. They're glued today.

Q. Okay. And your company –

A. Yes.

Q. – has been making this kind of blank for Fender for years?

A. Approximately 15 years, yes.

Q. And what's this?

A. That is a machine body blank. That is – that has a maple veneer on it, but that is also – the core is just a thin maple veneer, but the core is also alder. That's a four-board – what we speak of as a four-board spread. Same as – the starting point would be that piece.

Q. Just to give the jury some understanding, what – how many of these guitar blanks do you – does your company, Westwood, make for Fender Guitar annually?

A. Approximately 250,000.

* * *

[Tr. 28] was a period there for seven or eight years that we used cottonwood instead of alder. This was from about 1990 until about 1997 that we used cottonwood, but they are back using strictly alder now.

Q. A couple other things I just wanted to show you.

The alder lumber that – I think we've talked about that sufficiently, but we've got some other products your company makes. Could you tell the jury what these are.

A. These are just some cut stock-type parts. They're alder, which over 99 percent of everything we make is out of alder.

These might be paint brush handle blanks, Purdy Paint Brush Handle Company, in fact, they're here in Portland, uses almost exclusively – again, I don't know the percentage, but it's close to 100 percent. I won't say 100 percent, but close to. We make all of these. These are all wooden handles.

We sell them to a company in Italy, the blanks – again, we just sell the blanks, then they machine out of a company in Italy, and then they come back to Portland, Oregon, in a handle form. And then Purdy Company puts the bristles in. I don't know that much about paint brushes, but the metal work around it also.

Q. So the blanks are this product?

A. These could be cut stock for kitchen cabinet parts. [Tr. 29] Again, I don't know for sure exactly what the size is, but we makes hundreds and hundreds of different sizes in cut stock-type of parts.

Q. Okay. Thank you. You can retake the stand.

A. (The witness complies.)

Q. Now, prior to 1997, where was your company obtaining its alder lumber supply to remanufacture these various products?

A. We had bought from Diamond Wood Products for approximately 15 years before that time, and then Northwest Hardwoods bought Diamond Wood Products, and, again, I don't know the exact date, but that's October 1st of '96, I think.

Q. It's stipulated, it's '95?

A. '95? Okay. Fifteen years prior to October 1st of '95, approximately 15 years, we bought from Diamond Wood Products almost exclusively.

Q. And then it shifted to Weyerhaeuser after they bought Diamond Lumber?

A. Yes.

Q. What was happening with your business at Westwood Industries in Eugene in the mid-'90s?

A. Well, it was growing very, very fast mainly because of Fender. Fender is today still our biggest customer, but Fender in 1994 or '5, they were – excuse me. One year there they were 76 percent of our business, so they were – [Tr. 30] and they were growing like crazy. I mean, going from 550 guitars a day to over a thousand guitars a day. So we were running three shifts. It was hard for us to keep up in that couple year period of time there.

Q. And Fender has manufacturing plants where?

A. Their main plant, their American plant is in Corona, California, in the Los Angeles basin there, and then Ensenada, Mexico.

Q. Now, did you indicate to Weyerhaeuser that you needed additional volume as your business was growing?

A. Absolutely.

Q. Were you able to get it?

A. No.

Q. What did you do?

A. Of course, we were buying a lot of wood from Northwest Hardwoods. As far as we were concerned, it was a lot of wood because it was our livelihood. Explained that after about approximately a year, not quite a year of being very, very tight on material, of course, the market was – the alder lumber market was very tight at that time. We went back to the sales manager, Doug Bolton and I, and the salesman, Doug Martin and I, we talked back and forth many times.

I had been into all their mills, mills in Washington also to see if there's a different way that we [Tr. 31] could get some eight quarter, and they were looking at different ways to possibly break down the log to get us more eight quarter.

And finally after three or four months of this they had said – Doug Martin had told me – excuse me, Doug Bolton, the sales manager, had told me that basically, "That's all there is. We're not going to be able to get you any more." We used the eight quarter for the Fender bodies.

And I think it was at some point later, within a day or a week or a month, some time in there, I said, "Well, we're going to build a sawmill if we can't get more wood because we have to grow," and Fender was concerned that we couldn't keep up. We were keeping up, but barely.

Q. Now, you mentioned two names: Doug Bolton and Doug Martin, are they Weyerhaeuser employees?

A. Neither one is no longer, but they were at the time.

Q. Okay. Now, you referred to eight quarter. That's two inches?

A. Two inches thick, yes. Everything we see there in the guitar bodies are all cut from eight quarter lumber, yes.

Q. Now, were you asked by personnel from Weyerhaeuser to come to a meeting to talk about your sawmill plans?

A. I don't remember whether I had – they had asked me to go or I had asked them, because I was – I was the one pushing this and at the time I don't remember. Again, I [Tr. 32] don't remember exactly what – one way or the other, I ended up in Federal Way in a meeting.

Q. So you went up to Federal Way to a meeting with Weyerhaeuser personnel?

A. Yes.

Q. And did any Weyerhaeuser personnel travel up with you?

A. Two of them from Eugene, yes.

Q. And who were they?

A. Rod Buck and Steve Carter. Rod Buck is the mill manager of Eugene and Garibaldi sawmills, and Steve Carter was – I don't know the exact title, but log procurement person, or head log buyer in Eugene – maybe it's the Oregon area, I don't know. Eugene is their biggest sawmill there.

Q. And this meeting was in 1997?

A. Yes.

Q. How many people were at the meeting?

A. Approximately 15.

Q. And you were the only person from your company?

A. Yes.

Q. The rest were from Weyerhaeuser?

A. Yes.

Q. Could you describe what happened at the meeting – well, did you hear some presentation from the vice president of operations for the alder division?

A. Heinz Hohendorf.

Q. I think it's Hohendorf.

[Tr. 33] A. Hohendorf, excuse me. I had never met Heinz before. There were a number of people there in the meeting I had not met before that day. He got up and explained and drew on a board similar to what's over there that breaking down the logs to cut more eight quarter just would not work, and it was talked back and forth, but basically it just would not work.

Q. Did he – how long was his presentation? Could you explain a little bit more about that.

A. He got up and there were different – a lot of different people were talking in the room, we were talking back and

forth, and then he got up and started drawing basically a round log and how a log would be broken down and basically saying that it wouldn't – that it just wouldn't work out cutting eight quarter out of – a heavy percentage of eight quarter out of an alder log. It just was not economically feasible.

Q. Would you characterize his presentation as encouraging or discouraging of your plans?

A. Discouraging.

Q. At some point in the meeting did David Weyerhaeuser make any statement?

A. It was just about the end of the meeting that David Weyerhaeuser – in fact, a woman that was sitting to [Tr. 34] the left of me, I don't remember, it was a U-shaped big conference table, I don't remember her name. I hadn't had any business dealings with her, any dealings at all before.

But we had been in there an hour and half, and she said to me, "What are you doing here?" or something like that. And I said, "Well, I'm going to build this mill, but I want to continue buying alder lumber from you."

And David Weyerhaeuser was sitting at the end of the table and he pointed directly at me and said, "If you continue" – I don't have these words exactly, but when he pointed at me, he said, "If you continue your plans to build this mill, we're cutting you off. You have one week to decide." I said, "I understand." And that was basically the end of the meeting.

Q. How did you take his statement?

A. I'd never met David Weyerhaeuser before, before that day. It was a little bit intimidating, 15, 16, 14, whatever number it was of Weyerhaeuser people in the room, but I definitely felt threatened.

Q. Did you make any change in your business plan as a result of his statement?

A. My original business plan was to build a little mill to supplement buying alder lumber. At that point, just after that and after getting back to Eugene, I really decided that I really had to build something that I thought I would – [Tr. 35] whether I'd be cut off or not from them, but I needed to do something to be my own supplier. So my original plan was to cut 25,000 feet a day. It changed within days after that to cut 100,000 feet a day.

Q. So if I understand it correctly, you quadrupled the size of your original plan?

A. Of the cutting capacity, yes.

Q. Now, did you go ahead and build that mill?

A. Yes. That's what we're cutting today, 100,000 feet a day.

Q. And on an annual basis, what does that work out to in million board feet annually?

A. About 25 million.

Q. Now, after the meeting broke up, did you return to Eugene with these Weyerhaeuser personnel you'd come up with?

A. Yes.

Q. Were there any discussions?

A. It was pretty quiet, but, yes. I had known both Rod Buck and Steve Carter for some time, so it wasn't like I just met them, but I remember talking to Rod Buck and telling my displeasure with the meeting, and that – because he had asked me after a few minutes, after – on our way home, "What is your plan now?" And I said, "I'll have to think about it, but I'm not pleased with what I heard today."

* * *

[Tr. 37] A. Well, basically he just said – it was a short message, but he had said that some things were said in the meeting that probably shouldn't have been said. I don't remember word for word what was said, but that's really all I remember. I do remember, "Some things were said that shouldn't have been said."

Q. Now, when did Westwood Lumber, your mill in Reedsport, start up?

A. 1998, I believe.

Q. So it would have been first producing lumber in that year?

A. Yes, I believe June of '98.

Q. See mid year?

A. Yes.

Q. Does your company compete with Weyerhaeuser for alder saw logs?

A. Absolutely. They're our only competition or we consider them our only competition.

Q. What is your opinion about Weyerhaeuser's influence on the market in Oregon for alder saw logs?

A. They own the business as far as, again, in my opinion, they're 75 percent of the market, but we have – for us to get logs, we have to pay their price. I mean; we don't – our log suppliers generally get Weyerhaeuser's price for a quarter or for a month, and then we – if we are at that

* * *

[Tr. 38] price, we get wood. We don't have to necessarily pay more, but it's – we don't set the price. We're not –

Q. Weyerhaeuser in your experience sets the price –

A. Absolutely.

Q. – in the alder saw logs –

A. Absolutely.

Q. For the benefit of the record, I have to get my whole question out.

In the alder saw log market, your experience from mid-'98 through '01 is that Weyerhaeuser sets the price; is that correct?

A. And it is today, yes.

Q. Do you have an opinion about where the alder saw – where the – where alder saw log prices have been in the '98 through '01 period relative to the lumber market?

A. Well, my understanding, and I don't see all the sawmills' books obviously, but log prices are up and profits are down. And I think that's straight across the board in all alder sawmills.

MR. HAGLUND: No further questions.

THE COURT: Cross-examination.

MR. SIMON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Wheeler, my name is Michael Simon, one of the

* * *

[Tr. 42] Q. The people in the music industry, the people that know guitars better than I do, they know that different types of hardwoods have different types of sounds, correct?

A. Yes. That's debatable in electric guitars.

Q. Now, if a customer wanted to go into a guitar store, could they order a Fender guitar in poplar?

A. There is – my understanding is there is one. We have, I believe, one part number out of approximately 60 – between 60 and 80 body blanks that is poplar today.

Q. Now, let's go back to the conversations relating to the other issues. To make sure I understand the chronology right, that before Northwest Hardwoods acquired the Diamond mill in Eugene, your business, Westwood Industries, bought almost all of its alder needs from Diamond?

A. Over 99 percent.

Q. And that continued after Northwest Hardwoods came into the scene in 1995?

A. Yes.

Q. You continued to get all or almost all, 99 percent of you alder needs from the Northwest Hardwoods mill in Eugene?

A. Yes.

Q. Okay. Now, during the mid-1990s, alder lumber was very much in demand, correct?

A. Yes.

Q. You would say it was a very, very hot market?

[Tr. 43] A. Yes.

Q. Now, your business was growing, you told us that?

A. Yes.

Q. You wanted to buy more alder lumber?

A. Yes.

Q. You were receiving a lot of alder volume from Northwest

Hardwoods?

A. Yes.

Q. And you still wanted more?

A. Yes.

Q. Now, Northwest Hardwoods wasn't able to give you as much volume as your growing business needed at that time?

A. Correct.

Q. And this is way before the David Weyerhaeuser conversation, right?

A. I wouldn't say way –

Q. A year before?

A. A year before, yes.

Q. And so they explained that they had so much demand for their alder lumber product, they gave some to you, some to another guitar manufacturer, another customer in Eugene called Whittier, and they gave some to other customers?

A. Yes.

Q. They essentially put them on allocation, correct?

A. Correct, yes.

[Tr. 44] Q. And they explained this process to you, and they said, "We'd like to give you more, but we've got to be fair to other customers, too." That was explained, correct?

A. Yes.

Q. Okay. Now, because you needed more alder lumber, you actually bought a small sawmill in Reedsport, Oregon, before this meeting up in Federal Way, correct?

A. A few months, yes.

Q. So you actually bought the mill before going up to Federal Way?

A. Yes.

Q. All right. Now, at one point you told Doug Bolton of Northwest Hardwoods that you wanted a meeting to tell Northwest Hardwoods what you were doing because you wanted to continue to buy lumber from them as a customer, correct?

A. Correct.

Q. So, now that we've clarified that, you were the one that actually asked for that meeting?

A. I believe so, yes.

Q. So they didn't summon you up to Federal Way?

A. No.

Q. Okay. Now, a few weeks later you got a call telling you that there was going to be a management meeting, the managers were going to be getting together, and if you'd like to then participate in a discussion with them, at the [Tr. 45] end of that meeting you were invited if you wanted to, correct?

A. I'm not sure that was – I wasn't summoned there.

Q. Correct.

A. But I'm not – that they would like to talk to me also. That's the way I understood it.

Q. You then flew up to Federal Way?

A. Yes.

Q. In a Westwood Industries private plane?

A. Yes.

Q. And it was at this meeting that David Weyerhaeuser made the comment that you've just told us about?

A. Yes.

Q. Okay. Now, I understand what you just told us, that at the time you took it as a threat. After thinking about it for

a week or so, you didn't feel it was so much of a threat; am I correct?

A. Correct.

Q. You heard from your own sales manager, Scott Lilly, "That's just David"?

A. Yes.

Q. Now, within a day or two, you were also told by Northwest Hardwoods, as you've told us, that you were not going to be cut off. They assured you of that, correct?

A. Yes.

[Tr. 46] Q. And, as a matter of fact, as you told us when you got the message from David Weyerhaeuser himself, he left a message for you. I think there were messages going back and forth, and then you spoke live a month later, and it's your recollection that in the message he basically said, "You know, some things were said that shouldn't have been said."

A. Yes.

Q. That's your best paraphrase of what David Weyerhaeuser said to you?

A. Yes.

Q. In essence, he apologized. He didn't say, "I apologize," but, in essence, that's what he was doing?

A. I don't think David Weyerhaeuser apologizes for anything, but that's –

Q. That's as close as he gets?

A. Yes.

Q. Okay. Now, you bought the mill before. Now, when I heard you respond to Mr. Haglund, you said that the mill actually started in June 1998?

A. Yes.

Q. Now, Weyerhaeuser didn't cut you off as a customer, correct?

A. Correct.

Q. They have done a good job supplying your needs?

A. No, I wouldn't – I wouldn't say that. I think they've

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[Tr. 51] REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. You were asked whether you bought a mill. Did you buy a mill or a site in 1997?

A. Technically speaking, it was a mill. It was a mill, but it was a three-man hardwood operation, which we did before we tore all the buildings down except, I believe, a shop. And I didn't consider it a mill that we bought, but it was a mill site. And we did not use any of the equipment or anything that was there.

Q. So you built a new mill from there?

A. Yes.

Q. That carried well into 1998 to complete?

A. Yes.

MR. HAGLUND: Thank you.

THE COURT: That's all the questions that we have. I'll ask you, Mr. Wheeler, to wait until the recess before you retire.

THE WITNESS: Okay.

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**[Vol. 2-B (Apr. 9, 2003)] [Testimony of Rodney Buck]**

* * *

[Tr. 54] his plans at that point.

Q. Now, in your – I'd like to display on the screens what's been marked as Exhibit 446, and it is in evidence.

(Pause in proceedings.)

BY MR. HAGLUND:

Q. Mr. Buck, are you familiar with this document?

A. Yes, I am.

Q. It's a letter dated September 23, 1999; is that right?

A. Yes.

Q. And it's to the State Forester of the State of Oregon?

A. Yes.

Q. Turning – and it's on Northwest Hardwoods stationery, and it's got the Portland address up here; is that right?

A. Correct.

Q. Now, I'd like to turn to Page 2, and call your attention to the bottom of the letter. Is that your signature, Mr. Buck?

A. Yes, it is.

Q. Did you read this letter at a hearing before the State Forester on September 23, 1999, in Salem?

A. Yes.

Q. Could you describe how it is that this came to be? Did you draft this letter?

A. No, I did not.

Q. Could you explain how it is that you happened to be in [Tr. 55] Salem that day and read this letter into the record?

A. Well, Northwest Hardwoods was interested in getting alder as a substitution species, much the same as cedar was, because they were interested in exporting softwood material, so that was the reason for the meeting that day, to try and get an exemption for alder to be substituted. So the letter was prepared and I saw it when I got there that day.

Q. Now, let me make sure that it's understood here and the record is clear. If Weyerhaeuser were to export softwood like Douglas fir from its tree farms in Oregon, were the rules at the time such that the company would not be able to buy alder logs from State of Oregon forests?

A. Correct.

Q. And so you understood this was an effort to get an exemption from those rules?

A. Correct.

Q. I'd like to call your attention to a sentence that I'll highlight for you. The sentence I've highlighted there, did you read that into the record?

A. Yes, I did.

Q. And it states, "Those logs are estimated to provide about 50 percent of the raw materials for our hardwood mill at Garibaldi and about 34 percent of the raw materials for our hardwood facilities at Coos Bay and Eugene."

Do you remember reading that?

[Tr. 56] A. Yes.

Q. Now, Mr. Buck, did you have any involvement in the statistics that are sited in that paragraph?

A. No.

Q. Did you have any knowledge or understanding about whether those percentages were correct or not?

A. No.

Q. You are the mill manager at Eugene?

A. Correct.

Q. Did you have any responsibility for log procurement?

A. Not straightaway. Just as far as the mill having logs to run and more or less looking at value. And I paid more attention to that side of it, as opposed to exactly where the material was coming from and who it might be – who it might be coming from.

Q. Now, in terms of the way your company, then Weyerhaeuser, was organized, was the resource manager the title for the top log procurement person at Eugene?

A. Well, each facility had a resource manager.

Q. Okay. So Eugene had one?

A. Right.

Q. And was his name Steve Carter?

A. Yes.

Q. Did Mr. Carter report to you or to someone in Federal Way?

* * *

[Tr. 59] any way by the fact that you work for someone other than Weyerhaeuser?

A. No.

MR. HAGLUND: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Buck, you were, in fact, for Northwest Hardwoods, the mill manager for both the Eugene and Garibaldi sawmills, right?

A. Correct.

Q. Okay. And you had worked for Diamond Wood Products prior to working for Northwest Hardwoods?

A. Correct.

Q. And that started that 1988?

A. I worked for them earlier, but –

Q. As the mill manager?

A. Yes.

Q. So as of 1999, when this letter was written, you had been the mill manager at those facilities for about 11 years?

A. Okay.

Q. Now, when you read the testimony – did you read the letter you submitted and read into testimony, did you read it before you signed it?

[Tr. 60] A. Yes.

Q. And when you read it over, did it look reasonable to you?

A. Sure.

Q. You were acting in good faith?

A. Yes.

Q. Okay. Now, after – when you were at the hearing, who was there with you from Northwest Hardwoods?

A. Greg Miller.

Q. Was Steve Carter also there with you?

A. No. I don't recall. I don't think so. He might have been. I don't recall.

Q. Later that day or the next day, you said that Steve Carter was the resource manager.

A. Correct.

Q. Did you say anything to him, that the numbers didn't look reasonable, that something looked off?

A. No.

Q. You were acting in good faith on that day when you read that letter into testimony?

MR. HAGLUND: Objection, asked and answered.

THE COURT: The objection will be sustained.

MR. JOHNSON: Your Honor, now I think we're going to do the same thing we did with Mr. Wheeler. We also had Mr. Buck down as a witness on our witness statement, and I'm [Tr. 61] just going to ask him a few questions.

THE COURT: All right. At this time, Mr. Buck now becomes a witness for the defendant.

BY MR. JOHNSON:

Q. You mentioned Mr. Carter when Mr. Haglund was asking the questions, that he was the resource manager, and what is that position?

A. The resource manager?

Q. Yes.

A. He buys logs.

Q. So he's the person responsible at his sawmill for purchasing logs?

A. Correct.

Q. Okay. Now, where was his office located?

A. Across the hall from me.

Q. So did you have regular conversations with Mr. Carter while you were the mill manager at the Eugene mill?

A. Sure.

Q. Did you talk to him about log sourcing issues, log issues in general?

A. Periodically, yeah.

Q. And, in fact, did you travel with Mr. Carter to visit log suppliers on different occasions?

A. There was a couple of times that we actually visited vendors together.

[Tr. 62] Q. Now, when you were at Northwest Hardwoods, who did you report to?

A. Jerry Martin.

Q. Now, did Mr. Martin, while you were at Northwest Hardwoods, ever tell you that it was the strategy of Northwest Hardwoods to bid up logs to hurt competitors?

A. No.

Q. Did Mr. Martin ever tell you that it was the strategy of Northwest Hardwoods to buy more logs than it needed just so competitors couldn't get logs?

A. No.

Q. Now, you mentioned Mr. Carter, the resource manager. To whom did he report?

A. Del Fisher.

Q. And that's Mr. Fisher who is sitting here?

A. Yes.

Q. Now, did Mr. Carter, in your conversations with him about logs, ever tell you that Mr. Fisher had ever instructed him that he was supposed to go out there and buy logs at high prices to raise the costs of competitors?

A. No.

Q. Did Mr. Carter ever tell you that Mr. Fisher ever told him that he was supposed to buy more logs than he needed just to keep them away from competitors?

A. No.

[Tr. 63] Q. In fact, if such a strategy existed, would you have gone to work for a competitor?

A. Ask me that again?

MR. JOHNSON: I'll withdraw the question.

MR. HAGLUND: Just a couple follow-up questions, Your Honor.

THE COURT: Is that all, Mr. Johnson?

MR. JOHNSON: Yes, it is.

THE COURT: All right. You may redirect.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Buck, who prepared the letter that is Exhibit 446?

A. I'm not sure.

Q. Who presented it to you to sign?

A. Greg Miller.

Q. Who is Mr. Miller?

A. He was in government affairs.

Q. So he is with the department of Weyerhaeuser called government affairs?

A. Yes.

Q. Is he a lobbyist in the Legislature for Weyerhaeuser?

A. I don't know for sure. I know that he spends a lot of time in the Salem area watching basically kind of the political climate to see where things are at, where they're headed.

[Tr. 64] Q. Did Weyerhaeuser get the exemption from the rules?

A. Yes.

Q. Let me just ask you one last question, Mr. Buck. If you had known that the actual statistics, in terms of consumption had been – were – really five or six percent of Eugene's consumption came from State lands, would you have raised a question when you read the letter?

A. Yes.

MR. HAGLUND: Thank you. No further questions.

THE COURT: Further questions?

MR. JOHNSON: One question, Your Honor, or a couple maybe.

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. You said that you had never seen this letter prior to arriving at the Oregon Department of Forestry?

A. Yes.

Q. Do you know if the numbers were actual current numbers or they were future projections?

A. I have no idea.

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**[Vol. 2-B (Apr. 9, 2003)] [Testimony of James Harrison]**

* * *

[Tr. 65] sir.

JAMES EDWARD HARRISON

Was called as a witness on behalf of the Plaintiffs, was duly sworn and was examined and testified as follows:

THE COURT: State your full name and spell your last name.

THE WITNESS: James Edward Harrison, H-a-r-r-i-s-o-n.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Harrison, do you have – it's my understanding that you have a bachelor of science degree in business administration and economics from Southern Oregon State College in 1981.

And that you then went to work for the family business, Diamond Wood Products, and worked there from '81 through 1995, serving as sales manager and president from '87 through the '95 sale of the company to Weyerhaeuser; is that right?

A. Yes.

Q. Now, were you, sir, involved in the negotiations to sell the company?

A. Yes, I was.

Q. Could you describe over how long a period of time those [Tr. 66] negotiations –

A. It was on and off for about two years, maybe two and a half at the outside.

Q. Who was the negotiator for Weyerhaeuser?

A. Primarily Arnold Curtis and a gentleman named Peter Sills.

Q. Where did these negotiations take place?

A. Some over the phone, but mostly in Eugene at Diamond Wood Products, and in Tacoma – actually, the Weyerhaeuser hangar was the final negotiation.

Q. The Weyerhaeuser hangar?

A. Yeah, airplane hangar in Seattle when we were up there.

Q. And the negotiations occurred over about a two-year time frame?

A. Correct.

Q. Now, at some point in those negotiations, did Mr. Curtis bring what you would characterize as some pressure to bear on you?

A. The only real time that I remember was just the final negotiation.

Q. What happened?

A. Well, it was intense. Basically, Arnold said, "If we don't put a deal together here that we're going to come to Oregon. With or without you, we're coming to Oregon."

Q. And did he explain that any further?

[Tr. 67] A. Basically, he said that, "We have several hundred acres of industrial site in North Bend," I believe is what he said, which is also contiguous to a chip dock or something like that for export.

Q. And what did he explain might happen if the deal didn't get concluded?

A. Just basically that we'd compete head-to-head down here in Oregon.

Q. Did you feel any pressure associated with that in the negotiations?

MR. SIMON: Objection, leading.

THE COURT: Sustained.

BY MR. HAGLUND:

Q. How did it make you feel?

A. I wanted to get the deal done.

Q. Why ultimately did the Harrison family sell Diamond Wood to Weyerhaeuser?

A. Well, we thought the timing was right for us. I had been president and CEO of the company. I suffered – a couple things, one is at that time we were very profitable, and I felt that it was – I thought that we were at the – you know, towards the top end of the profitability of the company.

And, two, is I had had an accident and had broken my neck in three places and was partially paralyzed, and not [Tr. 68] feeling too well. And I guess three is my brother-in-law, Paul Rodenski (ph), basically, we ran the company together, had just come down with cancer probably three months earlier – six months earlier, and we just felt that the timing was right.

Weyerhaeuser was coming to Oregon and they wanted in. I wanted out for various reasons and we wanted to put the thing together.

Q. Was avoiding the competition head-to-head with Weyerhaeuser a factor?

A. Yeah. I was scared to death. I just did not want to face that.

MR. HAGLUND: No further questions.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Harrison, Michael Simon, one of the lawyers for Northwest Hardwoods and Weyerhaeuser.

Your father was involved in these negotiations, wasn't he?

A. Very little directly.

Q. Wasn't your father the one having a number of direct communications with Arnold Curtis?

A. I don't know.

Q. In the year 2001, did you take any steps towards beginning a new alder mill or hardwood lumber mill operation [Tr. 69] in Oregon?

A. Yes.

Q. Tell us what you did, please, in 2001.

A. Well, after 9-11, I had been day trading for five years before that and that became weak trading, and then weaker trading, and after 9-11, with the collapse of what I was doing, frankly, I needed to find something to do, and I had been looking at restaurants and, you know, just different areas to get involved in and came around to – I felt I knew the alder business, the hardwood business, and we just started scouring basically Oregon and Washington looking for – somehow to get involved back in the business in a small way.

Q. And you did get back in the business, correct?

A. Yes, I did.

Q. And what was the name of your business?

A. We made a deal – I made a deal with a company called Tree Source which – and bought a plant called Pacific Softwoods in Philomath, Oregon. We negotiated a deal that – really that started in January. I started looking in 2002. In

January, I found them. They were going to liquidate the plant or find a deal and I negotiated a deal. We signed the agreement February –

Q. I just wanted to know the name of the business, sir.

A. Pacific Softwoods. And now it's Diamond West Lumber [Tr. 70] Company.

Q. Diamond West Lumber Company in Philomath?

A. Correct.

Q. And it cuts alder lumber?

A. Correct.

MR. SIMON: Thank you, sir. Nothing further.

MR. HAGLUND: Your Honor, he inquired about the – there is some information now about Diamond West and 2002. I have a follow-up question.

THE COURT: You may. Is it in your witness statement?

MR. HAGLUND: Yes, it is.

THE COURT: I'll permit you to proceed beyond the cross-examination if it is in the witness statement.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Harrison, has Diamond West encountered any difficulty in the log markets from Weyerhaeuser with Diamond West?

A. As far as competing?

Q. Yes, in terms of access to alder logs?

A. We're getting lots.

Q. Have you run into any situations where there are exclusive arrangements with landowners?

A. Only one that I am aware of personally.

[Tr. 71] Q. Would you describe that, please.

A. In May of 2002, we revamped the mill to be able to cut hardwood, and we were going to start in June, so in May, we started inquiring for logs, and I approached –

MR. SIMON: Objection, Your Honor. This is beyond the scope of the witness statement.

THE COURT: I don't think it is. I am looking at it. The objection's overruled.

THE WITNESS: And basically Hampton Lumber, who I'd done business with for years in advance, I called a guy and I had been talking to him on some other issues, and told him that we wanted to talk about buying some hardwood logs, some alder logs, and he immediately said –

MR. SIMON: Objection, hearsay.

THE COURT: The objection will be overruled, not for necessarily the truth of what the man said, but for the effect it had on this witness.

You may proceed.

THE WITNESS: David Ivanhoff, I believe, is the vice president of Hampton Lumber. And I said I wanted to talk to him about buying alder logs for our sawmill, and he said that that would not be possible. And I asked him why, and he said, "Because if we sell you alder logs, Weyerhaeuser will cut us off of conifer, and you guys are good guys, we've done business in the past, we don't like [Tr. 72] it, but it's matter of self-preservation, and that's that. If anything changes, I'll call you back in the future."

Q. When you referred to conifer volume, is that a reference to trading certain types of softwood logs between Hampton and Weyerhaeuser?

A. I don't know how he meant it other than basically if he sold us alder, they were afraid of getting cut off of conifer logs for their softwood operations.

MR. HAGLUND: Thank you. No further questions.

THE COURT: Further examination?

RECROSS-EXAMINATION

BY MR. SIMON:

Q. Hampton Tree Farm or Hampton logs that you just referred to was one of many different log suppliers, correct?

A. Yes.

MR. SIMON: Your Honor, I have a matter for the Court after this witness is excused.

FURTHER REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Harrison, is Hampton one of the significant forest landowners in Oregon and Washington?

MR. SIMON: Objection, leading.

THE COURT: Objection overruled.

[Tr. 73] BY MR. HAGLUND:

Q. I didn't hear your answer, sir.

A. Does that mean I get to answer that question?

Q. Yes.

A. Yeah, they're a major landowner.

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**[Vol. 2-B (Apr. 9, 2003)] [Testimony of Thomas Collet]**

* * *

[Tr. 81] Q. Now, did you have a specialty in terms of lumber sales when you were working for Northwest Hardwoods?

A. I started in domestic sales. And then after a period of time, I think less than a year, I moved into international sales and then evolved into heading up their European alder sales.

Q. So you were specializing in alder sales to Europe?

A. Probably 75 percent of what I did was alder, and the rest was from the eastern mills, but it was all Europe.

Q. Now, in terms of the Northwest Hardwoods or Weyerhaeuser alder sales office here in Portland, is that where the sales staff are primarily located for Northwest Hardwoods?

A. At that time, most were.

Q. And do you recall some discussions in 1989 about a problem with stained lumber?

A. Yes. When I started there, I think it was late – I started in late '88, and then some time over the next few months, it could have been '89, I was doing domestic sales. And we had a very large inventory of stained lumber, and I remember asking the question why we had so much stained lumber.

Q. This was some time in 1989?

A. I believe it was 1989.

Q. Now, could you set the scene for what type of meeting [Tr. 82] this was and how this discussion came up?

A. I recall there was a bit of an informal meeting and it would have been Vern Aden's office. And I don't – I can't recall 100 percent who said it, but it was probably Vern who answered the question that I asked, "Well, why do we have

so much stained lumber to sell?" And the answer was that we had bought so many logs and that they had spoiled.

Q. Was this discussion associated with a particular facility?

A. With Longview.

Q. So the question is asked, "Why do we have so much stained lumber?" And the response comes, "It was because we bought too many logs."

Was there further discussion about this topic?

A. The next question was, "Well, why did we buy so many logs?" And the answer was that, "Arnold had said that Longview wasn't big enough for two alder mills," words to the effect, "One had to go and it wouldn't be us."

Q. And to the best of your recollection, who was it that said that?

A. I believe it was Vern, but it could have been anyone in the room at that time. But my recollection is it was Vern Aden.

Q. And who was Vern Aden in connection with the Weyerhaeuser alder sales operation in Portland?

[Tr. 83] A. Vern was the western sales manager. I believe that was his title. And his responsibility was for alder sales and sales of eastern species on the West Coast.

Q. And did he report at that time to Mr. Cliff Chulos?

A. I think in some – for some areas of responsibility, he reported to Cliff, and he might have reported even to Arnold for the alder. I'm not sure exactly.

Q. So you're not sure whether he reported directly to Arnold or to Mr. Curtis?

A. On all things. I know he reported to Cliff on some things, and he might have reported to Arnold on the alder sales.

Q. Now, you used the name Arnold. Who was referred to as Arnold in this decision?

A. Arnold Curtis.

Q. And did you know who the other mill was that had to go in Longview?

A. The only other mill that I was aware of was Ross-Simmons.

MR. HAGLUND: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Collet, Michael Simon, one of the attorneys for Northwest Hardwoods and Weyerhaeuser. We met back in your

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**[Vol. 3-A (Apr. 10, 2003)] [Testimony of Clifford Chulos]**

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[Tr. 5] MR. HAGLUND: Plaintiff calls Mr. Cliff Chulos. While he is coming in, I would like to point out to the Court that Delores Pigsley is here today. She is the tribal chair of the Siletz Tribe and the client representative for the tribe for the balance of the trial.

THE COURT: Very good.

(The witness was duly sworn.)

THE WITNESS: Clifford Benjamin Chulos. C-H-U-L-O-S.

THE COURT: All right. You may proceed.

MR. HAGLUND: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Chulos, it is my understanding that you have a bachelor's degree in economics from Portland State that you [Tr. 6] secured in 1963; that you then worked for four years for First Interstate Bank as a junior loan officer; that you then worked for North Pacific Lumber Company for four years until 1971; that you then worked for Burrows Computers selling information systems to lumber companies; that you in one of your sales calls to Weyerhaeuser were, after that sales call, hired by Arnold Curtis to begin work at Northwest Hardwoods in 1973; that at Northwest Hardwoods, you were a salesman for five years until 1977; that you were the sales manager of the division from '78 until sometime in 1992; that you then left Weyerhaeuser and have been the president and one of the owners of North American Wood Products in Oregon from 1992 through the present.

Is that an accurate summary of your educational and work experience?

A. Just two corrections: One would be when I went to work for Weyerhaeuser, it was Northwest Hardwoods. Weyerhaeuser didn't purchase the company until, I believe, about 1980.

The second thing would be I was head of sales until mid-1991. It was mid-1991 that I was demoted, so to speak, put in charge of international sales, but all of the domestic sales people did not report to me.

Q. Okay. Mr. Chulos, are you here today pursuant to a subpoena that was served on you?

A. Yes, I am.

* * *

[Tr. 12] irrelevant in terms of international sales application.

THE COURT: The objection will be sustained.

BY MR. HAGLUND:

Q. Mr. Chulos, I would like to ask you some questions about log procurement. Do you remember any discussions of log procurement among senior managers as it related to competition?

A. Obviously there were a lot of discussions, many of them quite informal as we traveled together in planes, automobiles. Reference was made at some of our formal monthly meetings as to the log supplies. And if you talk about various portions of the business, logs came up quite often. There were times where the issue of whether or not we were being too aggressive and building too many inventories in logs would come up.

Q. Could you describe the discussions about building too large of inventories?

A. We often talked about the fact that obviously we wanted to make sure we had adequate supplies, but there

were times when we got into the discussion that if for some reason we either acquired another sawmill or a sawmill went out of business, that the log prices would drop due to the reduced competition and therefore we could recoup any of these additional charges.

On one occasion in, probably 1991, in the [Tr. 13] summertime, Heinz told me that Juel Sheldon was going to hate him because he was going to raise prices of the logs. I made the comment, I said: Why are we doing this for us because we have done this many times in the past. But another rule of economics comes in. Every time you do, we raise the price. Ross-Simmons raises the price. The loggers respond to the higher prices by supplying a lot more material, and we both end up with inordinate inventories in the fall which are going to spoil, and we're going to have stained lumber to sell.

Q. What was Mr. Hohendorf's response?

A. I had been told to do.

Q. By whom?

A. Arnold.

Q. Arnold Curtis?

A. Right. On a number of occasions throughout the late '80s – Dave McCullum was much more eloquent than I will ever be: Why do we do this because when we do raise the prices, the supply goes up and no one is deprived of logs. We have excess logs, as does the competition.

Q. And when you said the charges would go up, or recouped these charges, were you referring to recoup the additional log cost?

A. Yes.

Q. Were you considered a part of senior management in your [Tr. 14] role as head of sales?

A. Yes.

Q. Approximately how many individuals were in the so-called senior management group during your time?

A. Well, I think that's going to vary with how far down you go. Obviously Arnold was the senior person. Dave McCullum, Heinz Hohendorf, myself. Towards the end the group expanded to include the sawmill managers and obviously the finance person, whether it be Gene Novak, or later Karen was part of the meetings. Sometimes we went down to even a sales manager level, but generally that would be mid-management.

Q. So the senior management generally included Arnold Curtis, the president; Heinz Hohendorf, the VP of operations; yourself; Dave McCullum; and the comptroller being Gene Novak or whoever was in that position?

A. Yes. Yes.

Q. Now, within these senior management meetings, did they occur generally monthly?

A. Yes.

Q. So you would travel to Federal Way for these?

A. Yes. Or oftentimes they were held at one of the sawmills, like it might be in Longview. It might be in Centralia the next month, Arlington the next month instead of Federal Way.

[Tr. 15] Q. Now, at these meetings, was there ever any discussion about Weyerhaeuser's ability to influence price for logs?

A. Any time you buy or are involved in a market of over 50 percent, I think it was taken as a given by everyone that we could influence price; that we had to be a major influence.

Q. As you understood where the market share was in the late '80s, after you had the Longview plant up and running in

'86, what was your understanding and that of the senior management at Weyerhaeuser concerning Northwest Hardwood's market share of the alder saw wood market?

A. That it exceeded 50 percent.

Q. Was it the same percentage as to the market for finished alder products?

A. I am going to assume that, yes. You mentioned sawlogs. And sawlogs, the highest value would be for lumber.

Q. I want to make sure it is not just an assumption. Was it understood that the company had a 50 percent plus market share in the late '80s in both the alder sawlog market as well as the market for finished alder lumber?

A. Yes.

Q. Now, I want to ask you a follow-up question regarding what Mr. Curtis said at some of these meetings where Dave McCullum or others would question the strategy of raising log costs.

[Tr. 16] Is it true, sir, that he said, in effect, if we pay more today and somehow our competition goes away, we can recoup the costs manyfold because the prices of logs will go down when there is less competition?

A. That was stated at meetings and also in private conversations, small conversations with senior managers.

Q. By Mr. Curtis?

A. Yes.

Q. By Mr. Hohendorf?

A. Yes.

Q. So this issue of log pricing came up many times throughout a significant number of these monthly meetings over a period of several years?

A. We are talking a long time ago. I can't tell you how many monthly meetings. It came up a number of times in private conversations.

Q. As well as at meetings?

A. Yes.

Q. Now, when you made a comment – you stated a minute or two ago – I think you said you were in a car with Heinz Hohendorf or on a plane and he told you that Juel was going to hate you. Who were you referring to?

A. Juel Sheldon, the general manager at the Ross-Simmons.

Q. What was your understanding about why Mr. Hohendorf was saying Juel Sheldon would hate him?

[Tr. 17] MR. SIMON: Objection, Your Honor. That calls for speculation from Mr. Hohendorf, the speaker.

THE COURT: To the extent you know, you may testify. The objection is overruled.

THE WITNESS: We were talking about logs – he was going to increase log prices, and we specifically talked about that. I assume we were talking about Juel was going to hate it because we were going to increase the price of logs in Longview.

BY MR. HAGLUND:

Q. Now, were there times when the logs that were purchased by Northwest Hardwoods for its Longview mill were not needed to process at the Longview Weyerhaeuser mill?

A. I suppose that's a matter of opinion of what is enough inventory going into the various seasons of the year. But we had enough experience with losing logs to spoilage in previous years that when we reached – there were certain levels that you could not saw the logs within 60 to 90 days that you

were probably encountering spoilage, especially in the late summer and early fall.

Q. So were there times when it was stated in these meetings that we're buying more logs than we need, and they will stain or spoil?

A. I can't tell you the exact wording, but it was stated in the meetings.

[Tr. 18] Q. And was that – was that done to keep those logs away from competitors? Were the excess inventories built to keep them away from competition?

A. It was – we raised the price of logs when we had adequate supplies, and I don't know that it was actually said: We want to do this to restrain them.

One of the things that we didn't seem to acknowledge was the fact that some of the suppliers would supply our competitors no matter what we did because as much as we like to think of ourselves, there were people who would prefer to either not deal with Weyerhaeuser or prefer to keep more market conditions – open-market conditions for the product.

Q. Now, Mr. Chulos, I know it has been six months since your deposition, and it is hard to remember everything. Let me read a few questions and answers and ask you if you gave these answers to these questions last fall when you were deposed.

MR. SIMON: Your Honor, if this is inconsistent with Mr. Chulos' last answer, I will have no objection, if I get the page and line number. If it is not inconsistent, I will object.

THE COURT: We will have to see.

MR. SIMON: May I have the page and line number.

MR. HAGLUND: Certainly. Page 23, line 20:

[Tr. 19]"QUESTION: Now, at these meetings was it discussed that Weyerhaeuser needed extra logs or additional logs to wood the mills?

"ANSWER: No, we didn't need the logs. It was discussed because we knew they were at risk of staining.

"QUESTION: Now, was it ever discussed that the purpose of buying the logs was to keep logs from competitors?

"ANSWER: Yes.

"QUESTION: Then who made such a statement?

"ANSWER: Arnold."

Do you remember giving those answers to those questions at the deposition?

A. Do I remember making them? No, I don't. But they are essentially true.

Q. Thank you. Regarding Northwest Hardwoods and its operations, do you recall discussions in the late '80s or early '90s that Northwest Hardwoods was somehow immune from the antitrust laws?

A. Yes.

Q. Could you tell the jury about those discussions?

A. Well, it was – it began to come out that if we looked at alder as a hardwood, and if you look at North American hardwoods, alder is less than 3 percent of total supply of hardwoods cut each year in North America. Even though we [Tr. 20] might have 50 percent, or plus, of the alder production, that would translate into less than one and a half percent of hardwood production in North America. Customers always had alternatives, either alternative North American species or possibly imported hardwood species or possibly alternative softwood species.

Q. Were you and other senior managers told by Mr. Curtis to start referring to alder as just a small part of the U.S. hardwood industry?

A. Yes.

Q. And did he explain this in a way where he was at a meeting saying: Folks, we have been looking at this the wrong way. We really don't have any worries if you talk about it, the alder industry, in this fashion? Did he say things to that effect?

A. He said things to that effect.

Q. Did you have the impression that he had legal advice–

MR. SIMON: Objection, Your Honor. Leading.

THE COURT: Objection will be sustained. I am not going to object it on the grounds of leading. I am going to sustain it because of the impression. I think he is entitled to lead this witness. So we won't worry about that.

BY MR. HAGLUND:

Q. I would like to ask you now some questions about [Tr. 21] specific competitors. Do you remember discussions about Ross-Simmons as a competitor?

A. Yes.

Q. Were there discussions about the potential impact of Ross-Simmons – the potential positive impact of Ross-Simmons leaving the marketplace, failing as a company?

A. I don't recall specifically putting the name together. The comment about the advantage was competition in general.

Q. Now, did Weyerhaeuser try to buy Ross-Simmons in the mid-'80s?

A. I can't recall if it was mid-'80s or early '80s, but at some point in that time period, I would say, between 1981 and 1985 we attempted to buy Ross-Simmons.

Q. And that was before the decision was made then to convert a mill in Longview that opened in '86?

A. Yes.

Q. Now, do you remember any discussions about a competitor in Everett, Washington, called Smith Street?

A. Yes.

Q. What do you remember?

A. Well, Smith Street was and is a very small sawmill; put out very high-quality material. But because of their size we never – they did not present a threat in the sales marketplace.

No. 2, it was decided because of their position in

* * *

[Tr. 38] Q. All right. Were you generally aware of the sales activities, both internationally and domestic, for Northwest Hardwoods while you were there through 1992?

A. Yes.

Q. Let's talk about that for a few minutes, and then I will come back to North American Wood Products.

Now, throughout the period of 1980s, from 1981 to 1991, while you were at Northwest Hardwoods, Northwest Hardwoods was selling all of the lumber it could make, correct?

A. Pretty much.

Q. You were sold out?

A. Not all the time.

Q. Most of the time?

A. Most of the time.

Q. Now, you had more demand a lot of the time from customers than the company could fill. Is that correct?

A. Much of the time.

Q. Company was looking to grow?

A. Yes.

Q. In order to serve that customer demand?

A. Yes.

Q. The customer demand was the primary reason why the company was looking to grow, correct?

A. I believe so.

* * *

[Tr. 50] A. Yes.

Q. When did Weyerhaeuser rejoin that organization?

THE COURT: Let's go on. I think we are getting away from the subject here. Let's go on. Any other questions of this witness?

MR. HAGLUND: Yes.

BY MR. HAGLUND:

Q. Have you had any contact with Mr. Novak at all since he left your company in 1995?

A. None whatsoever.

MR. HAGLUND: No further questions.

THE COURT: Any further questions?

MR. SIMON: No, Your Honor.

THE COURT: You may step down.

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**[Vol. 3-A (Apr. 10, 2003)]**
**[Testimony of Mark Rasmussen]**

* * *

[Tr. 51] of Science Degree from Utah State in environmental studies with a minor in economics and that you were valedictorian of the college of natural resources.

You obtained a master's degree in forest science/economics from Utah State in 1982.

You worked for the United States Forest Service for three years as an operations research analyst in the early '80s.

You worked for the National Forest Products Association for five years in the mid '80s as a policy and programs analyst.

And then you spent ten years as a forest economist for Timber Data Company in Oregon from 1987 through 1996.

Since '96 you have been with the forestry consulting firm here in Portland called Mason, Bruce and Girard, spending two years as a senior forest analyst and the last four years as a shareholder.

Further, it is my understanding that while at Timber Data Company, beginning in '87 and throughout your forestry consulting work with Mason, Bruce and Girard, that you collect, edit, analyze on a regular basis timber supply and forest industry economics issues and matters.

Is that an accurate summary of your education, background and experience?

A. I think so.

[Tr. 52] Q. Now, Mr. Rasmussen, do you have an opinion concerning whether the market for alder sawlogs is a distinct product market?

A. Yes, I do.

Q. Could you share that opinion.

A. It is my opinion, based on the analysis I have done, that alder logs are in a market by themselves – by themselves here in the Pacific Northwest.

Q. And does the alder sawlog product market have a geography?

A. It is confined to western Oregon and western Washington.

Q. Now, what is the basis of your opinion, sir?

A. Nearly all the logs are found in western Oregon, western Washington, all the alder timber resources there. Those logs are processed at mills in the Northwest. There is a very, very small amount of export to foreign countries and the logs are processed here, and they are processed by hardwood sawmills.

Q. They are processed at specialized mills making hardwood lumber here in the Pacific Northwest?

A. That's right.

Q. Now, Mr. Rasmussen, what, in your opinion, would happen to the alder industry in the Pacific Northwest if the alder timber resource were suddenly off limits?

* * *

[Tr. 55] hardwood logs moving from the East of the United States, east of the Mississippi to the Pacific Northwest for processing here?

A. No.

Q. That's not happening now and you haven't seen it happen in the past?

A. No. It is not happening now, and I have not seen it happening in the past.

MR. HAGLUND: The demonstrative exhibit that was marked as Exhibit 18, Your Honor, I would like to be able to approach the witness as we just had it blown up.

BY MR. HAGLUND:

Q. Mr. Rasmussen, if you could, could you come down from the witness stand and just explain how this map shows slightly different information about the hardwood industry in the United States.

A. Yeah. This map – if you are a forester, you recognize this is where the bulk of the hardwood inventory sits.

Q. You need to speak up, please.

A. The timber in the West is primarily softwood species, conifers, and out here we have lots of conifers but also a lot of hardwood. This map shows the circles and indicate the size. The purple circles --

THE COURT: Put that on the easel here so the court reporter can be listening directly to him.

* * *

[Tr. 58] Washington if alder were off-limits?

A. I'm not aware of any logs that currently come into the Pacific Northwest, hardwood logs for processing in the Northwest mills. Could they come in? Maybe. There would be another big cost disadvantage there or financial disadvantage. That is, first, you have to incur the transportation costs of moving those logs from, say, South America up to the Pacific Northwest.

But, secondly, labor is cheaper outside this country. You would expect to see those logs, if there was a product for the wood making those logs, you would expect more likely to see that those mills would be built in South America and the product would be shipped. It is much cheaper to ship the products than the logs.

Q. So from the standpoint of economics, are hardwood logs from South America or elsewhere overseas, in your opinion, a viable substitute for the loss of the alder resource to come in to substitute for that resource to feed the hardwood industry in the Pacific Northwest?

A. I don't think so. I think if alder were suddenly unava[illegible]e, more likely what you would see is taking people taking the good mills and dismantling them and setting them up somewhere else where there is a resource.

Q. Thank you. You can return to the stand.

I would like to turn now to the lumber market. [Tr. 59] Mr. Rasmussen, do you have an opinion regarding whether the market for finished alder lumber is a distinct product market?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is that it is a distinct market, distinct from other hardwood lumber markets.

Q. Why is it, sir, that you have reached that conclusion?

A. My opinion is based on two analyses that I performed. First, I made an extensive review of the literature to see how people who are in the hardwood lumber business think about the markets. The second thing I have done is a statistical analysis.

Q. Let's take each of those separately. You said that you performed a literature review. What exactly did you do?

A. I tried to find everything that I could that was written about the hardwood lumber business, and I looked for articles written by researchers at universities. The forest service has a number of researchers dedicated to hardwood products and hardwood markets. I looked at the trade journals and I talked to some people.

Q. Now, when you say that you talked to some individuals, what types of people did you talk to?

A. Mostly I was – mostly I followed up with people writing the articles I was reading, asking them for more [Tr. 60] clarification or their opinion about certain things.

Q. Where would you – could you give the categories or types of researchers or industry folks that you talked with?

A. Yeah. As I mentioned, the Forest Service has a number of people who work on researching hardwood issues. There is a set of people I didn't talk to very much. They are the people who worry about the growth and yield of hardwood timber.

But there are also a number of people who are working on and understanding the markets, developing the markets, trying to promote the use of hardwood products both in the U.S. and abroad. So that's one category.

There is similar arrangements at universities. I think Virginia Institute of Technology has a group of people who are doing the same kind of thing, similar kind of thing.

So I talked to those kinds of people. I talked to people who watch the market and write about the market in different trade publications, and I talked to – I guess I talked to a couple of lumber brokers.

Q. Okay. Turning to the literature review. You mentioned you reviewed articles. Could you describe the type of articles and categories that you reviewed.

A. I haven't thought about categorizing them. There is a certain number of articles that are written, as I mentioned, in the trade publications about, you know, what's going on [Tr. 61] in the different hardwood lumber markets. I read some articles. There is a certain set of researchers who every year are trying to say what the total hardwood lumber production

was for the year and how it changed and what products were being made.

I read –

Q. How many articles did you review approximately?

A. Well, it is in my bibliography. More than 100, 120, something like that.

Q. And approximately how much time was devoted to reviewing that literature?

A. Probably three or four weeks spread out over a couple of months.

Q. And what findings or conclusions did you come to based on the literature review and follow-up discussions with researchers and industry participants?

A. The question I w as trying to answer was the question you asked me: Is alder part of – how does alder fit into this larger thing we might call the hardwood lumber market.

I guess what I found is that people in this market and people who are watching hardwood lumber industry don't think of it as one market. They think of it as a collection of markets. If you want to know what the price of hardwood lumber is, you have to be pretty specific. You have to ask about the price by species and by grade.

[Tr. 62] If you look at something that is talking about changes in the market, it is always changes by species and grade. It will say something like select cherry was up again this month and northern hard maple was down. The demand for oak flooring seems to be holding steady. That was last month. They always talk about the market in terms of species and grades or products.

Q. Now, can you give some examples of where you see in the literature discussion of specific species and specific product categories?

A. There are two publications that people look at on a regular basis. There is one called the Hardwood Market Report, and its counterpart is Weekly Hardwood Review. Both of these are published from companies in the East. What they do, they talk to a bunch of people every week and try to peg the price for a number of different hardwood lumber products each week. And then people trading lumber during the week are looking at that to sort of evaluate the trades they are making.

Q. And if one looks at those publications, those two U.S. industry publications that track hardwood prices, they are going to be tracking those prices by species and grade. Is that right?

A. Yeah. Even Hardwood Market Report, which I think has a little bit wider distribution, even breaks it down into [Tr. 63] region of the country. So if I wanted to know the price for high-quality hard maple, I would see three prices: One for the northern region, which I think on this map would be this area that is called glacial and central. Then there is a price for the Appalachian region and a price for the southern region. Those prices might be different.

Q. Is that why, based upon your review, might those prices be different?

A. As I talked to people, what I began to realize – they told me – is that – take maple, for example. The characteristics of the maple lumber produced in one region might be a little different. And if you are making a certain kind of thing, you should be aware of those characteristics and it might have a different value.

Q. Now, do you find alder reported in these two trade industry publications that track hardwood lumber prices?

A. No.

Q. Why is that?

A. Well, alder – it was included in the Weekly Hardwood Review until 1995 and then they dropped it.

Q. Why did they drop it?

MR. SIMON: Objection, foundation.

THE COURT: Objection will be overruled. I will permit him to testify.

THE WITNESS: I asked why they dropped it and when [Tr. 64] they dropped it.

MR. SIMON: Objection. Now, we are hearing related hearsay.

THE COURT: Objection will be overruled. This is an expert testifying based on his survey of the subject. You may proceed.

THE WITNESS: The response from the person there was they saw – they felt like they were reporting prices primarily for one company, and they didn't want – they weren't interested in doing that.

BY MR. HAGLUND:

Q. Was that company Weyerhaeuser?

A. Yes, I assume that was right.

Q. Now, could you give some examples of where a particular species is referenced in a particular application and the dominant species in that application?

A. I mentioned that often we see in the literature – you would see discussion by species and grade. Some of the publications, especially where they are trying to sort of total up what the production was for year, do it by product. For example, flooring is a big use of hardwood lumber. For the most part that's red oak.

Q. And the market is referred to – the market for flooring is generally referred to as the red oak market?

A. If you look in some of the publications, you would see [Tr. 65] actually red oak and maybe flooring is sort of a description of that lumber product.

Q. Okay. Now, what about applications like gymnasium floors?

A. That's maple that would be used for that. Hard maple.

Q. Hard maple as opposed to soft maple?

A. That's right.

Q. That's almost a universal application for most of the gym floors throughout the United States?

A. I think you would be surprised if you saw one that wasn't.

Q. No alder gym floors?

A. Not that I am aware of.

Q. Bowling alleys?

A. Hard maple.

Q. Again, because of its characteristics?

A. That's right.

Q. How about Fender guitars?

A. I play a Fender guitar. I know it is made out of alder.

Q. What, Mr. Rasmussen, did you not find in this literature review that you thought was significant?

A. Well, a lot of my work centers around softwood. So I'm reading the softwood journals and price reports as well. The big one that I think almost everyone reads is called [Tr. 66] Random Lengths published out of Eugene. They report in a similar fashion price for softwood products each week.

Random Lengths has an index. Everyone looks at that first thing. You turn right to the index and get an idea which way the wind was blowing that week. Were prices up? Were prices down? I didn't see – I looked hard. That's what – when I started my statistical analysis, that's what I was looking for, was something that says: Here is the price of hardwood lumber. But it just doesn't exist.

As I got into this further, I saw that it wouldn't make sense to the people involved in that market to create an index like that.

Q. So the tracking that goes on is by species and grade, not as an aggregate industry?

A. That's right.

Q. Now, you mentioned that there were two fundamental bases of your opinion. One was the literature review and the second was a statistical analysis that you did. I would like to turn to the second category.

Could you explain what statistical analysis you did do.

A. We did something called a price correlation analysis.

Q. And that's an economics term?

A. That's right.

[Tr. 67] Q. It is well known in the field of economics?

A. Sure, yes.

Q. And as simply as you can, could you explain what it is?

A. The notion is, in terms of determining markets and whether two products are in the same market, the notion is, if the prices for two products are going in the same direction over time, then you have a good feeling that they are in the same market. If they are moving in opposite directions or

randomly relative to each other, then you don't think they are in the same market.

Q. And is there a way mathematically to derive statistics that help as you look at a price, the prices of two products moving through time, is there a way of mathematically going through a statistical analysis to measure whether they are closely or not closely correlated?

A. Yeah, there is a standard statistical test used in many applications. It is called a correlation coefficient.

Q. And did you perform that type of analysis?

A. Yes, I did.

Q. I would like to put on the screen what's been marked as Exhibit 86. We will deal with a few of these to explain what you have done, and we will try to break it down.

Now, we will zoom up on Exhibit 86 here in stages.

A. I hope so.

Q. Do you have a hard copy there?

[Tr. 68] A. Yeah, I do.

Q. We will eventually be dealing with 85 through 90.

Could you just briefly describe what the columns are here and then we zoom in.

A. Okay. This is a printout of a Microsoft Excel spreadsheet that I made. We can do all this now on a spreadsheet, which is very nice. What you see here – okay, in the upper – if I touch this does that –

Q. If you use your finger and move it, you can be John Madden.

A. I will try that. What you see here, I'm comparing the prices for – it says: Alder SUP 4/4. That means alder superior grade. Weyerhaeuser has a number of grades that it uses

to – when it sells its lumber. Superior is the highest grade. This is the highest priced grade.

4/4 – I am sorry – four-quarter. This means that this lumber is four-quarters of an inch thick, which means it is 1 inch thick. Alder lumber and a lot of hardwood lumbers is sold in different thicknesses. Four-quarters is a very common one.

I'm comparing alder superior four-quarters to Appalachian four-quarters FAS, which means first and second. This is the highest grade used by the companies that make eastern hardwood. They have a grading system different from alder. FAS is the highest grade there.

[Tr. 69] Hard maple. That's a certain group of maple species. As we talked about before, they have a high density. They are used for things like gym floors and bowling alleys and furniture, things like that.

Q. And the alder sup. which you said stands for superior, is that the Weyerhaeuser top grade?

A. Yes, that's the top grade.

Q. You are comparing the top grade of the Weyerhaeuser alder lumber production with the top grade in the Appalachian hard maple?

A. That's right. There are two other things to notice here, the unsel – that means unselected – apparently a lot of hardwood maple, even in this higher grade goes through another selection process where they sort out the better pieces. This is the price for the group that hasn't been sorted through.

Then the KD means kiln dried. All of the alder finished lumber that is sold is kiln dried. Some of the eastern hardwood lumber that is sold is kiln dried. A lot of it is sold rough and green, meaning it hasn't been planed and it hasn't been dried.

Of all the prices that I might find, this is the hard maple that is most closely – the kind of hard maple lumber that is closely analogous to the alder lumber.

Q. Because it is the highest grade of the hard maple [Tr. 70] compared to the highest grade of the predominant producer of finished alder lumber at Weyerhaeuser?

A. That's right. And they are both kiln dried.

Q. Now, can you explain what these columns of data show.

A. Yeah. First, let's look here. This is the monthly price of the alder lumber. This was data provided by Weyerhaeuser through their expert, and Mr. Simon, I guess, got it for us.

So this is the monthly price per thousand board feet. You see in June, 1990, Weyerhaeuser sold some alder superior four-quarter, and the average price was $1,041 per thousand board feet. All these prices are per thousand board feet.

Q. And your comparison here – we won't zoom back – but you have ten years worth of the pricing data for these two different species of hardwood?

A. I think it is actually 11 years or 10 and a half years. It goes from June, 1990, down to December of 2000.

Q. And it is monthly prices?

A. Yeah.

Q. Traveling through that 10 and a half time frame?

A. That's right.

Q. All right. Go ahead.

A. The next column is the Appalachian hardwood – the Appalachian hard maple price. You will see that down below [Tr. 71] here. So that's the fundamental data that this

analysis is based on. From there we manipulate that data to give us the correlations that we want to know about.

Q. Now, what's the first step that you did in connection with this statistical analysis that you called a price correlation analysis?

A. The first thing – can you move this over now so I can see the graph?

Q. Certainly.

A. Okay. The first thing I did was to graph these out and just get a feeling for how they look compared to each other. You can see here – you can turn those off?

Q. I will do that for you.

A. So you can see that there is some similarities and some differences. You can see that both of these are trending up over time. You can see that they both have a little bit of a dip in this area here and a flat spot and some kind of recovery here.

You see some differences as well. It looks like the hard maple had a really good run in this period here whereas the alder, while it was going up, was trending up more slowly. So the first thing that I always like to do when I get some data is graph it out and see what I see.

Q. Then what do you do?

A. Well, then I calculated a correlation coefficient. [Tr. 72] With a spreadsheet, now it is very easy. I just have to identify the range of the data, the two columns I'm interested in, and put in a formula and it bangs it right out for me.

The correlation coefficient for these two species – these two price trends or these two price series is .965.

Q. Is that a high correlation?

A. I guess I should tell you a little bit about the correlation coefficient. If two prices are moving exactly in tandem, the statistics would be 1.0. If two prices were moving always opposite, the number – you would say they have inverse correlation, perfect inverse correlation, then the statistics would be minus 1.0. If they are moving randomly against each other, then you have zero. You say there is no correlation.

This first calculation gives us 965, very close to 1. And you say, you know, if you stop right there, you say they are correlated. They are in the same market.

Q. But do you stop right there?

A. No.

Q. Let me show you the second graph that is immediately below the first one that you talked about and ask you to describe what you see here.

A. You have to be careful with the correlation coefficient [Tr. 73] because of the mathematics behind it. It can be – it can give you a false positive if both of the series are trending at the same time. Because what we're really interested in here is how these things are moving from period to period. And if they are both trending up, the way the correlation coefficient is calculated, it can give you a false positive, I guess, is the best way to call it.

Q. Let me stop you right there. I want to ask a question here, too, regarding this. So, in other words, if I'm simply doing the first step that you have discussed here that was shown on this graph, if I were only to try and measure whether alder in a given month went up and Appalachian hard maple went up, if they both went up in that month, is the correlation a perfect 1.0?

A. You calculate the correlation over a period of time. If they both went up together every month or they both went down or they're tracking completely, then it would be a 1.0.

Q. This shows the limits of my questioning ability with this kind of stuff.

A. We have been over your limits here before.

Q. If then you take a year and in that year alder is going up at – is going up the entire year, alder superior and Appalachian hard maple is also going up in the same year, you would have a 1.0 correlation?

A. If they were going up at exactly the same rate, it

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[Tr. 83] THE COURT: All right. You may proceed,

Mr. Haglund.

MR. HAGLUND: Thank you, Your Honor.

BY MR. HAGLUND:

Q. Mr. Rasmussen, you talked about the first stage. What were you trying to examine in the second step of this price correlation analysis?

A. As I mentioned, what we are really interested in is how these prices are changing from month to month relative to each other. If you can – can you move over to the left on this sheet a little bit.

Q. Sure.

A. Just a little bit farther, if you would. That's good.

In these two columns here what I have done is calculated the monthly price change for each series. You see the $6 here is the difference between the 1,047 and 1,041 for the alder. And you can see the Appalachian hard maple went down $10 in that month while the alder was going up $6.

The economists refer to this as the first difference. It is simply a change from one period to the next. So now move over to the graph we were looking at before, please.

Q. Okay.

A. So what I have done here is simply graph out those [Tr. 84] periodic changes, those first differences. You can look here, this is zero. If there is no change in a month, the line would be along here.

So what you see, look right here, for example, the hard maple in this month went down $40. At the same time, the alder went up a few bucks. Over here the hard maple went up, it looks like almost 70 bucks, and in that same month – it is hard to tell here because I have all these months squished together – but the alder was either unchanged or went down slightly or maybe up slightly. I can't see how it was lining up there.

So, anyhow, you can take a look at this graph and say, well, maybe they are not tracking each other as tightly as you might think. So what I can do then is simply run that same calculation of the correlation coefficient on these first differences. That's what I show up in the upper left-hand corner of this sheet right here.

So when we did it on the series, just the prices by themselves, we got a .965. When we do it on the first differences, it is .276.

Q. And what kind of a correlation is .276?

A. .276 is much closer to zero than it is to 1. Zero is no correlation. 1 is perfect correlation.

Q. So overall when you look at all of this information, what does it tell you about the price correlation between [Tr. 85] Appalachian hard maple and alder superior lumber?

A. Well, this tells me that .276 suggests to me that these two series, while they are both trending up at the same time, they are not moving together. They are not very closely correlated.

Q. What does that indicate in the way the two products operate?

A. Well, the notion, as I said, is if two products are in the same market, their prices would be moving together. So the conclusion is if the prices aren't moving together, then they are not in the same market.

Q. Is that what this shows?

A. Yeah. I would say that suggests it.

Q. Let's move to another example here. This is a comparison of what species?

A. This is alder again. This is the same grade against red oak from the northern region. Again, FAS being the highest quality of red oak.

Q. Again, it is the Weyerhaeuser superior lumber monthly price data?

A. That's right. In all these we look at it is always the same alder price series.

Q. It is the same 10 and a half year period?

A. That's right.

Q. Let's look at the graph. What does it show?

[Tr. 86] A. Same kind of thing. Both are sort of generally trending up at the same time.

Q. And the correlation based upon that first test shows what?

A. .9, which suggests that there is good correlation there.

Q. And when you do the first differences analysis, and it is displayed in the second graph as Exhibit 87, what do we see?

A. Same thing as before. They are not moving at the same time in the same direction for the most part.

Q. And did you do another calculation?

A. Yeah. It is in the same place up there, .221.

Q. Which is a low correlation?

A. That's right.

Q. Okay. Let's do one more. This is Exhibit 88. This is – what did you compare here?

A. This is cherry. Cherry is interesting because cherry is the species – this high grade cherry is the species and grade that always has the highest price. This is the primo, the best hardwood lumber, the most valuable hardwood lumber that is produced. You can see that there. It trends up sharply over this time period.

Again, this is the same series here for the alder. It looks a little different because the scale of the graph [Tr. 87] changes to accommodate the high price for cherry.

Q. When you do the first – the second stage of this analysis, the first differences, what does it show?

A. Again, it doesn't show very close correlation there. The other thing you notice here is that cherry – the red line is almost always above zero. Cherry is almost always going up. Just a few time periods here where it went down.

Q. And when we move back to the correlation coefficient that you developed, what correlation does it show?

A. It shows .059, which is very close to zero, which means no correlation.

Q. So in this instance, it is so low in your opinion that it means no correlation?

A. Sure.

Q. What does that mean about the markets for Appalachian cherry versus alder superior?

A. Well, given this approach to thinking about how the markets are related, you would have to conclude that they are not related; they are not the same market.

Q. Did you do this same analysis for all of the hardwood species in the East that the data was provided for?

A. Yeah, what I'm doing here is following the process that Weyerhaeuser's expert did. He did this for 17 different species, eastern hardwood species, the highest grade on 17 species. I replicated that analysis for each of those [Tr. 88] species.

Q. Okay. Now, what is Exhibit 85? This is 85A.

A. Can you zoom in a little bit more there? This is called – I'm going to have to get some air sick pills here.

Q. Could you explain what 85A is.

A. This is a correlation matrix. One way to do this is – you can set up the computer to say: Show me the correlation between all of these species. So I had the 17 species plus alder plus also an average of the 17 species that Weyerhaeuser's expert looked at.

So I set up the computer to calculate correlation between each and every one of these. So we have this big table. For example, let's see, we looked at alder as it related to Appalachian hard maple right there. That was the .28. Here is the cherry. I rounded it here to .06.

I could also ask how is this Appalachian hard maple related to each of the other species. Well, to itself it has perfect correlation. That's good. That's what you would expect. You could scan down this column here to see what it's most likely – what it is most closely related to, and maybe not surprisingly, it is most closely related to northern hard maple.

Q. And you are pointing out the – could you point it out.

A. Right here. That 0.85. Okay. So we have this matrix here where you can ask – you can make the comparison for [Tr. 89] any and all of these pairs – I don't want to say that. I can look here and see the correlation between any two price series in this table. This is the table as I set it up here so we can see all the alder here in one column here.

Q. And is it your opinion that you would have thought you – that you would have expected to see a fairly high correlation between northern hard maple at .85 relative to Appalachian hard maple?

A. From one standpoint you think they are both hard maple; they are both selling into the same market. It is interesting, as I said before, that when you talk to people, they think that there is some kind of distinction between the hard maple from one part of the country and the hard maple from another. That's why you don't have a perfect correlation here.

Q. What does this column right here, where you compare alder with each of these 17 hardwoods, what does this column tell you about the markets?

A. Well, when I scan down through here, I see that the highest number I get is 0.33. The lowest is with the cherry, .06. That's not a very big number. It makes me question how closely the prices are correlating.

Q. Does this column suggest relative price independence of alder from these other hardwood species?

A. I guess that would be a good way to say it.

[Tr. 90] MR. HAGLUND: Your Honor, this is a table that includes all of the data that was run in a summary form by Mr. Rasmussen and is just not for demonstrative. We move for the entry of 85A.

THE COURT: Any objection?

MR. SIMON: Can we have the ruling reserved on expert demonstratives until some later time so we can talk about it further and more arguments.

THE COURT: The problem is, with a lengthy trial like this, I like to keep them as current as we possibly can. What's your specific objection on this exhibit?

MR. SIMON: That the methodology used by this witness regarding its first differences analysis is not generally and appropriately accepted in the field of economic analysis. We will show that with our expert, Dr. Randall Pozdena.

THE COURT: All right. I will leave that as a fact issue to be determined by the jury. I will receive 85A. Is it 85A?

(Exhibit 85 was received.)

MR. HAGLUND: That's correct, Your Honor.

THE COURT: We only have 85.

MR. HAGLUND: I apologize. I provided counsel with that. Here is 85A.

BY MR. HAGLUND:

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[Tr. 98] THE WITNESS: So what I was asked to do here was to figure out how much of the alder harvested from state lands could conceivably – well, how would I say this? The question was: If all of the alder harvested from the state lands was delivered to Garibaldi, for example, what percentage of Garibaldi's resource use in that year would that account for?

So I found that Garibaldi consumed about 16.2 million board feet of alder in 1996. The state harvest from those three districts, the districts up by, in and around Garibaldi, was three and a half million board feet. So if Garibaldi received all of that, then that would have accounted for 21.6 percent of the wood used by Garibaldi in 1996.

BY MR. HAGLUND:

Q. And then you show all of the percentages for each year tied exactly to their actual consumption?

A. That's right.

Q. Now, what does the second table show?

A. The second table is similar. I'm now looking at the Eugene mill. I'm looking at the Oregon Department of Forestry districts that are closer to Eugene with the assumption being that if alder was – if any of the alder from state lands came to Eugene, it would be the alder that was closer to Eugene than Garibaldi, and I performed the [Tr. 99] same calculations over here on the far right column.

Q. So in those years, given the consumption in this column, which is actual consumption, if all of the alder harvested from state lands according to their records that were in the area/tributary to Eugene, the percentage of the mills' consumption in those years was in this column?

A. Again, you have got to emphasize that assumption. I don't know how much of it was delivered to Eugene. This assumes that all of it was delivered to Eugene.

Q. Then in the lowest table there, is that a combined?

A. Now, I'm summing it up. I'm summing up all of Eugene and Garibaldi's mill consumption and all the alder harvested and calculating a percentage there.

Q. Okay. Then very quickly did you also prepare a couple of graphs or charts that displayed the –

A. That just makes a picture of the column we just looked at. This is – each bar shows the volume of wood of logs consumed at Garibaldi. The red line is the volume of state – the volume of alder harvested from state lands.

THE COURT: The record should show that he is referring to Exhibit 105.

MR. SIMON: May I ask which table figure it is, Your Honor, from his report. I found it. I apologize. Thank you.

BY MR. HAGLUND:

[Tr. 100] Q. Then did you do the same thing for Eugene in Exhibit 106?

A. Yes. That's what you see there. Same thing.

Q. Now, turning to another subject –

THE COURT: Any objection to 105 and 106?

MR. SIMON: No objection.

THE COURT: They will be received.

(Exhibits 105 and 106 were received.)

BY MR. HAGLUND:

Q. Mr. Rasmussen, I would like to put Exhibit 94 on the screen, blow it up and ask you what it is and ask you if you have any questions.

A. We obtained from Weyerhaeuser a report that shows the volume and price of lumber sold by grade each month each year. This wasn't mill by mill. This was companywide. What we noticed there, there are lots of grades that Weyerhaeuser uses when it sells its lumber.

What I wanted to do here was first list all the grades. But what caught my eye about that, in the eastern lumber, eastern hardwood market, there are four standard grades. With what you see here, there are many, many.

I have forgotten the total; 50, 60, something like that. What I was trying to do here is show how often this grade was used because it was clear that not all grades were used all the time.

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[Tr. 104] logs. That's the log yard. And what we're looking at here is how much volume sits in that log yard at the end of each month. What I did, I graph out those inventory volumes for each of the mills and log yards.

Q. Is the green line shown here the Longview mill?

A. The green is Longview.

Q. Now, what did you observe as a forest economist regarding the inventory levels at Longview?

A. Well, the first thing that I came to here was that Longview seems to be way high in some years. They have really high inventory in some years, especially compared to the other mills. If you look more closely, it is a little hard to see here. You can see most of the mills have some kind of annual pattern here, typically have a little more volume in the log yard in the winter than they do in the summer. But Longview stands out at least in these years in that respect. If you look down here, you see that it is not standing out.

Q. Now looking at Exhibit 99 -

A. That's good.

Q. – does that take the other mills out and show Longview only?

A. That's right.

Q. And in calling your attention to '89 and '93, did those–

[Tr. 105] A. You have '94 there.

Q. In '93 heading into '94.

A. You're right. This is January of '94 right here.

Q. Okay.

A. Okay.

Q. Did those inventories start to build in the summer?

A. Yeah, they did.

Q. What's your assessment of that strategy in the alder business?

A. Well, in alder you have to worry about stain. When you cut an alder tree down, if it is warm out immediately there is an organism that gets into the wood and begins to turn it to stain to red. That, in alder, is not a desirable feature. It is a very undesirable feature and reduces the value of the lumber you can make.

So you have to be careful when the weather is warm, especially you have to be careful that logs don't sit around for long. The longer they sit, the more stain they will have.

Q. You reviewed the expert witness disclosures of Mr. Nelson?

A. Yes.

Q. Do you know of any business reason to build these kinds of inventory through the summer months?

A. Mr. Nelson suggested that was done to put pressure on [Tr. 106] Longview's competitor at Ross-Simmons. It seems like a reasonable explanation for that.

Q. Okay. Now, Mr. Rasmussen, I would like to put on the screen what's marked as Exhibit 97. Did you prepare this?

A. Yes, I did.

Q. What does it show?

A. This is a comparison between alder log prices and conifer log prices in western Washington from 1992 through 2001.

Q. Could you describe what it shows.

A. It shows a couple of things. The dramatic story here at the beginning is this big spike in softwood log – softwood

log prices, conifer log prices in 1993. Prices took a huge spike up in 1993 and have been drifting gently downward ever since. I don't know if I can draw on that or not. But you can see prices trending down since 1993.

Alder, on the other hand, looks to me like it has been trending up through that period for the most part. You can break this into smaller segments, and I think that it was trending up at a steeper rate for some time and that trend leveled out and started rising again.

Q. And what's the red show?

A. That's the alder, the price for alder.

Q. Okay. Thank you. Now, is there anything that you found curious about the graph here?

[Tr. 107] A. Well, what caught my eye, when I prepared this, as we study alder and talk about alder, there is a lot of discussion about it being a come-along species. Do you want me to explain come-along? Has that been discussed?

Q. I don't think there has been a witness yet. The lawyers described it. Could you describe what that means.

A. The notion is that most of the alder these days is found mixed in with conifer stands in various percentages but usually in a minor percentage. That for many, many years, the alder has been thought of as a problem that you have to deal with when you take the conifer out. The focus on the harvest and the management of a piece of ground has typically been on the conifer.

Lots of people in the industry refer to alder as a come-along species. What struck me here is if it is coming along, and for many years you would find alder at a very low price. I don't have prices past 1992. Maybe I should explain that. Or prior to 1992.

These prices come from – they are published by timber data companies as well as the Washington log market report.

If you are interested in information about log prices, what you find is you get, just like hardwood lumber, you get prices by species and by grade and by region.

This service is unique in that they try to put together an index so that you can in one place understand [Tr. 108] how the market is moving.

If you were to stretch this back out, what you would see is that alder prices being at a relatively low level, not changing very much, sort of consistent with this notion that it is just a price that you get for the alder logs as they come along with the conifer harvest.

That all began to change here in, say, 1994 or so where the prices began to accelerate where now this 12-inch alder is bringing more than – the index for that is higher than the index for the domestic conifer.

Q. Now, turning to Exhibit 96. Did you prepare this exhibit as well?

A. Yes, I did.

Q. Does it show the actual harvest of hardwood in Oregon and Washington?

A. That's right. This is data that we saw before reported by the state of Washington and similar data reported by the state of Oregon. This is for harvest from all ownerships.

Q. Which is which in terms of the states?

A. The green is Washington and the red is Oregon.

Q. Okay. If we zoom up and look at particularly the period of the mid '90s through 2000, what does the graph show?

A. Well, what this graph looks to me is that you have a relatively constant level of harvest through this period [Tr. 109] from 1995 through 2000.

Q. So stable supply?

A. Yeah, stable supply.

Q. This is what is harvested as opposed to what's standing in the woods?

A. That's right.

Q. Now, turning to what's been marked as Exhibit 81A, did you prepare this graph as well, Mr. Rasmussen?

A. Yes, I did.

Q. And it has got several layers. Would you please take the Court and the jury through these layers, and then we will focus on particular periods and then zoom on a little bit.

A. Okay. There is four different time series on this graph, and I'm using two different axes so it might look a little formidable at the beginning here.

The blue bar, let's start with that. The blue bar is the western hardwood production. That's how much hardwood lumber is being produced each year according to the Bureau of Census. The scale for that is on the left side here.

So you would see here in, say, 1994 it looks like there was about 450 million board feet of hardwood lumber produced in the West. As we said before that's primarily alder.

[Tr. 110] The green line – I'm sorry – the green bar for each year shows the volume of lumber sales reported by Northwest Hardwoods. So this is how much hardwood Northwest Hardwoods sold each year.

Q. Is that from their alder sawmills in Oregon and Washington during this time frame?

A. Good point. That is exactly what it is.

Q. Okay. And what does – if you look at those two bar graphs in combination, what do they tell you about what is happening in the industry?

A. Well, they show – if you compare them, you can see – 1981 is where Northwest – is where Weyerhaeuser first acquired Northwest Hardwoods and you see it is a relatively minor percentage of the total hardwood lumber production.

As time goes on and those mills produce more lumber and as Weyerhaeuser buys more mills, you see by the time we get out here, there is a relative – out to 2001 – that Northwest Hardwoods has a relatively large share of the Pacific Northwest's hardwood lumber production.

Q. Okay. Now, what does the red line with the red square show?

A. The two lines have to do with prices, and the price axis is on the right side here. So this, for example, is $600 per thousand board feet and this is a hundred dollars per thousand board feet. The red line is the average price [Tr. 111] that Weyerhaeuser received for the hardwood lumber sold each year.

Q. And this is from Weyerhaeuser data the average price per thousand board feet for all of their alder or all of their hardwood sales from their Oregon, Washington mills in the given year at an average?

A. That's right.

Q. And what des the black line with the triangle show?

A. The black line is the average price that Weyerhaeuser paid for the logs used each year. So this is their log costs.

Q. Now, in your opinion, Mr. Rasmussen, as a forest economist, what relationship is there generally between the lumber market and the log market in a given wood product market?

A. We always think that logs follow lumber.

Q. Could you explain why you say that.

A. Logs account for the major cost of manufacturing lumber. It used to be we think it was somewhere around 60 percent of the cost of lumber was what you paid for the log. I went to a thing the other day where the softwood guy told me it was 85 percent now.

So when the price of lumber goes up and there is competition in the market, then the mills can afford to pay more for the logs and the log prices go up. When the price [Tr. 112] of lumber goes down, the mills have to pay less for logs and the price of logs goes down.

Q. Now calling your attention to the period from 1981 through 1997, do you see that relationship, logs following lumber, in evidence in this chart?

A. Actually you might extend out to 1998. Between '97 and '98, lumber prices fell and log prices fell. But generally there is a pretty consistent relationship, generally consistent relationship between log prices and lumber prices during that time period.

Q. What about this '98 through 2000 time frame? What do you see?

A. What I see here is something that we don't see very often. That is, we see lumber prices falling or holding steady and log prices increasing.

Q. When you look at the period of '96 through 2000 and go back to Exhibit 96, was there anything in the log supply market, '98 through 2000, that would be consistent with that situation?

A. The supply was constant. In fact, you might look at it and think there was a slight increase there.

Q. Okay. Now, I would like to turn to some issues related to some other materials that you reviewed. Did you review – and there should be a juror notebook on your table there.

* * *

[Tr. 116] A. What it shows is the allocation through much of the '90s had been somewhere around 5 percent, it looks like. I don't know if it was established that way, but that's how it worked out. In 2000, those allocations were cut back; in 2001 they went away completely.

During this period in here, if I remember the totals right, Northwest Hardwood was returning somewhere around, annually somewhere around 8- or 9- or $10 million back to Weyerhaeuser to cover the cost of selling and overhead, and that went away.

Q. It was dramatically reduced in 2000 and went away in '01?

A. That's right.

Q. Mr. Rasmussen, I just would like to put on the screen, and Mr. Nelson testified about this. Actually that's the wrong one. I will use it as an example. 114 is a charting of what?

A. We received from Weyerhaeuser data about the logs that came into each mill each month. We got that in two forms. This comes from a summary form which shows the volume of logs by each sort, which is how we talk about grade and how we talk about logs and diameter.

This is for the high sorts. This is for the higher quality logs. What we are showing is average prices month by month. What you are seeing here is a line for each [Tr. 117] size class. The lower prices are for the smaller logs, the 1 to 5-inch logs.

What that means, 1 to 5-inch, when we talk about logs, when you talk about the size of the log, it is always the diameter at the small end of the log. You might have 5 inches at the top. By the time you get down to the butt of the log it is larger. In fact, it should always be larger.

Q. Mr. Nelson discussed one of these for Longview and talked about a change in the gap between the lowest price, smallest diameter logs and the highest price at Longview. Did you prepare that graph as well?

A. Yeah. We prepared graphs like this for each mill and each sort.

Q. Now, I would like to turn to a different topic. Did you perform some analysis of some different scenarios designed to establish or try to present what might have happened in the alder log market if certain corrections are made for alleged behavior by Weyerhaeuser?

A. Yes, I did.

Q. I would like to display Exhibit 126 and ask you – what did you do?

A. As I mentioned before, I took Mr. Novak's – the data found on his sheets and made a spreadsheet. Then I was able to – I built the spreadsheet to help me calculate, not only [Tr. 118] what the margins were, but what log prices would have been in order to meet certain margins.

Q. Now, there are three scenarios. Is that right?

A. Right.

Q. In scenario A, did you use information from Mr. Novak regarding a $20 million reduction in log costs?

A. Yeah, I did.

Q. And you gained that information from reading his deposition?

A. That's right. He said something about thinking that profits were $20 million a year less than they might have been.

Q. And is that – let me zoom in here to scenario A. How did you use that $20 million figure that Mr. Novak talked about?

A. Well, this one was relatively straightforward. I said: Okay, if Mr. Novak is right and profits could have been $20 million higher, then let's assume that – that log costs would have been $20 million less. So I divided that 20 million by the volume of logs processed each year and came up with this average price per thousand that you see in that column there.

Q. So it varies depending upon their consumption from $89 and a thousand in 1988 to $84 in 2001?

A. That's right.

[Tr. 119] Q. Now, scenarios B and C were derived differently. Can you describe the process or approach generally?

A. In B and C the notion was – another way to ask the question: What would log prices have been, assuming Weyerhaeuser has the ability to influence log prices, what would log prices have been if the target had been to maintain the average profit ratio for the 1991 through '95 period or the 1986 through '95 period? That's a difference between B and C.

Off the top of my head – I forget which is B and which is C. I guess I could find that in my report. If you want me to look that up. Probably makes a difference, doesn't it?

Q. I think that B is the ten year – I will check that in a second. Let me ask you a question.

A. Okay.

Q. In deriving either of these averages, did you include all of the Northwest Hardwoods alder sawmills?

A. No. For the target profit percentage, I used all the mills except for Longview.

Q. Why was that?

A. As we saw on our previous graph, Longview would seem to be lower than standard profit for a Weyerhaeuser mill, so I felt like – and in listening to Bill Nelson's – reading his deposition, it also sounded like Longview may have been [Tr. 120] pushing the log market up for years prior to 1995 or '96. So I felt it was prudent to drop Longview out of that calculation.

Q. I looked at your report, Mr. Rasmussen. Let me represent to you that scenario B is the ten-year average profit for the Weyerhaeuser alder mills excluding Longview between '86 and '95.

A. Okay.

Q. So based on that representation, could you explain specifically what you did to develop the numbers that are in this column regarding reduced log costs?

A. All right. I made a spreadsheet that looks identical to exhibit – I think it was 414 which summed everything up for all the mills except Longview.

By doing that, I was able to calculate easily not only the log consumption and the average log price, but also the average profit for those years – for each year.

Q. So what was the average profit for the Weyerhaeuser mills, alder sawmills, except Longview during that ten-year period?

A. You know, I don't know that that's in my report. Let me look here and see. Oh, I'm sorry, it is. This is on Exhibit B of my report. The average profit for that ten-year period was 17 and a half percent. So then what I did is I calculated the difference between the profit, the [Tr. 121] average profit for each year, and the average – and this ten-year average.

And so once I knew the percent, I could figure out what the dollar difference is and then I divided that dollar difference by the volume of logs consumed that year.

So what I found is that to hit a 17 and a half percent profit in 1997, that could have been done if the average log prices – if the average log price was reduced by $17. In 1998, you would have to reduce it by $58. By the time you get to 2000, you would have to reduce it by $135.

Q. If the Weyerhaeuser mills, excluding Longview, needed to – were to maintain that historic level of profitability in 2000, their log prices should have been $135 per thousand less?

A. That's right.

Q. Okay. Very quickly then, if we look at scenario C, what type of historic time frame did you use?

A. This is the same process. The historic time frame was '91 through '95, which was on average a little bit more profitable, 18.1 percent.

Q. So the difference between B and C, this one is 17.5 and C is 18. what?

A. 18.1.

Q. Then Mr. Nelson testified how those numbers were used

* * *

[Tr. 133] Agree or disagree?

A. Generally agree.

Q. "Additional mills may implement these processes if they appear profitable while other mills cannot or will not adopt them."

Agree or disagree?

A. Are you trying to describe the behavior of many, many people? Generally agreed.

Q. "When periodic downturns in the lumber market occur, many less efficient mills are forced out of the market."

Agree or disagree?

A. Agree.

Q. "When subsequent increases in price occur, the efficient mills remaining vigorously compete for stumpage, quickly erasing any short-term profits gained by new technologies or marketing methods."

Agree or disagree?

A. That's generally true.

Q. "Each time this happens, the stumpage lumber market margin decreases."

Agree or disagree?

A. Is there a third choice like, sometimes yes; sometimes no?

Q. Yes.

A. Sometimes I agree and sometimes I don't.

* * *

[Tr. 138] A. Same guy.

Q. Title of the article: Are Hardwood Markets Changing?

A. Right.

MR. HAGLUND: Objection, Your Honor. 2002 is beyond the scope.

MR. SIMON: Your Honor, the relevant portions I'm going to read to him do not include 2002 data. He is looking back historically.

THE COURT: That's fine. I will overrule the objection.

BY MR. SIMON:

Q. Do you see in the first column where it talks about how bad was the downturn this time?

A. Yes.

Q. By the way, you are familiar, are you not, with the Asian economic crisis that took place beginning in 1997. You are familiar with that?

A. The Asian flu is what we call it, yeah.

Q. You want to call it the flu. Are you aware that Ross-Simmons documents refer to it as an Asian economic crisis?

A. No, I don't. In the industry we call it the Asian flu.

Q. You can call it that. I will call it based on what the Ross-Simmons documents say.

A. Okay.

[Tr. 139] Q. But you are familiar with it?

A. Yes.

Q. The first paragraph under that heading reads: "As in past recessions, hardwood lumber producers have suffered through more than a year of poor or negative profits brought on by declining lumber prices, low volume of shipments and high stumpage prices."

Agree or disagree?

A. Well, I'm going to agree that Mr. Luppold knows about profits that I don't know about. I don't know what profits are outside what I have read.

Q. Looking at the second-to-last sentence in that paragraph: "The reduction in demand and price brought on by these changes cause lumber production to decline as sawmills shut down or reduced hours."

Agree or disagree?

A. What time period is he talking about?

Q. Talking about – why don't you – why don't you read it to yourself. I don't want to characterize it.

A. It says, "Lumber shipments and prices fell during 2001." Let me look at my report because I had some statistics about 2001. My recollection is that hardwood lumber production increased in 2001.

THE COURT: In the article, in 1400 is he referring to hardwood?

[Tr. 140] MR. SIMON: Absolutely. The title of the article is: Are Hardwood Markets Changing? It is just about hardwoods.

THE WITNESS: I do see from 2000 and 2001, according to the Bureau of Census data, there was a reduction of hardwood lumber production.

BY MR. SIMON:

Q. When Mr. Luppold – that's for 2001, correct?

A. That's a reduction from 2000 to 2001.

Q. When Mr. Luppold writes: "The reduction and demand in price brought on by these changes caused lumber production to decline as sawmills shut or reduced hours."

Would you agree or disagree?

A. That's how production goes down is by someone producing less than what they produced year before.

Q. You are aware that Ross-Simmons Hardwood Lumber Company shut down, went out of business in May 2001?

A. I was aware it was sometime in 2001.

Q. Would you turn to the next page, please. Do you see the heading Global Market for Furniture and Other Wood Products?

A. Yes.

Q. Look at the third paragraph down underneath that. "Initially the hardwood lumber industry saw Asian furniture manufacturers as a market opportunity. We shipped lumber. [Tr. 141] They manufactured furniture along traditional U.S. styles and sold it to U.S. customers at low prices."

Agree or disagree?

A. Again, I'm trusting Mr. Luppold's analysis here.

Q. He knows hardwoods better than you do?

A. Sure. If you want to say that.

Q. "However, as Asian manufacturers established a critical mass of production capacity, they may have noticed that U.S. consumers showed little brand or species loyalty."

Agree or disagree?

A. Again, Mr. Luppold knows – he is the Forest Service guy in charge of watching the hardwood market.

Q. Okay.

A. If he writes it, I will take it at face value.

THE COURT: With that, let's put that in evidence. Then you can argue it and move on.

MR. SIMON: We move in 1378 and 1400 into evidence.

THE COURT: Any objections?

MR. HAGLUND: No, Your Honor.

THE COURT: They will be received.

(Exhibits 1378 and 1400 were received.)

MR. SIMON: Thank you.

THE WITNESS: I'm sorry. I should have said that sooner.

* * *

[Vol 3-B Tr. 10] point of those inventories?

A. I can't tell from my graph because I have so much jammed together here.

Q. You prepared this graph, correct?

A. Yeah, uh-huh.

Q. Your best estimate, sir.

A. I am just going to have to guess at this.

THE COURT: Isn't there another exhibit that shows it?

MR. SIMON: Not that I am aware of, Your Honor, I don't think that I've seen from him.

THE WITNESS: Well, it would be in one of those boxes, I'm sure. We could sort through that.

BY MR. SIMON:

Q. I'm not going to do it. You prepared this graph.

A. Yeah. I have a spread sheet, of course, which this is prepared from.

Q. Would you agree with me, sir, that the highest point is basically in the middle of winter, end of December?

MR. HAGLUND: Objection. For what years?

MR. SIMON: I just said the years. It would be 1989, 1993 and 1994.

THE WITNESS: In 1989, if I look at January, I can see that it's – okay. Let me assume that I have this lined up right, which is hard to do here, but let me make that [Tr. 11] assumption. And if that's true then that would be December,

November, October. It looks like the high point in 1989 is in October.

BY MR. SIMON:

Q. How about '94?

A. '94, January, December, November, October, September, and that's sort of what I –

Q. September?

A. That's what I remember, but I am not confident enough to say for sure it's September.

Q. All right. I'll present this to the jury. We'll argue it on this point.

Mr. Rasmussen, the highest point of your chart that goes here is for early 1994, end of 1993, correct?

A. That's right. Like I say, it looks maybe like it's September of '93.

Q. And for that high point in the end of 1993, early 1994, that's for the Longview mill, correct?

A. That's right.

Q. And approximately what's the volume of logs?

A. In '93, the high point looks like it's just a little less than 18 million board feet.

Q. Okay. And saw logs or pulp logs or both?

A. I believe this is total inventory.

Q. Now, there's a difference between saw logs and pulp [Tr. 12] logs, isn't there?

A. Yes. You will take saw logs and turn them into timber and pulp logs into pulp – pulp into chips.

Q. You take the saw logs and turn them into lumber?

A. Whatever you can out of it. A lot of that ends up becoming chips as well.

Q. But if you can extract it efficiently, you get a lot of good lumber from saw logs?

A. Depending on the efficiency, maybe 40, 50, 60 percent comes out as lumber. The rest comes out as chips.

Q. And obviously the amount of the efficiency depends – the amount that you get out depends upon the efficiencies of your mill?

A. And whatever you're trying to get out of it.

Q. If you're trying to extract the maximum quality of high value lumber, the amount that you get out depends upon the efficiencies of your mill?

A. I suppose that's right.

Q. Now, with pulp logs you make them into alder chips?

A. That's right.

Q. Alder chips are then sold to paper and pulp manufacturing?

A. Yes.

Q. Pulp logs still can stain if they're kept out too long in warm weather, correct?

[Tr. 13] A. Sure.

Q. Doesn't make the slight bit of difference to a pulp log?

A. I am not sure. I asked a couple of people in the industry about that and they hadn't – they hadn't thought about it, so I assume there's no discount.

Q. Thank you, sir. There was no one that you asked that ever told you that if a pulp log incurs a little bit of staining it makes the slightest bit the difference in the chip market?

A. That's right, I asked several people.

Q. And no one told you that it makes any difference?

A. Yeah.

Q. Now, with respect to the logs that are reflected in these charts here, some are stored in a log yard, others are stored in water, in rafts, in water, correct?

A. That's correct.

Q. By the way, did people that you talked to let you know that when you store saw logs in water it extends the life of that log for a great deal of time without causing stain problems?

A. That's what I've heard.

Q. Now, with respect to chips, I think that you have in your report – by the way, do you have your corrected expert witness report handy? It's the one that you signed and it's [Tr. 14] dated March 10, I believe.

A. Yeah. Yes, I do. I believe I do.

Q. If you don't, I have an extra copy here.

A. Okay.

Q. Would you turn to what you labeled as Figure 10, please.

A. Yes.

Q. Figure 10 is a chart that you prepared, correct?

A. That's right.

Q. And for Figure 10, you chart out Northwest Hardwoods' chip production for its various mills over roughly a 20-year period, correct?

A. Yes.

Q. What is the highest point of chip production that you see on this chart, year and mill, please?

A. Excuse me.

Q. Year and mill. The highest point of chip production.

A. It's 1993, and at Longview.

Q. Correct. Now, we're not talking inventory, we're talking actually produced chips. Do you know where the Longview mill, the Longview hardwood sawmill for Northwest Hardwoods, what it does with the chips that it produces?

A. I've heard that it goes to the Longview paper mill, but I don't know that for sure.

Q. Okay. But you do know that there exists a Weyerhaeuser [Tr. 15] paper and pulp mill in Longview?

A. Yes.

Q. Not too far from the hardwood sawmill owned by Northwest Hardwoods in Longview?

A. Not far at all.

Q. Okay. And you've heard that the Northwest Hardwoods sawmill makes not only hardwood lumber but also hardwood chips, and that those hardwood chips are sold to or sent over to the Weyerhaeuser paper and pulp mill in Longview.

You've heard that?

A. I have heard that, yes.

Q. And you've seen no reason – nothing in the documents that shows that's incorrect?

A. No.

Q. Okay. And we see here that the highest quantity of chip production was from 1993 in Longview, over a 20-year period?

A. That's right.

Q. Now, to make a large quantity of chips does one need a large quantity of pulp logs?

A. You need a large quantity of logs that you're going to chip. They don't necessarily have to be pulp logs.

Q. Fair enough. I can accept that. Now, if we go back to 1993, end of 1993, early 1994, on Exhibit 98, your spiked inventory, where the highest point there was for Longview in [Tr. 16] 1993, we've just gone over that, did you make any analysis or determination what portion of those logs were pulp and what portion – which would be used for chips, and which portion of those logs were saw logs which would be used for lumber? Did you make any determination at all?

A. No, I didn't.

Q. Wouldn't it be relevant to the analysis that you're providing to this courtroom and this jury?

A. What I don't have is the – I have – I have some information about the inventory and I have some information about production. What I don't know is what logs were used to make what product.

Q. You didn't have that information?

A. No.

Q. Did you ask Mr. Haglund for that information?

A. No, I didn't.

Q. Would it have been relevant to look into that before coming up with any conclusions?

MR. HAGLUND: Objection, Your Honor.

THE COURT: Objection will be sustained.

MR. SIMON: Thank you.

BY MR. SIMON:

Q. Mr. Rasmussen – Mr. Rasmussen, I am going to hand you for the sake of time several pages of documents that come from Plaintiff's Exhibit 418A.

[Tr. 17] THE COURT: Would you like to approach?

MR. SIMON: May I please?

THE COURT: You may.

MR. SIMON: Thank you, Your Honor.

BY MR. SIMON:

Q. Mr. Rasmussen, these are, for orientation purposes – here, let me tell you. These two pages that I've handed you are from Plaintiffs' Exhibit 418A. It is in one of those 16 boxes there.

A. That's right.

Q. Just for orientation so there's no confusion in my questions and your answers, just because they're in plaintiffs' exhibits doesn't mean that they are plaintiffs' documents. Do you see that down in the bottom right-hand corner, it begins with the letters "WY" and some numbers?

A. Yes.

Q. And you've done a lot of litigation before, correct?

A. I've done some.

Q. You've consulted in a number of trials?

A. A couple.

Q. You've participated in hearings?

A. Yes.

Q. You've consulted on litigation that even didn't go to trial?

A. Yes, correct.

[Tr. 18] Q. So you're aware of how the process works?

A. A little bit.

Q. You know that plaintiffs have the opportunity to get documents from the defendant and vice versa?

A. Yes. A lot of the information I used came from Weyerhaeuser's records.

Q. Exactly. So you understand that even though those boxes might be labeled Plaintiffs' Exhibits –

MR. HAGLUND: Objection, Your Honor. This is asked and answered.

THE COURT: Sustained.

BY MR. SIMON:

Q. Now, the two pages I've handed you, which, for the record, are numbered WY032954 to 955. It's a little hard to read in the first page, but I'll represent to you it says – do you see where it says, "Combined Longview consumption report," and it says, "January 1994"?

A. Yes.

Q. Okay. These two pages are for Longview, January 1994. Would you turn to the second page, please.

A. January is blanked out on mine.

Q. It's the hole punch. I'll represent to you and counsel, we have the document numbers, it said,

"January 1994."

A. All right.

[Tr. 19] Q. Now, do you see how this page is divided into sections? The top third talks about alder, the middle third talks about maple, the bottom third talks about something else?

A. Miscellaneous hardwoods.

Q. Okay. I'm only going to be asking you about the alder because that's what we're talking about in this trial.

A. Right.

Q. Now, do you see the top third relating to alder?

A. Uh-huh, yes.

Q. The first couple of lines talk about alder pulp, correct?

A. That's correct.

Q. Then there's alder saw logs?

A. Uh-huh.

Q. And then after that there's total alder?

A. Right.

Q. Now, with respect to the total amount of alder beginning in the inventory in January 1994, what's the approximate – and you can round out the number if you wish – what's the number of volume in the inventory column for total alder?

A. For total alder? You have it circled here?

Q. Yes.

A. Is that the number?

Q. Yes.

[Tr. 20] A. It looks like 12.8 – well, 12,856,820, it looks like.

Q. I think for our purposes 12.8 million would suffice.

A. Right.

Q. You'd agree with that?

A. Yeah.

Q. And since you told us earlier that you thought this high point of, oh, about – almost 18 million, 17-something million. I believe may have been in the September-October time period, we're now looking at the inventory report for January. Does this seem to correlate?

A. Yeah, it does, uh-huh.

Q. Now, for 12.8 million board feet of total alder, does this document break it down into how much was alder pulp and how much was alder saw logs?

A. Yeah. It tells me how much was in the inventory as pulp and saw logs. I don't know that it tells me how much was saw and how much was pulp.

Q. Fair enough. But listed in the inventory, does this show that 8.4 of the 12.8 million was alder pulp?

A. Right.

Q. Is that what it's shown as?

A. Yes, it does.

Q. And does it show that only about 4.4 million was for alder saw logs?

A. Yes, it does.

[Tr. 21] Q. Were you in the courtroom a few days ago when Bill Nelson testified that he thought an appropriate inventory would be between four and five million?

A. No, I wasn't.

Q. All right. May I ask, please, that you be given Exhibits 104, 105 and 106. You talked about these with Mr. Haglund. Sorry I didn't do this earlier.

A. Okay. I have them.

Q. Okay. Now, the exhibits that you received the information from, these were for the – excuse me one second.

These are the actual numbers based off of the ODF harvests for the years indicated, correct?

A. That's correct.

Q. All three of these charts are for the actual numbers?

A. That's right.

Q. Are you aware that the Oregon Department of Forestry predicts numbers going out into the future, amounts of harvest?

A. I am not sure what you mean.

Q. Okay. Are you aware that the Oregon Department of Forestry issues projections of how much it expects to be able to make available for harvest in the future? You're aware of that, aren't you?

A. Yeah. There's a forest plan. Is that what you're [Tr. 22] referring to?

Q. Yes.

A. Yeah, sure.

Q. And you're aware of it, just as often as not the numbers that the Forestry Department predicts as its harvest in the future are inaccurate as often as they're accurate. You'd agree with that, wouldn't you?

A. You mean they say, "We're going to do this," and then they do something different?

Q. Yes. They say that we expect that in the future, in five years from now or ten years from now, we expect that we'll have these amounts harvested from our lands, and they're wrong as often as they're right, correct?

MR. HAGLUND: Objection, vague, Your Honor.

THE COURT: The objection will be sustained.

BY MR. SIMON:

Q. Are you familiar with the fact – and I'm taking this one step at a time.

A. Okay.

Q. That the Oregon Department of Forestry puts out projections of how much it expects will be harvested in the future?

THE COURT: He said yes to that question.

BY MR. SIMON:

Q. All right. Now, do you personally, Mr. Rasmussen, have [Tr. 23] any experience determining in the past how often they're right and how often they're wrong?

MR. HAGLUND: Objection, no time frame, vague, ambiguous.

THE COURT: He can ask that question. The objection is overruled.

Have you had any experience with that?

THE WITNESS: Well, I've been working for the last two years for the counties that benefit from the harvest of the timber and with respect to the 10-year plan.

BY MR. SIMON:

Q. Can you answer my question, sir?

THE COURT: The answer is yes.

THE WITNESS: Yeah. I guess I am – I guess I know what the plans are. I know what's been done in the past. I know what the past plans said.

BY MR. SIMON:

Q. And based upon what you've seen of the past, have you seen that they've been inaccurate a fair number of times?

A. Are you talking about sales levels versus plans?

Q. Harvest.

A. Harvest?

Q. You don't know what harvest means?

A. Yeah. I'm trying to understand why anyone would compare harvest to this projection. Are you talking about [Tr. 24] cruise versus cut out perhaps?

Q. Mr. Rasmussen, I will simplify the question.

A. Please do.

Q. Based on your experience in the past, have you come to conclude that the State's predictions are not always accurate?

THE COURT: What predictions? Are you talking about the harvesting of certain types of logs or all types of logs?

MR. SIMON: All types or any types.

THE COURT: And any year?

MR. SIMON: Yes, based on his past experience.

THE COURT: Any year, all logs. Can you answer that question, Mr. Rasmussen? I'm not sure how it's related.

THE WITNESS: The State sells stumpage in three-year contracts, so at any time point – and they make a projection about how much timber is in those contracts that they sold. To help the counties plan their budget, they estimate when those sales will be sold and those sales are sold at – oh, I'm sorry, when the timber will be harvested and paid for, so the counties can sort of plan their budgets around that.

BY MR. SIMON:

Q. And with respect to those –

[Tr. 25] MR. HAGLUND: Your Honor, he's interrupting before the witness is finished.

THE COURT: Let him finish.

Go ahead.

THE WITNESS: With respect to those projections, I'll bet you anything they'd never hit it right on.

BY MR. SIMON:

Q. Okay. I'll accept that.

A. Okay. And I'd be surprised if anyone could ever make it right on.

Q. I'll accept that, too.

A. And I'd be surprised to find anyone who expected them to.

Q. And I'll accept that, too.

THE COURT: Mr. Simon, we're not too interested in what you accept.

MR. SIMON: Thank you, Your Honor.

THE COURT: Just ask the questions and not make speeches.

BY MR. SIMON:

Q. In 1999, are you aware that the Oregon Department of Forestry were making projections for such sales five and ten years in the future?

A. In '99, they were working on the planning process to cover the period from – well, a ten-year program. That was

* * *

[Tr. 34] Q. Did you investigate or perform any analysis of what else might have been going on to answer the question of why are the 1998, 1999, 2000 profits of Northwest Hardwoods lower than the average from either 1986 to 1995 or 1991 to 1995? Did you do that analysis?

A. Well, I could see that the reason the profits were lower was the log prices were higher while the lumber prices

– the log prices were going up while the lumber prices were coming down.

Q. Did you do any analysis that would tell you whether there were other things going on in the economy or the world that could contribute to lower profits in those later years?

A. Well, I was aware of things, sure, you know.

Q. And as we talked about earlier what you called the Asian economic flu happened in 1997 with what Ross-Simmons called, "The Asian Economic Crisis." You knew about that and you knew that that caused a number of hardwood sawmills to have lower sales to some extent or another. You knew that, didn't you?

A. What I saw was interestingly enough that the northwest – the hardwood sawmills in the Pacific Northwest saw a reduction in production, whereas the hardwood sawmills in the east, the total hardwood lumber production, went up between 1997 and '98.

Q. Okay.

[Tr. 35] A. That was another thing that made me think these are two different – two different markets, two different things.

Q. All right. Well, let's talk then about the Northwest sawmills, because you were only looking at the Northwest sawmills for the purposes of your damage analysis, correct?

A. That's correct.

Q. All right. So you knew that the Northwest Hardwoods mills that produced predominantly alder, you knew that? They made mostly alder, correct?

A. Correct.

Q. And you knew that their sales figures for the amount of alder sold for the 1998, 1999, 2000 period wasn't as great as it had been in years earlier. Is that what you saw?

A. No. I saw that there was a reduction from '97 to '98, but then there was an immediate increase from '98 to '99 and'99 to 2000.

Q. The increases then in those later years weren't as great or as steep as some of the increases in the earlier years, correct?

A. I think that the increase from '98 to '99 looks to me like the biggest increase in the time period.

Q. You knew that prices had been falling to some extent for alder lumber shortly after the onset of the Asian economic crisis, correct?

A. That's what the data showed, yes.

[Tr. 36] Q. Did you consider the possibility that there would be a reduction in the profit margins of the Northwest Hardwoods mills in the year after 1997, caused in any part at all by the Asian economic crisis?

A. The hypothesis that my calculation was based on is that if you control a large portion of the market for logs, you have some ability to control the price you pay for those logs.

Q. That wasn't my question, sir. Let me try to be clear about it.

A. Maybe say it again. I'll try to answer it.

Q. Sure. I'll try that.

Did you consider the possibility that the Asian economic crisis in 1997 in any way might have caused a lessening of the profit margins or annual pretax profits at the Pacific Northwest mills of Northwest Hardwoods? Did you consider that possibility?

A. My calculation assumes that – I guess you would look at that calculation as assuming that Northwest Hardwoods would be able to, by changing their log costs, deal with that crisis.

Q. And stated another way then, sir, your assumptions, your damage model assumes zero effect caused by the Asian economic crisis of 1997, correct?

A. No. It assumes that Weyerhaeuser could have controlled [Tr. 37] its log costs to maintain margins.

Q. Does your – are there any steps that you could have taken in order to try to determine what precisely was causing the lower profit margins in these later years as compared to the earlier years and your base years? Was there anything that you could have done?

THE COURT: I'm not – I'm not sure that that assumption is correct. From what I've heard there wasn't a lower margin in later years, I thought he just testified.

MR. SIMON: Your Honor, that's not the way I heard it, so I'd like to go back and clarify it. This is critically important.

BY MR. SIMON:

Q. I want to take a few steps back then and make sure I understand it. In Scenario B, you looked at the profit margins for the Northwest Hardwoods mills in the Pacific Northwest, excluding Longview, right?

A. That's correct.

Q. And for the period of 1986 to 1995, it averaged 17.5 percent?

A. That is correct.

Q. And for the years after that that was part of your Scenario B damage model, the actual pretax profits or margins that you observed were lower than 17.5 percent, right?

* * *

[Tr. 41] percent? Is there anything else you could have done –

A. Well –

Q. – besides the assumptions you made?

A. Yeah. There was one thing I did here that I don't know that we talked about. Mr. Haglund asked me earlier about the allocations for selling and general administration, and you remember I mentioned that in the year 2000 and the year 2001, those allocations were reduced.

And so in my scenarios, one thing I did was I put those back in at the previous year's level. So, in other words, the profit for – the reported profit for the year 2000, I lowered that to reflect the fact – or to make it more comparable to the previous years. So that's one thing I did. Does that answer your question?

Q. In part. Let's continue.

Did you investigate whether or not Northwest Hardwoods' labor costs had gone up or down in the period of 1996 through 2000, as compared to before 1995?

A. I think I made a graph somewhere and looked at the – what, on Mr. Novak's spreadsheet, called the variable manufacturing cost. And that would be – that would include labor and all the costs of running the mill.

Q. And so were labor costs higher or lower in the period of '96 through 2000 than they were in the period of, say – in the period of '91 to '95?

[Tr. 42] A. You might be more familiar with my report than me by now. Do you know if I put that graph in here?

Q. I didn't see it or at least I didn't see it in the results of your analysis.

A. As I recall, the variable manufacturing costs were relatively flat during that time period.

Q. Relatively?

A. Yeah.

Q. Did you investigate other costs to compare them to the relevant time period of '96 to 2000 versus your assumed base time period of either '91 to '95 for Scenario C or '86 to '95 for Scenario B?

A. I looked at – my source for this, you remember, is Mr. Novak's spreadsheets, and I looked at all of the costs. All of the values on his spreadsheet as I was doing my analysis.

Q. Is that where you got all your numbers from, Mr. Novak's spreadsheets?

A. They were all from Mr. Novak. I did all this a long time ago before we had any more data.

Q. So – and you didn't update your data or confirm it after receiving more data, correct?

A. No, that's correct.

Q. All right. And if Mr. Novak's spreadsheets then contain errors, then those errors would be reflected in your [Tr. 43] analyses?

A. I suppose so.

Q. Okay. Now, are you familiar with the concept – you're an economist, right? You told us that earlier.

A. Yeah.

Q. You are familiar then, are you not, with the concept of a regression analysis?

A. Yeah, but I don't think you have to be an economist to know about that.

Q. Well, okay. A regression analysis is used for, among other purposes, to try to isolate potential causes of changes when there's a number of possibilities. Am I correct in general terms?

A. Yeah, sure.

Q. Did you use – let me rephrase it the other way – you did not do a regression analysis as part of your preparation of Scenarios B and C. I'm correct, am I not?

A. I may have done some regressions, but they – I don't remember using them for B or C at all.

Q. And there was no regression analysis discussed in your witness report or in your exhibits, correct, with respect to Scenarios B and C?

A. Yeah, with respect to those, that's true.

Q. Okay. And you could have done that, am I correct?

A. I could have done what?

[Tr. 44] Q. A regression analysis with respect to Scenarios B and C.

A. Well, I'm not sure how I would have used regression for Scenarios B and C.

MR. SIMON: Okay. Then another witness will have to explain it to us. I have nothing further.

THE COURT: Further questions, Mr. Haglund?

MR. HAGLUND: Yes, thank you, Your Honor.

THE COURT: And, Mr. Simon, no more comments to indicate argument. Let's not do that. You may examine.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Rasmussen, you were asked a variety of questions about stumpage versus log prices. In your experience could you explain the difference or are there differences in how stumpage prices may move over time compared to open market log costs?

A. Yeah. When you buy stumpage, the transaction occurring is, if I were going to buy a stumpage sale, the land-

owner would go out and mark the boundary, make some estimates about what kind of volume is out there, and then typically open it for bid.

I would bid on that stumpage at often certain dollars per thousand, either by species sometimes, rarely,

* * *

**[Vol. 3-B (Apr. 10, 2003)] [Testimony of George Lukin]**

* * *

[Tr. 50] Q. And are you here pursuant to a subpoena that was served on you last week?

A. Yes.

Q. Have I ever met you before you showed up to the courthouse today?

A. No.

Q. So I don't know your whole background, I'm going to have to ask the questions. Before taking on this new position in the woodstove industry, did you work in the forest products industry for about 20 years?

A. Yes.

Q. And was that – was a part of that '96 through early 2001, with the WTD Industries' alder sawmill in South Bend, Washington?

A. Yes.

Q. And that mill closed in early '01?

A. Like January, I think.

Q. What was your position?

A. Timber manager.

Q. So what was your responsibilities?

A. Buying logs and run a log yard.

Q. What type of logs?

A. Alder saw logs.

Q. That was an alder sawmill?

A. Yes.

[Tr. 51] Q. In terms of your competition with Northwest Hardwoods' mills for alder saw logs during that five-year time frame, what mills, Weyerhaeuser mills in Washington, would you have been competing with?

A. The one in Centralia and the two up north there.

Q. Arlington and Sedro Woolley?

A. Yes.

Q. Now, South Bend, is that the Grays Harbor area?

A. Pacific County.

Q. Pacific County. During the '96 to '01 time frame, were there substantial Douglas fir log exports out of that area?

A. Yes.

Q. Who's the biggest landowner in that area?

A. Weyerhaeuser.

Q. In your work as a log buyer for WTD's alder mill, did you come into regular contact with Weyerhaeuser's export log buyers?

A. Yes.

Q. Do some of them live in that Grays Harbor area?

A. In Aberdeen.

Q. Now, calling your attention to the '97-'98 time frame, did you – were you told anything by a Weyerhaeuser log export buyer about the need to provide extra assistance to Northwest Hardwoods?

A. Could you say that again?

[Tr. 52] Q. Did you have a conversation with somebody from Weyerhaeuser in the log export area in 1997-'98, about them providing help to Northwest Hardwoods?

A. Yes.

Q. Could you describe the conversation.

A. They – they just said that Northwest Hardwoods was trying to tie the alder saw logs in with the export sales.

Q. What does that mean or what did you understand that to mean?

A. If you wanted to sell your fir and hemlock to Weyerhaeuser, then you needed to sell your alder to Northwest.

Q. So if – and who was this person you were talking with?

A. Bruce Sutten.

Q. And what's his capacity at Weyerhaeuser?

A. Export logs, I think, in the Aberdeen sorting yard.

Q. Is he the manager of that?

A. I think so.

Q. And you need to explain this for the judge and the jury, when he told you that they were being told to tie the export logs with the alder logs for Northwest, what does that mean? What were they going to be telling loggers to implement that policy?

A. That in order to sell their fir, hemlock, whatever, to the export log yard there that they would have to sell the [Tr. 53] alder saw logs off the same sales to Northwest Hardwoods.

Q. Now, in a private patch of timber that a logger has a contract to log, are the highest value logs coming off of that going to be the export grade Douglas fir and hemlock?

A. At that time they were, yes.

Q. And so if that logger wanted to be able to sell his export grade logs to Weyerhaeuser, those export log buyers

were saying you've also got to send the alder off of that patch of timber to Northwest Hardwoods?

A. Yes.

Q. Okay. Did you actually see evidence of that policy in the field in 19 – during your years after that conversation at WTD Industries?

A. Just from loggers, had stated that.

MR. SIMON: Objection, Your Honor, that's hearsay.

THE COURT: If you – if you had experience sufficient to be satisfied that was the fact, you can testify to it.

MR. SIMON: Your Honor, may I ask a brief question in aid of objection on that point?

THE COURT: You may.

QUESTION IN AID OF OBJECTION

BY MR. SIMON:

Q. Is the entirety of your experience based upon what log buyers told you?

[Tr. 54] A. I don't understand the question.

Q. Sure. If the entirety of what you're about to answer to Mr. Haglund – by the way, my name's Michael Simon, one of the lawyers for Northwest Hardwoods – is the entirety of your information about this area, what other people, log suppliers told you on that issue?

A. Yes.

MR. SIMON: Thank you, sir.

We would object, Your Honor.

THE COURT: The objection will be overruled. The evidence is in the witness statement. Under Rule 701, this is, in effect, an opinion, and if it is rationally based on the perception of the witness, I will allow it.

So how much experience did you have, and do you feel that's an accurate statement?

THE WITNESS: Yes.

THE COURT: It will stand. The answer will stand.

BY MR. HAGLUND:

Q. During the 20 years that you were in the industry, were you primarily involved in buying and selling logs in that Grays Harbor area?

A. I think about eight years doing that.

Q. Okay. And you were the resource manager for WTD with the principal responsibility for five years at their alder mill?

[Tr. 55] A. Yes.

Q. Now, at the time that you heard this con' – that you had this conversation with Mr. Sutten, who was the dominant export log purchaser in that part of Washington State?

A. Weyerhaeuser.

Q. The whole five years you were in your job at WTD?

A. Yes.

Q. Now, lastly, Mr. Lukin, I want you to assume that there will be some testimony from Northwest Hardwoods/Weyerhaeuser log buyers from Centralia, Sedro Woolley and Arlington that they have never increased their original bid to a logger or landowner in the face of a competing bid from a competitor.

Having made the assumption that they will testify in that fashion, do you consider that to be consistent with your experience in the industry buying and selling alder saw logs?

MR. SIMON: Excuse me. Objection, Your Honor, may I be heard briefly?

THE COURT: The objection will be sustained.

MR. SIMON: Thank you.

THE COURT: The question may be rephrased as to what his observations were without respect to commenting on the testimony of other witnesses.

BY MR. HAGLUND:

Q. I'll rephrase. Mr. Lukin, in your experience competing [Tr. 56] with the log buyers from the Northwest Hardwoods' mills in Centralia, Sedro Woolley and Arlington –

THE COURT REPORTER: I'm sorry, could you repeat that.

MR. HAGLUND: Okay. I was going too fast. I'll have to start over. My apologies.

BY MR. HAGLUND:

Q. Mr. Lukin, in your experience, competing with the log buyers from the Northwest Hardwoods' mills at Centralia, Sedro Woolley and Arlington, did you observe those log buyers increase their original bid to a supplier in the face of a competing bid from a competitor like yourself?

A. Yes.

Q. And that was a regular practice you observed in the marketplace?

A. Not every time.

Q. But it happened more than once?

A. Yes.

MR. HAGLUND: Thank you very much. No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Lukin, Michael Simon, the attorney for Northwest Hardwoods.

* * *

[Tr. 58] from a Northwest Hardwoods log buyer, correct?

A. Not that I can remember.

Q. You learned that from the log sellers?

A. Right.

Q. And the log sellers wanted to increase the prices that they were getting for their logs, correct?

A. Yes.

Q. And as you sit here today, you can't tell us whether those logs sellers were being straight with you, can you?

A. Some of the guys that I deal with I trust that they would not lie to me.

Q. And others you don't?

A. Right.

Q. And when you were buying for WTD, sometimes you'd get the logs, right?

A. Yes.

Q. And sometimes Northwest Hardwoods would get the logs, right?

A. Yes.

Q. And sometimes Cascade would get the logs?

A. Yes.

Q. And sometimes Ross-Simmons would get the logs?

A. Yes.

Q. And sometimes Washington Alder would get the logs?

A. Yes.

* * *

**[Vol. 3-B (Apr. 10, 2003)] [Testimony of James Webber]**

* * *

[Tr. 62] BY MR. HAGLUND:

Q. I'll start over, Mr. Webber. In your experience competing with the log buyers from the Northwest Hardwoods mills in the places you mentioned and based on your personal experience, did you see those log buyers increase their original bids to suppliers in the face of a competing bid from you?

A. I didn't see the paperwork, but I increased my bids and the logs did not come to me and they did go to the Northwest Hardwoods mills.

Q. Did you learn from loggers that they had increased their bid?

A. That they did get a bump in price.

MR. HAGLUND: Okay. No further questions. Thank you.

THE COURT: Any cross?

MR. SIMON: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Webber, in the year 2001, did you take any steps towards beginning to form Willapa Bay Hardwood Company?

A. Yes.

Q. Tell us what you did in 2001.

A. Let's see, 2001. In September, I believe it was around August or September of 2001, old WTD mill, Pacific Hardwoods [Tr. 63] in South Bend, they began to – they were going to go to auction. There had been some interest

from some of the employees at the time to buy – purchase the mill.

And at that time, we began working on a business plan and – to purchase Pacific Hardwoods' mill and assets of Pacific Hardwoods to run that mill.

Q. And are you one of the owners of that mill?

A. I am a shareholder.

Q. Okay. Now, I take it then you got the financing for that mill?

A. Yes.

Q. It's operating?

A. Yes.

Q. It cuts alder lumber?

A. Yes.

Q. And you consider yourself one of the competitors of Northwest Hardwoods' mill, correct?

A. We use a different – we using pulp grade logs and they use saw logs, so in an indirect way. I mean, we both cut alder lumber.

Q. And you both sell alder lumber?

A. We both sell alder lumber.

MR. SIMON: Thank you, sir.

I have nothing further. Thank you.

THE COURT: Any further questions?

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**[Vol. 3-B (Apr. 10, 2003)] [Testimony of Eugene Novak]**

* * *

[Tr. 68] Weyerhaeuser.

Essentially, I had all the financial reporting and had the data processing, I guess in today's terminology known as IT. You know, the traditional payables, receivables, you know, financial statements, planning process, that all fell under my responsibility. I managed the people in the business in that area.

Q. And where were you working out of?

A. Here in Portland.

Q. And who did you report to?

A. I reported to Arnold Curtis, who was the president/vice president of the business.

Q. And how many personnel worked for you or were supervised by you here in Portland?

A. I think initially it was about six or seven, and it grew to 12 or 14 in the Portland office.

Q. Were you a part of the so-called senior management team as comptroller?

A. Yeah. Yes, I was.

Q. Were there regular monthly meetings of that group?

A. There were regular meetings if Arnold was in town. He wasn't always in town. If he was not in town, we did not have a meeting.

Q. Now, do you remember discussions with Arnold Curtis and Heinz Hohendorf about the use of the log market against the [Tr. 69] competition?

A. The log market was discussed on a continual basis month after month in these meetings, as well as outside of the meetings.

Q. And what do you remember being said about using the log market?

A. Be very aggressive, you know, procure wood. You know, just source our mills and keep them running full two shifts.

Q. Was there a discussion about using the log market to hurt competitors?

A. I don't think I heard the words "hurt competitors," but it certainly was implied to be aggressive in the log market, yes.

Q. How would you describe the interest that the division showed toward tracking or monitoring its competition?

A. Well, the competition to me, as I viewed it, was – always seemed to be a constant, you know, concern for the business, and so they were aware of what the competitors were doing. As best you could without obviously being in their office and seeing their books.

I mean, the log buyers reported back constantly about the status of log yards and competitors, and were a pretty knowledgeable information base that was exchanged. I don't know if there was anything formally documented as such.

[Tr. 70] Q. But you were aware of regular monitoring of log yards and competitor information?

A. That was done, yes.

Q. How would you – how did you consider the emphasis on competitors within the senior management group? Was it low, medium, high? How would you describe it?

A. For me personally, it was excessive. I could not understand being as large as Northwest Hardwoods was, even

in the beginning, back in '81, we were the largest mills and as it progressed over the years, I never could understand why we were so concerned about the competition, being that we were the dominant player.

Q. Now, in the Portland office, who was in charge of sales?

A. Cliff Chulos was the vice president of sales at the time.

Q. What's your opinion of Mr. Chulos in terms of the hardwood industry?

A. I think Mr. Chulos is the most knowledgeable man I've ever come in contact with relative to the hardwood industry. I don't think anybody knows more about hardwoods than he does.

Q. You had any – you worked at a company founded by Mr. Chulos for a few years; is that right?

A. That's correct. North American Wood Products.

[Tr. 71] Q. And you left in '95?

A. That's correct.

Q. Have you had any contact with Mr. Chulos since then?

A. I haven't seen Cliff since '95 when I left.

Q. Now, you returned to Weyerhaeuser in '95, and were there through the end of 2001?

A. That's correct.

Q. Now, during that time frame, did you – were you – did you have interaction with senior management?

A. All the time. I was one of the senior managers, you know, for, you know, the time prior to that. I also worked with the senior managers for a while in '98 when I accepted the controller's position. Again, I was back on what they

called the lead team at that time. Yes, I was very much – I rubbed elbows with them and, you know, discussed issues, you know, strategies and so forth on a regular basis.

Q. Mr. Novak, was there within that core group of senior management, was there any recognized understanding of the company's relative position in the alder saw log and finish alder lumber markets?

A. If I understand your question, I think you're talking relative size to competition?

Q. Yes.

A. Yeah, we were very much aware of that. We estimated, you know, what the size of that was.

[Tr. 72] Q. What do you recall management understood its market share or size to be in the saw log market?

A. Probably 60, 65 percent of it.

Q. How about in connection with the alder lumber market?

A. At least 60, 65, maybe 70 percent.

Q. Now, did management understand that it had the power to control the log market?

MR. SIMON: Objection, leading.

THE COURT: Objection overruled.

THE WITNESS: I think it's fairly obvious if you're that size you have a fairly persuasive impact on the market situation.

BY MR. HAGLUND:

Q. My question was: Did the senior management of Weyerhaeuser, as you observed them, understand that?

A. Senior management of Northwest Hardwoods or senior management of Weyerhaeuser Company?

Q. Senior management of Northwest Hardwoods.

A. Northwest Hardwoods senior management, people were very much aware of it, yes.

Q. Were they likewise aware of their power to control alder lumber prices?

A. I would say so, yes.

Q. Do you remember – going back to your first 10 years or 11 years with Northwest Hardwoods, do you remember [Tr. 73] discussions about the antitrust laws or monopolies?

A. Well, first of all, we were constantly made aware of the antitrust within Weyerhaeuser because of the issues that arose –

MR. SIMON: Objection, Your Honor.

THE COURT: The objection will be sustained to the last part. The first part will stand. You were constantly aware of the antitrust situation, but without going into detail.

THE WITNESS: We were aware of it.

BY MR. HAGLUND:

Q. Now, were there discussions with Arnold Curtis about the position of Northwest Hardwoods in the industry in the antitrust or monopolization contest?

A. There were discussions about antitrust issues.

Q. With Arnold Curtis?

A. With Arnold Curtis and the senior team on numerous occasions.

MR. SIMON: Objection, Your Honor. Beyond the scope of the witness' statement.

MR. HAGLUND: Your Honor, this is a witness we had to subpoena. It covers at the end, bottom of Page 32.

THE WITNESS: The objection will be overruled.

BY MR. HAGLUND:

Q. What do you remember about those discussions?

[Tr. 74] A. Well, it was a concern about our position relative to the total volume we had both in the lumber market as well as the log market, and that goes back, as I recall, as early as 1984.

And I was certainly made aware of the fact that within alder we had a well known, I guess you would say, monopolistic basis. That was the concern that was always raised by the people within the business as well as probably people outside the business.

Somewhere, as I recall, in the '80s we were instructed to basically look upon alder as not being unique and different and to think of it as just another species of the industry, which in that case, instead of having a monopolistic position, you would have about two-and-a-half to four percent of the market of the total hardwood industry in this country.

Q. Now, in – I'd like to call your attention to the time frame of 1998. You were offered the controller position in February; is that right?

A. That's correct. I accepted it in February.

Q. And you left it some nine months later in '98?

A. That's correct.

Q. And could you explain why that was.

A. Well, it is really two, two or three reasons. One, I had a quadruple bypass surgery in July of 1997. My health [Tr. 75] was an issue. Secondly, I was going through a rather difficult divorce which lasted almost two years before it become final. And, thirdly, it required me to relocate to Federal Way, and I did not want to relocate to Federal Way.

Q. Who replaced you as comptroller of the division?

A. Vicki McInnally was hired. Well, first of all, I was offered by Rob Taylor, the director of finance and planning for the whole business after Karen Moll left, and then when Karen Moll left, Vicki McInnally was hired as the director of finance and planning for the whole business, and I subsequently wound up reporting to her.

Q. You reported to her and what title did you have then?

A. Senior business analyst.

Q. What did you think of Ms. McInnally as a comptroller?

A. Very capable, very knowledgeable, very good person.

Q. What kind of relationship did you consider yourself to have with her?

A. I thought we had a great relationship.

Q. Now, what does a senior business analyst do at Weyerhaeuser in a business like Northwest Hardwoods?

A. It can range from a myriad of projects. You can be involved in working on a major capital project, gathering the information and putting together the financial analysis of support.

It could range to developing a financial model. [Tr. 76] It could be a special project, special evaluation of some particular business issue, or it could be part of the strategic development. Also, in my case, I worked on acquisitions.

Q. Did you do any – at some point, did you participate in an analysis of the financial performance of the Diamond Wood acquisition?

A. I wasn't involved with the acquisition of Diamond Wood Products. That had taken place while I was there, but I was not involved with it. I was involved with the implementation of the acquisition as far as converting the business over to our books and developing reports and formats and proc-

esses that would fit into the Northwest Hardwoods/Weyerhaeuser style of management.

Q. Now, as part of senior management, you are familiar with the sales and marketing strategy of the division?

A. I was familiar with it. I wasn't involved with all of their, you know, detailed meetings, but as part of the association with the lead team, I would be involved in key meetings. And if there was a special study going on, I would be involved with it.

Q. Was it well recognized by senior managers that the proprietary grading system helped set the alder industry apart from other hardwoods in the United States?

A. Oh, absolutely. I don't think anybody else prior to [Tr. 77] them had it, and I don't know who's had it since.

Q. Did – as you observed the policy within the division, did you observe as part of a sales strategy sales managers selling to customers the idea that Weyerhaeuser could exert greater control over alder prices in comparison to what would happen with eastern hardwood lumber?

A. Well, I think it stands to reason if you understand the industry that would be a logical, you know, conclusion. You could because there were only a handful of mills. I think – I don't know what the exact number was. It was at one time 60-some alder hardwood mills. It's dwindled down to about 15 now, so in comparison to the rest of the industry which has several thousand hardwood mills.

Q. Did you observe that actual evidence in the marketplace in terms of alder lumber prices falling more slowly when the rest of the hardwood market was in a deep decline?

A. Yes, I would say that would be the case.

Q. And on the other side of the coin, did you see Northwest Hardwoods successfully restrain the upward rise of al-

der lumber prices when the rest of the hardwood market was rising sharply?

A. That was the strategy, yes.

Q. And that was a strategy that was sold as an advantage of customers buying alder in terms of the stability of supply?

[Tr. 78] A. Yes. I think the philosophy was: You be with us in the hard times for our side, we'll be there in the hard times or the times when the product was hard to get.

Q. Now, moving to the last part of the 1990s, '98, '99 and 2000, Mr. Novak, in your capacity as a senior business analyst after November of '98, did you engage in some financial modeling to try to understand why Northwest Hardwoods' margins were declining so significantly in that time frame?

A. I built a rather elaborate financial model for the alder business to be used by management to try to get our hands around the issues that, you know, were ongoing.

Q. And why is it that you built this model?

A. I felt, from my perspective, that's how I could help, you know, the team understand the whys and wherefores of the profitability of the business or lack of profitability at times. I also felt that it was a vehicle that would get everybody on the same page relative to what the business was doing, ranging from the procurement of raw materials all the way through the sales of product.

Q. Was this model that you built developed in part because your analysis showed a disconnect between what lumber was doing and the performance of log costs?

A. I thought there was a disconnect, yes.

MR. HAGLUND: I'd like to ask that witness be [Tr. 79] given the witness notebook if it isn't up on the – jury notebook, I'm sorry.

BY MR. HAGLUND:

Q. Now, Mr. Novak, if you would turn in that notebook to Exhibit 44 – Plaintiff's Exhibit 414. I'd like to display the first page. And what is Exhibit 414?

A. Well, this is the – one of several pages that I put together, one for each of the alder locations. And what I and the team of people would consider to be the key numbers of the business without getting buried in the total detail, and it ranges from, in this case, this mill in Arlington in 1981 to the year 2000, 1981 was the first year – first full year under Weyerhaeuser's ownership of Northwest Hardwoods.

Q. So on this page, Page 1 of this exhibit, is the Arlington mill; is that right?

A. That's correct. At least that's what it looks like. Yes, it is.

Q. And you displayed key financial statistics for 20 years running?

A. That's correct.

Q. And could you explain, and I'll zoom in here, in these first couple of boxes on the left-hand side, why you were selecting these particular statistics?

A. Well, these are all the major cost components of the business.

[Tr. 80] Q. Both revenue and cost?

A. That's correct.

Q. As well as overhead?

A. And overhead is on there as well, yes.

Q. And then you've got production and other statistics arranged as you move down the page?

A. That's correct.

Q. And what were you – down below you have some information where you've got things displayed as a percent of sales. What were you trying to do in this part of your model?

A. What I'm trying to do is just show the relative relationship of various components of cost to the sales over a period of time.

Q. And if one analyzed the data for Arlington that's shown on this 20 years, was there a – anything that kind of jumped out at you as the principal reason for the decline in profit margin at the Arlington mill in the last – say, in that '98 to 2000 time frame?

A. Well, you can see that the percentage of raw materials cost to sales declined rather dramatically.

Q. So let's see if I can do this. I will highlight that line. And what are we seeing there as you move from the mid-'90s through the balance, especially the last couple of years, in terms of raw material costs?

[Tr. 81] A. The trend line shows that it was in the low 40s and it kept climbing up into the low 50s, as far as the relationship of raw materials to sales.

Q. And you are not seeing either dramatic declines or increases in the other major cost categories that you've displayed down below?

A. That's correct.

Q. Okay. Let's turn to the third page of this, which happens to be Longview, and I've already got highlighted a couple of lines. One of them is pretax profit. What are we seeing is happening to the pretax profit for the Longview operation of Northwest Hardwoods between '97 and the end of 2000?

A. Well, it's declined rather significantly.

Q. And I want to call your attention, sir, to the other highlighted area where – right here, of the allocations. What are those categories?

A. Well, those were allocations from the overhead cost that were associated with the business, and it principally would be – would have been at the time I was there, would have been a Portland office and the Federal Way office, and it was a combination of the general administrative and the selling cost.

Q. And, Mr. Novak, what happened in 2000 to the selling and G&A allocations to the Longview mill?

[Tr. 82] A. I believe that was a time frame that the management made the decision not to allocate all the costs out to the operations.

Q. So was there a dramatic reduction in these historic allocations that had gone on for many years in the year 2000?

A. There was a dramatic difference in how they were distributed out. There wasn't a dramatic difference in the cost of them.

Q. But the financial – year-end financial statements that would display the financial performance of the alder sawmills saw a big change between selling G&A allocations in 1999 and 2000; is that right?

A. That's correct.

Q. What's your understanding of why that was done?

A. My understanding of it, since I think I am fairly knowledgeable about the business and the financial statements, it was done to make the mills look better.

Q. Now, Mr. Novak, once you had completed the financial model that's reflected in these six pages, one page of key stats for each mill, did you distribute it to anyone?

A. I distributed it with a very brief e-mail to Rob Taylor.

Q. Did it go to – and I'm referring to Exhibit 414, you had it in a electronic format, I take it, then?

[Tr. 83] A. It was in electronic format, Excel worksheet.

Q. And you sent it to Mr. Taylor?

A. I sent it to Mr. Taylor, yes.

Q. Anyone else?

A. I copied Jerry Martin and Don Barton.

Q. And I'd like to put on the screen what's been marked as Exhibit 412. And what is Exhibit 412, Mr. Novak?

A. 412 is a copy of the original brief e-mail message to Jerry Martin, you know, which had the attachment to it, and also shows his response to me in regards to that.

Q. So your e-mail to Mr. Martin says, "This document was sent to Rob this morning after I was asked my thoughts, impressions. Like the memo you shared with me last week, I would appreciate your confidentiality in this matter."

And he would write back – that's the upper part?

A. That's Jerry Martin's comments, yes.

Q. So you got back a response the very same day?

A. That's correct.

Q. "Thanks for the candid views. As always you have had the best interest of the company at heart."

That's Mr. Martin's response to you?

A. Those are his responses to me.

Q. Okay. Now, turning to Exhibit 413, is this a copy of the e-mail that you sent – same e-mail that you sent to Mr. Martin down below to Don Barton?

[Tr. 84] A. That's correct, it is.

Q. And his response is up above?

A. That's correct.

Q. Now, he says there, "Important message here. Maybe you ought to accidentally broadcast it to a little wider audience." Why did you send it to so few people?

A. Well, there was a lot of frustration about the profitability of the alder operations at this time. Both Jerry Martin and Don Barton and I had conversations about that profitability and the issues associated with it, and it was strongly felt that the major issue was the raw material cost.

Both had had discussions with Mr. Taylor. Both were frustrated with the fact that they didn't feel like things were, you know, occurring to change the situation. They were people I worked with on a regular basis, and I sat down and said, "Well, maybe if I put together an analysis and send it to them, maybe if he saw the numbers in black and white, they might sink in a little easier if you could visualize it as opposed to the just talking about it."

Q. Did you – you sent this e-mail also to Mr. Taylor?

A. No. The original e-mail went to Rob.

Q. Right. And did Mr. Taylor respond?

A. Well, originally all I sent was the Excel workbook with the six, you know, analyses on it and a very brief e-mail [Tr. 85] cover letter. His response was that he didn't see anything dramatic in there, I think, something to that effect. And that he referred to me as the so-called ace analyst, and he would appreciate it if I had any comments to share it with him. And I proceeded to do that with a follow-up e-mail.

Q. And I'm now going to put on the screen a document that is in the juror notebooks. That is Exhibit 411.

Now, is this – so you got this brief response from Mr. Taylor, and then what did you do? Did you draft this?

A. I proceeded to draft this letter to him and a Word document and attach it to an e-mail.

Q. And why? Why did you draft up a memo?

A. He asked me my thoughts.

Q. Are those your thoughts?

A. Those are the thoughts at the time, yeah.

Q. Just calling your attention to the first paragraph here. You were using his term when you referenced yourself as an ace analyst?

A. That's his term. I don't think of myself that way.

Q. In the third paragraph, why did you feel the need to say, You know that I have never been one to mince words, not share an opinion, challenge issues, et cetera"?

A. I think there was an understanding within our organization that I was willing to tackle and get involved [Tr. 86] in the tough issues and express my views on it and that's basically what I said.

Q. Okay. Let me turn to Page 2 of this memo. And at the top in the first paragraph you say, "If we have what we believe to be 65 to 70 percent of the alder activity in the form of logs and lumber, then why have we seen Northwest Hardwoods see this prolific increase in the price of logs? When you look at the fact that Northwest Hardwoods expanded in size through acquisition and internal growth, you would think that the opposite would have occurred for obvious."

Should there have been another word at the end of that second sentence? Should it have been for obvious reasons, or what did you mean by this paragraph?

A. Well, I think it says what it says. It says we had the predominant market share, and in so doing, you know, it doesn't make a lot of sense to see why the price of the logs

were going the direction they were going when we had such a large market share.

Q. Is this commentary the basis of the disconnect you referred to in this memo?

A. I'd say it is at the very heart of it.

Q. Okay. Now, I'd like to turn now to another paragraph just down the page. It reads, "If I understand some of the thoughts that came out of the meetings over the past few weeks, it is my understanding that Northwest Hardwoods' [Tr. 87] annual potential opportunity for raw material costs improvements range up to $20 million. Does that infer that we have given up some 40 to $60 million in the last three years?"

Why did you write this paragraph?

A. I wrote this paragraph in response to a comment by Rob Taylor that said he thought the impact of high raw material costs cost Northwest Hardwoods over $20 million on an annual basis. I was in a series of meetings that were involved in remodeling early in 2001.

Q. So this memo's written in March, late March 2001. And you had been a part of meetings earlier in the year where there were discussions about how Northwest Hardwoods could reduce its log costs?

A. Yes.

Q. And do you understand Mr. Taylor saying something about them being higher than they should have been?

A. Yes, he did.

Q. What did he say?

A. Well, basically he said they were, you know – I think the comment, you have to go back. My memory – it's been a long time now.

The comment was that we had given up about $20 million in potential log cost opportunity within the last year.

[Tr. 88] Q. So was it your understanding that he felt Weyerhaeuser had overpaid by $20 million for its logs?

A. That would be my assumption, yes.

Q. Okay. Now, when you sent this memo to Mr. Taylor, did you get any subsequent reaction from him?

A. No.

Q. No response in the next week or two?

A. Well, the only response that I got was a short comment verbally to me, which was basically, "I understand where you're coming from."

Q. That was all?

A. That's all he said.

Q. Now, during this 2000-2001 time frame, did you have some meetings with Vicki McInnally regarding the financial model that's Exhibit 411? Those are the spreadsheets.

A. These spreadsheets here?

Q. Yes.

A. No. I don't know that Vicki saw these, unless Rob gave these, because I did not give a copy of these particular sheets to her.

Q. Okay. Well –

A. The financial model that I – you would be referring to would be the financial model that was the large multiple worksheet, western alder operation model.

Q. Let me rephrase my question. Did you have discussions [Tr. 89] with Ms. McInnally in early 2001 about the disconnect between logs and lumber markets?

A. Well, there was lots of discussion because she was my boss and she was very much aware of the profitability issues of the western operations, so there was a continuum of discussion on an ongoing basis about the issues of raw materials, and one of the concerns was trying to get this model where I had built be implemented, so there was a regular discussion of the issues all the time.

Q. Did she ever say anything to you why logs had gone up when the lumber market was going down?

A. Yes.

Q. Could you please state what she said.

A. I was up there for some other project at the time, you know, but she – I was frustrated. Myself, I was frustrated with the log cost situation. I said I didn't understand the whole reason why the log costs was so high. And the next thing I heard was, "Well, that was the strategy that we designed" I threw my hands up in the air, and I said, "Well, wait a minute here. I don't want to hear this. That's not part of the conversation I want to be a part of."

Q. Why?

A. Well, that's an antitrust issue.

Q. Did this happen only once?

A. Well, surprisingly, it happened a couple of days later, [Tr. 90] which I was totally caught off guard again the second time about, and I just said, "I do not want to talk about these issues." In that tone, because the way she said it to me implied something other than – than what I was willing to get into.

Q. Now, Mr. Novak, were you – did you subsequently lose your position with Weyerhaeuser at the end of the year?

A. I was informed that I was out of a job on September 12, 2001. I had a job until the end of the year, and my re-

sponsibilities from that point forward was to try to find a job in Weyerhaeuser or outside.

Q. Now, why do you believe you were let go?

A. I personally believe I was let go because I wrote this letter and some of the other issues surrounding this raw material cost issue.

Q. Now, before you – how long – at the point where you departed Weyerhaeuser on December 31, 2001, how many years had you been with the company all totaled?

A. Just short of 30.

Q. After you learned that you – your position, that you were losing your position and were being terminated, did you write a letter to the chairman and CEO of the company, Steven Rogel?

A. Yes, I did.

Q. Why?

* * *

[Tr. 100] right?

A. Sure.

Q. Okay. Do you remember any of those issues, what they were?

A. Yeah. We talked about the financial modeling. We talked about projects back in the Midwest relative to other financial modeling. We talked about PACE, which is the Process to Achieve Capital Effectiveness.

THE COURT REPORTER: I'm sorry, would you say that again?

THE WITNESS: PACE, P-A-C-E.

BY MR. SIMON:

Q. And then after that discussion, you said something about log prices; is that right?

A. I made a comment that I didn't understand how we could continue going down the path we were going as a business with the log prices being where they are, and why, as the management team, things weren't getting, you know, accomplished to do something to lower them.

Q. And that's when she gave the response that you told us about; is that right?

A. That's correct.

Q. Can you tell me, exactly what were her words, as best as you can recall?

A. I can't tell you the exact words because it's been over [Tr. 101] a year.

Q. As best as you can do, sir.

A. My recollection of what she said was that that was the business strategy, to price the logs up to deal with the competition.

Q. And then if I heard you correctly in response to Mr. Haglund, "I threw up my hands and said I don't want to have anything to do with this."

A. That's correct.

Q. And I take it when you say that you literally mean you threw up your hands?

A. I literally threw my hands up in the air (indicating) and said, "I don't want to hear this."

Q. Okay. Now, you just now put your hands up basically where your elbows are perpendicular. Is that about how you did it or did you go higher or perpendicular like you just showed us?

A. I don't recall.

Q. But you threw your hands up, essentially saying, whoa, right? Is that what you were trying to communicate to her?

A. I was communicating to her I didn't want to listen to the subject matter.

Q. Okay. So you threw your hands up, and as best as you can recall, what did you say to her?

A. I said I don't want to go there with this conversation.

* * *

[Tr. 108] Q. Okay. And you didn't go there. We established that.

A. I didn't want the hassle.

Q. Okay.

A. I didn't want to hear the comments to begin with.

Q. Now, when you sent Exhibit 411 dated March 22, 2001, to Rob Taylor who was expressing concerns about log costs being too high, I want to make sure there's no doubt about this, no confusion, this was after both of those two discussions with Vicki McInnally?

A. I believe that's correct.

Q. All right. When Vicki McInnally told you what she had told you, did you think it was a Northwest Hardwoods management strategy to do what she said?

A. Why wouldn't I?

Q. Okay. So you believe that she was telling you what company strategy was?

A. She was part of the senior management team at the time.

Q. And the head of the senior management time was Rob Taylor, right?

A. That's correct.

Q. So if that was company strategy, why bother to send this message to Rob Taylor?

A. This message had nothing to do with our conversation. It had to do with the issues and the trends that were occurring in the business.

* * *

**[Vol. 3-B (Apr. 10, 2003)] [Testimony of Paul Ehinger]**

* * *

[Tr. 124] is here from Eugene. I think my direct is probably 20 minutes.

THE COURT: All right.

MR. HAGLUND: Plaintiffs call Paul Ehinger.

THE COURT: Mr. Ehinger, step right up and raise your right hand.

PAUL EHINGER

Was called as a witness on behalf of the Plaintiffs, was duly sworn and was examined and testified as follows:

THE COURT: Just be seated.

State your full name and spell your last name for us.

THE WITNESS: I'm Paul Ehinger. My last name is spelled E-h-i-n-g-e-r.

THE COURT: Thank you.

You may proceed.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Ehinger, it's my understanding that you've been in the wood products industry for approximately 50 years; is that right?

A. Yes, approximately, a little more.

Q. I misplaced my notes, so I am going to have to ask you –

THE COURT: Maybe you can shorten up the [Tr. 125] examination then.

MR. HAGLUND: I think that will happen, Your Honor.

BY MR. HAGLUND:

Q. Mr. Ehinger, could you briefly describe your experience.

A. Basically, I – my preparation was going to forestry school at the University of Michigan. Out of school, I worked for the Forest Service very briefly in Kentucky and Missouri. I then came out to Oregon and worked for a consulting firm for about two years. After that, I went to work for Edward Hines Lumber Company for 31 years.

I gave that up, then worked in an association working out problems in the industry between here and Washington, D.C., for the next three to four years. And then I decided to quit chasing my tail and went to work as my own private consultant to the industry.

Q. And while you were at Edward Hines Lumber Company, were you in senior management positions for most of that period?

A. 1965 to 1980, I was vice president, then senior vice president for the last seven or eight years in charge of all western operations.

Q. Now – and your consulting practice began when?

A. 1984, January.

Q. For a period of 10 years, between mid-1980s and [Tr. 126] mid-1990s, did you put out periodic reports on mill closures in the forest products industry in the Pacific Northwest?

A. I did.

Q. And what states were covered by that report?

A. The five western states: California, Oregon, Washington; Idaho, Montana.

Q. And have you continued to maintain the database regarding the entry into or exit out of the wood products industry since the last formal report that you did?

A. Yes. We maintain databases covering all the information basically that's contained in the report.

Q. Okay. Mr. Ehinger, I am going to put on the screen –

MR. HAGLUND: Perhaps the witness could be handed Exhibits 14 through 17, and 124 and 125.

(The clerk complies.)

BY MR. HAGLUND:

Q. Okay. Do you have Exhibit 14 in front of you there, Mr. Ehinger?

A. I do.

Q. And it's displayed on the screen here. What does this exhibit show?

A. It shows the location of timberlands in Washington primarily and a little bit of northern Oregon, plus location of the Northwest Hardwoods' alder sawmills.

Q. Now, does it also show timberland ownership as of some [Tr. 127] time in 2001?

A. Yes.

Q. Is the red – what's the red?

A. The dark red is Weyerhaeuser, the blue is the State timber, and there's a lighter color of pink shown down in Oregon which is Willamette Industries, and then it shows also yellow for Crown Pacific.

Q. Okay. One of the major landowners in Northwest Washington?

A. Yes.

Q. And also on the peninsula; is that right?

A. Yes.

Q. Now, can you – we see as of 2001 the four Northwest Hardwoods mills on this map. Could you point them out, going north to south.

A. Well, the north one is the Sedro Woolley mill. Arlington mill is the next one down. Then you drop down to the Centralia mill and then to the Longview mill. And then it catches the Garibaldi mill over on the Oregon Coast.

Q. So here's Longview, and if we go down to the bottom of the map –

A. On the left side –

Q. Right here?

A. – is Garibaldi.

Q. And there's Longview. Do we see large Weyerhaeuser [Tr. 128] tree farms in proximity to the Longview mill and the Centralia mills here and here (indicating)?

A. Yes.

Q. And that's the red that can be seen on Exhibit 14?

A. Right.

Q. The large Weyerhaeuser tree farms; is that right?

A. Yes.

Q. Okay. Now, turning to what's been marked as Exhibit 15, we see the same information, but now it's the State of Oregon. I'm going the wrong way here. Is that the case, Mr. Ehinger?

A. Yes.

Q. And we see the Weyerhaeuser land ownership in red and Weyerhaeuser alder sawmills with the large red dots?

A. That's right.

Q. What is the blue again, State of Oregon?

A. This is State of Oregon timber. The red is Weyerhaeuser. The pink is Willamette Industries.

Q. Who else – what other major –

A. And they don't show any Crown Pacific because Crown Pacific is all east side timber, and this is the State of Oregon.

Q. Now, if you look at – I'll zoom this up a bit – and is there another landowner that's being displayed on this map? If you look at the legend there.

[Tr. 129] A. Oh, yes. Georgia Pacific was holding land at that time.

Q. And is this part of their ownership in the Lincoln County area?

A. Yeah, the purple.

Q. The purple. Okay.

A. And then you get it down in the Coos/Curry County area down in the south edge of the map.

Q. Okay. And we see how many Northwest Hardwoods/Weyerhaeuser alder sawmills in Oregon as of the end of 2001?

A. Two.

Q. Garibaldi –

A. Garibaldi and Eugene.

Q. Thanks. Now, going on to Exhibit 16, what have you tried to display on this map?

A. This shows the existing mills, alder mills, in Washington. The open mills that are not owned by Cascade are shown in yellow. The red mills are the Cascade Hardwood

[sic] mills that we pointed out earlier. The black dots are the closed mills that have closed at that time and since that period of time.

Q. I think you said that the red dots are the Cascade Hardwood mills. Did you misspeak?

A. Northwest Hardwoods mills.

[Tr. 130] Q. Weyerhaeuser mills?

A. Weyerhaeuser mills, whatever you want to call it.

Q. Cascade Hardwoods is a competitor?

A. Yes.

Q. Okay. Now the black dots, I want to make sure this is understood, what are the black dots showing?

A. They represent hardwood mills that have closed in Washington since 1980.

Q. So this is a 21-year time span?

A. Yes.

Q. '80 to '01?

A. Yes.

Q. Okay. And as we go down, we also see a variety of closures, closed mills in the southern part of the state?

A. Right.

Q. Okay.

A. Yes.

Q. Let's shift now to Exhibit 17.

A. Yes.

Q. What are you trying to show here?

A. The same thing in Oregon, open mills, closed mills and Northwest Hardwoods mills. There are basically just

two Northwest Hardwoods mills, although the map catches the Longview mill up at the top center.

Q. Is this right on the Columbia River, which is obviously

[Tr. 131] part of the border between the two states?

A. Yes.

Q. Black showing closed mills north to south; is that correct?

A. Yes.

Q. And yellow, other open mills?

A. Right.

Q. Again, the same 21-year time frame?

A. Same time frame.

Q. Okay. That's for Exhibit 17.

Now, Mr. Ehinger, did you prepare a written list that is Exhibit 124, showing the number of closed hardwood mills in Oregon and Washington during this same 20-year period?

A. Yes, I did.

Q. And if we were to go back to 1980, how many operating hardwood mills were there in – well, how many closed in the last 21 years in Oregon?

A. Closed in Oregon would be 14.

Q. And if we look at Washington state?

A. 17.

Q. And those are all listed on this Exhibit 124?

A. That is correct.

Q. And have you listed their location?

A. The locations, I have listed the town which they're in [Tr. 132] and the identification of the year of closure that we could get.

Q. And that's out in the right-hand column?

A. Yes.

Q. And is Exhibit 125 a listing of the open hardwood mills as of –

A. 2001.

Q. And how many?

A. Seven in Oregon, eight in Washington.

Q. And of those 15, how many are Weyerhaeuser's?

A. Six of them.

MR. HAGLUND: Your Honor, we would move the entry of these exhibits, as they are supported by the data that Mr. Ehinger has testified to.

MR. SIMON: No objection.

THE COURT: 124 has already been received. 14 through 17 will be received.

MR. HAGLUND: I think 125 had already been received as well.

THE COURT: No, 125 has not.

MR. HAGLUND: Had not? Okay.

THE COURT: It will be received. (Plaintiffs' Exhibit Nos. 14, 15, 16, 17 and 125 received.)

BY MR. HAGLUND:

[Tr. 133] Q. Now, Mr. Ehinger, if you were to describe the change in the competitive landscape of the hardwood industry in Oregon and Washington between 1980 and 2001, how would you describe it?

A. Well, in 1980, the competitive nature was pretty loose, and by 2001 obviously it's gotten very tight, because of the expanding capacity of the existing mills, even though the curtailing of lots of mills, and the timber supply has not improved.

Q. Has the amount or number of competitors declined dramatically over this time frame?

A. Oh, substantially.

Q. If we were to total up the numbers on the exhibit we just presented, 124 and 125 –

A. I think it is 31.

Q. 31 have closed?

MR. SIMON: Objection, asked and answered.

THE COURT: The objection will be sustained. The exhibits are in evidence and he has testified to it.

MR. HAGLUND: Thank you, Your Honor.

BY MR. HAGLUND:

Q. Mr. Ehinger, I would like to ask you some questions about barriers to entering the alder sawmill business. Do you have an opinion about whether there are, as of the year 2001, barriers to entering the alder sawmill industry in [Tr. 134] this region?

A. They've substantially increased since the 1980 period when we started looking at this.

Q. How? Could you explain.

A. Number one, the timber supply is getting crowded by the mills and capacity simply because there are no more places for people to go to get the alder timber. Secondly, the cost of entering the business, building a mill and so forth, has gone up substantially.

And the thing that you have to look at is there are really two groups of mills here. There are the real small mills, which generally produce anywhere from two to seven or eight million feet a year. And then there are the larger mills, the substantial mills that are producing 25 up to 50 or 60 million feet a year.

The big mills all have planing mills, dry kilns and so forth to process material. Those small ones do not have them simply because they can't invest in them and they use common open market people who will surface timber, dry it and have it ready for market and ship it for you.

Q. Now, is the – you mentioned two. Is the presence of Weyerhaeuser a barrier to entry?

A. Competition is always a barrier to an entry in specific locations. And Weyerhaeuser, being very dominant and controlling 70 percent of the timber supply, is a [Tr. 135] consideration any time you're looking at starting a hardwood mill in Oregon or Washington.

Q. Now, have you actually provided, as part of your consulting work, advice to companies over the last 15 years that were looking at siting a sawmill, either softwood or hardwood?

A. Yes.

Q. Is that something you've done on a regular basis?

A. Yes.

Q. How important is an available timber supply to whether a new mill starts up in Oregon and Washington?

A. That's the number one consideration you have to give because you do not have the opportunity to source timber, there is little use in building a mill, so that is the number one. And those I work with, probably half of them are rejected very early in the game simply because there's no timber supply, whether it be hardwood or softwood.

And that also goes to the size of the mill. In other words, a person who is trying to build a 25 to 40 million foot production of alder lumber is crowding the marketplace, regardless if a fellow is going to produce five to ten million, fine, they can get by, or the ones that are even one to two.

Q. To build the size of the mill that you characterize as large to compete with Weyerhaeuser, what type of investment [Tr. 136] are you looking at?

A. 20 to $25 million, if you're building the complete mill yourself to produce that quantity of lumber.

Q. Did you –

A. And that's pricing new mill equipment, as opposed to getting old mill equipment or a mill that's being sold at auction or elsewhere.

Q. Did you act as a part of – did you provide some advice to a firm that was evaluating the potential of the Siletz Tribe using its Toledo mill to re-enter the alder business or the wood products industry?

A. They were interested – the instructions to me were what were the timber opportunities, to analyze the total timber opportunities in the area that would be tributary to a mill in Toledo or approximately in that area.

At the outside, the indication was given to me that people were considering the possibility of a hardwood mill, and I said, "Look, you can do a lot of things, but don't try hardwood. You're in a tough place, a hard location, and it's a difficult operation to manage." And I said, "That is the least likely type of operation that would have success."

Q. Okay. Now, there were some questions earlier regarding a chart that I think you were involved in.

A. Yes.

* * *

[Tr. 146] A. Roughly speaking.

Q. And you certainly would not say that Weyerhaeuser controls anywhere near that amount of the standing –

A. I agree with that.

Q. And if others were to say that the amount would be somewhere significantly less than seven percent, would that be a reasonable amount?

A. I don't know. I wouldn't respond.

Q. You'd have no basis to agree or disagree?

A. No.

Q. Okay. Do you still have before you Exhibit 15 and Exhibit 16 – I'm sorry, 14 and 15. Those were those maps of western Washington, that is Exhibit 14, and western Oregon, that's Exhibit 15. Do you still have those, sir?

A. 14 and 15 you want? Let me get the right glasses here.

Q. 14 and 15.

A. 14 and 15, I've got them.

Q. Okay. Now, you told us when you were answering questions to Mr. Haglund, with respect to Exhibit 14 for western Washington, what is shown there that's indicated in the legend, those are essentially the large industrial landholders, correct?

A. That's right.

Q. But there are a number of other landholders that have timberlands in Washington, correct?

[Tr. 147] A. Yes.

Q. That would include the Campbell Group? You're familiar with that?

A. There are all kinds of them there.

Q. And if I name several of them, tell me if I've got them right. The Campbell Group, Hancock, Champion, Rayonier–

A. I think Champion got rid of all theirs.

Q. Hampton, Simpson and Merrill & Ring, they all own timberland that has alder in Washington, correct?

A. I don't know whether they've got alder on all of them.

Q. They are timber owners?

A. They are timbers owners. Let's just leave it at that.

Q. All right. And with respect to Exhibit 15 in western Oregon, again, these are just the large industrial landholders that you have on your map?

A. These are some of the large industrial, yes.

Q. But there are plenty of other private landholders that have timberlands. And would those include Boise Cascade, Simpson, Stimson, Hancock, Moore Mill, Menasha Group and Roseburg Forest Products?

A. They all own substantial holdings.

Q. Now, the companies that I've named, they would also be considered large industrial timberholders, correct?

A. Yeah.

Q. May I ask you, sir, why those weren't included on the [Tr. 148] maps of Exhibits 14 and 15?

A. I didn't put the ownerships on the map.

Q. Who did?

A. I don't know. Mr. Haglund will have to tell you that. They came from Atterbury's ownership maps and they were obviously selected.

Q. And so you have no information about why these other large industrial landowners were not included on the map?

A. No.

Q. Now, Mr. Haglund asked you about your analysis of the hardwood mills that have closed since 1980, and you commented that there were 17 in Washington that have closed and 14 in Oregon that have closed?

A. Yes.

Q. And would you agree, sir, that there were a whole series of reasons why mills close, and perhaps if you have 17 mills that closed, perhaps 10 different reasons. Would you agree with that?

A. Very possible.

Q. And that's what you just told me last week, wasn't it, sir?

A. Yeah. But I think there was another thing when we talk mills, mills that I enter, two things that we want to be sure that everybody is clear on: Number one, they are mills that cut logs. They are not just cant mills or secondary

* * *

[Tr. 150] and if you would like to see the whole article, I'll make it available to you, but I don't think you'll need it.

A. No, just spit them out.

Q. Okay. In the year 2000, there's a quote attributable to you that says – connected with timber and mills.

"'All of the markets are down right now,' said Paul Ehinger, a Eugene, Oregon, consultant to the forest products industry. 'It's a matter of how big a problem you're willing to live with until the market comes back.'"

What did you mean by that, sir?

A. It really means – I'm sure you understand, you go and talk to a person for 20 minutes, and they pull one thing out which makes it difficult sometimes. But having said that,

actually how long the downturn was going to be and how deep the pockets were to be able to go through is one of the key things, because financial strength is one of the key things to the survivor of any operation.

Q. And the final quote – I'm going to ask the same type of question, sir. This was from 1998, about three years ago, Puget Sound Business Journal, here's the quote attributed to you.

"'People who are seeing problems now are people who are having management problems,' said Paul Ehinger, an industry consultant in Eugene, Oregon. 'Independent mills can do fine if they are well run and have good management.'"

[Tr. 151] What did you mean by that, sir?

A. Exactly what it says. I think it is self-explanatory.

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**[Vol. 4-A (Apr. 11, 2003)] [Testimony of Richard Zerbe]**

* * *

[Tr. 3] (Apr. 11, 2003)

PROCEEDINGS

(Open court; jury present:)

THE COURT: Be seated. Good morning, ladies and gentlemen. I appreciate all of you being on time and ready to pay attention. You may call your next witness.

MR. HAGLUND: Plaintiffs call Dr. Richard Zerbe.

(Richard Zerbe was duly sworn.)

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Dr. Zerbe, I am going to cover your educational background, work experience, awards, professional associations and publications. I am going to do each of those categories in kind of a paragraph recitation and at the end of each component I would like to ask you if that's accurate. If I make an error, please correct me.

First, it is my understanding that you received your bachelor's degree in 1960 from the University of Oklahoma with areas of concentration in mathematics, general sciences and political science and that in 1969 you received your Ph.D in economics from Duke University?

A. That's correct. I would add that the mathematics included statistics.

Q. Okay. Now, with regard to your work experience, between college at Oklahoma and Duke you were a lecturer at [Tr. 4] Marshall University from 1964 to '66. You were also an assistant professor for three years from '66 to '69 at York University in Toronto, Canada.

Following the receipt of your Ph.D, you were then in succession a research fellow in law, in economics for two years, from '69 to '71, at the University of Chicago. You were a scholar in residence for the following year with the American Bar Foundation. You were an affiliated scholar for two years with the American Bar Foundation. And you were an assistant professor of economics for five years, from '71 through '76, at Roosevelt University?

A. That was an associate professor.

Q. Where is Roosevelt University?

A. It is in Chicago.

Q. Then you were a research associate – during that same period of time, you were also a research associate in the department of economics at the University of Chicago?

A. Correct.

Q. You were a visiting professor as well of economics, visiting associate professor at Northwestern University in Chicago during that same period of time?

A. Correct.

Q. Then beginning in 1981 or beginning in 1976, I'm sorry, you began work for the University of Washington and that continues to this day. During that 27-year period now, or [Tr. 5] 26 year period now, you have been the acting director of the program in social management of technology. You have been an adjunct professor in the department of economics. You have been an adjunct professor in the school of law for the last 12 years. And you are currently and for the last 20 years have been a professor in the Daniel J. Evans School of Public Affairs, all of those at the University of Washington in Seattle?

A. That's correct. I was also an adjunct professor in civil engineering for a period of time.

Q. Okay. Let me turn to just a few of a number of awards, grants or honors. You were on the council of law-related studies at Harvard in 1971. You were a research fellow in law and economics for the two years before that at the University of Chicago. And you were an Olin fellow or had an Olin fellowship at the Yale Law School in the fall of 1990. Is that right?

A. Correct.

Q. Now, turning to public service and professional associations. During your career you have served on the board of economic advisors to the economic committee of the ABA, American Bar Association, Antitrust Section and have served as a consultant to the Federal Trade Commission of the United States several months as a consultant in the Washington, D.C. office and over ten years consulting from [Tr. 6] time to time for the Seattle office for the Federal Trade Commission. Is that correct?

A. That's correct. I'm not sure exactly how many years I was consultant for the Seattle office, but roughly right.

Q. Okay. You are a member in terms of professional associations of several – two that I will mention are the American Economic Association and an associate membership in the American Bar Association?

A. I'm no longer an associate of the American Bar. I let that lapse.

Q. Go ahead.

A. Could I add –

Q. Sure.

A. I was a founding member of the American Law and Economics Association.

Q. And a past member of its board of directors?

A. Yes.

Q. Now, you have written widely in the field of law and economics, specifically antitrust law. Is that correct?

A. Including antitrust law.

Q. And for the last 23 years, you have been a senior editor of a publication entitled Research in Law and Economics and a Research Annual. The next volume due late this year or early next year is on antitrust law. Is that correct?

[Tr. 7] A. That's correct. I had been leading editor during that period.

Q. You have written dozens of articles, chapters in books throughout your career in the fields of law, economics and antitrust economics. Is that correct?

A. That's correct.

Q. And one of the earliest articles that you wrote which appeared in the law journal called The Journal of Law and Economics in 1969 was entitled the American Sugar Refinery Company 1887 to 1914, the Story of a Monopoly?

A. That's correct.

Q. You also wrote a follow-up article regarding monopoly and oligopoly in The Journal of Law and Economics?

A. That's correct.

Q. Now, Dr. Zerbe, were you retained by the plaintiffs to provide expert opinion on antitrust economics in this case?

A. Yes.

Q. Now, have you testified in any case in the last four years?

A. No.

Q. I would like to ask you, Dr. Zerbe, whether you have an opinion concerning whether alder sawlogs is an economically distinct market?

A. Yes.

Q. And what is that opinion?

[Tr. 8] A. That it is an economically distinct market.

Q. What is the basis for your opinion?

A. The fact that there are specialty mills for alder sawlogs. The fact that 95 percent of the hardwoods in the Pacific Northwest is alder. The fact that transportation costs for logs are high.

Q. Now, is there a geographic definition or component to what you describe as the alder sawlog market?

A. I believe I would describe it as western Washington and Oregon.

Q. So the geographic confines of the alder sawlog market in your opinion is western Oregon and western Washington?

A. Yes.

Q. Is that basically where the alder grows in the United States?

A. Yes.

Q. Predominantly?

A. There is some alder in Alaska, I understand, as well.

Q. A fairly small amount?

A. Yes.

MR. HAGLUND: Now, I would like to ask if the witness could be handed a jury notebook.

BY MR. HAGLUND:

Q. Professor Zerbe, if you could turn to Exhibit 400. This is a document that you reviewed as part of your [Tr. 9] preparation of this case?

A. Yes.

Q. And I want you to – for purposes of this next question, I want you to assume that within the time frame of 1998 through 2001 that Weyerhaeuser held a 64 percent or above share of the alder sawlog market as you have defined it. Based on keeping that assumption in mind, do you have an opinion about whether Weyerhaeuser has a monopoly power in the alder sawlog market?

A. I do.

Q. Could you tell the Court and the jury what that is.

A. Well, I believe that they have monopoly power in the alder sawlog market. Such a conclusion has been – given that market share, it is pretty standard.

Q. Now, in this situation with respect to the alder sawlogs, they have this large share of an input into a manufacturing process at alder sawmills. Is that right?

A. That's correct.

Q. You used the term monopoly power. Is there another term known in your field for this type of monopoly?

A. Yes.

Q. What is it and please describe what it means.

A. When there is monopoly power on the buying side. That is, when there is a single buyer, it is called monopsony. So there would be monopsony power, which is just monopoly [Tr. 10] power on the buying side.

Q. So at 64 percent or above, Weyerhaeuser has monopoly or as synonym monopsony power in the sawlog market?

A. Correct.

Q. Now, does there have to exist only one buyer or a buyer with this market share?

A. Just a buyer with this type of market share.

Q. Now, Weyerhaeuser has an expert in this case, Dr. Randall Pozdena. Have you reviewed all of the materials he has filed in this case regarding his opinions on the market definition and monopoly power issues?

A. I have.

Q. Now, Dr. Pozdena takes the position that because Weyerhaeuser does not own more than 7 percent of the alder – standing alder resource in Oregon and Washington that it cannot have monopoly power in the alder sawlog

market. You are familiar with that conclusion of his?

A. I am.

Q. Do you agree with it?

A. Absolutely not.

Q. Could you explain why.

A. It doesn't fit the definition, the textbook definition. Monopsony is you have – you are the sole buyer or you have buying power on the buying side. It has nothing to do with ownership of the resource. Any standard textbook shows [Tr. 11] this.

Q. So ownership of the resource when it is a monopsony on the buying side is not a condition of finding monopsony or monopoly power in that product market?

A. Absolutely not.

Q. I would like to give you a slightly different example. Let's take the situation of the orange growing region of Arizona. Let's assume for the moment that Sunkist is the sole processor of what are called juice oranges into orange juice in Arizona. Further assume that they own no orange groves themselves, but they buy 80 percent of all the juice oranges in Arizona and convert them into orange juice.

In that situation, does Sunkist have monopoly or monopsony power in the orange juice/orange market in Arizona?

A. They would, assuming that Arizona is a relevant market.

Q. Now, I would like to turn now, Dr. Zerbe, to the second market issue in this case. Do you have an opinion concerning whether the market for finished alder lumber is an economically distinct market?

A. I do.

Q. What is that opinion?

A. That it is.

Q. By "finished alder lumber" do we mean kiln dried and surfaced alder lumber?

[Tr. 12] A. Yes.

Q. What's the basis of your opinion, Professor?

A. Well, I have heard the other experts testify. I read their statements about alder's workability characteristics and looked at – the grading system for alder is different from any other hardwood. Primarily my opinion is based on the data.

Q. Now, you do not have a working background, in terms of your career, in the woods product industry?

A. That's correct.

Q. So you have read – you read the materials prepared by Mark Rasmussen in this case?

A. I have.

Q. As well as Paul Ehinger?

A. I have.

Q. As well as an expert that will be here next week, Dr. Philip Tedder?

A. I have.

Q. Did you listen to the testimony yesterday of Mr. Rasmussen and Mr. Ehinger?

A. I did.

Q. Did you agree with what they had to say?

A. Insofar as I had knowledge, I did.

Q. Now, I want to turn to the data and your analysis of it in a few minutes, but let me first proceed to first ask you [Tr. 13] to turn to Exhibit 409 in the juror notebooks. Is this an exhibit that you reviewed as part of your preparation to give testimony in this case?

A. Yes.

Q. Does it show that Weyerhaeuser, as of May 12, 2000, the date of this Weyerhaeuser document, is designating their market share of finished alder lumber at 75 percent?

A. Yes.

Q. That's noted in the third bullet up above as well as in the table below?

A. Correct.

Q. Now, I would like to ask you a hypothetical question, Professor. That is, assuming that during the time frame of 1998 through 2001 that Weyerhaeuser held a 75 percent or higher share of the market for finished alder lumber that you have defined, do you have an opinion about whether Weyerhaeuser held monopoly power in that market?

A. I do.

Q. And could you say what that opinion is and explain it.

A. The opinion is they would hold monopoly power in that market.

Q. Now, you have given this conclusion as to both markets, sawlog and lumber. As an economics professor with expertise in antitrust economics, could you explain to the Court and the jury what's the significance in terms, from an economics [Tr. 14] perspective, of a company having such large shares of a market that you would define as constituting monopoly power? What's the significance of monopoly power in the market?

A. Two: It gives them control of price, which increases profitability.

Q. Now, when you say control over price, what do you mean?

A. I mean control over both the price of sawlogs and the price of lumber, alder lumber.

Q. And taking the sawlog market, is that controlled to either increase the price for logs or decrease it?

A. Yes, it is.

Q. And likewise with finished alder lumber, the power to decrease it or increase it?

A. Yes, it is.

Q. Now, Dr. Zerbe, you heard Mr. Rasmussen yesterday describe a statistical analysis that was done. Did you and Mr. Rasmussen perform that analysis as a team?

A. We did.

Q. And what type of analysis was it?

A. Correlation analysis.

Q. And I would like to display what was displayed yesterday as Exhibit 85A.

Is Exhibit 85A a table showing the results of what you and Mr. Rasmussen did?

A. Yes.

[Tr. 15] Q. I have tried to zoom in on the first couple of columns. What did this analysis seek to do, Dr. Zerbe?

A. It seeked to determine the relationship between changes in prices of alder and other hardwoods.

Q. And what did the analysis show?

A. It showed that –

MR. SIMON: Objection, Your Honor. Cumulative with Mr. Rasmussen's testimony.

THE COURT: The objection will be overruled.

THE WITNESS: It showed the correlation of changes in prices wasn't small.

BY MR. HAGLUND:

Q. So in terms of the –

A. That is, one way to put it would be that changes in the prices of other hardwoods do not well predict changes in the prices of alder or vice versa.

Q. Could you explain how that is important to the conclusion you reached that finished alder lumber is in a distinct market from other eastern U.S. hardwoods?

A. Certainly. If they were in the same market, you would expect the correlation, the first differences, to be larger. You would expect there to be change in the pattern together. They don't.

Q. And that is shown in the column I have highlighted here?

[Tr. 16] A. Yes.

Q. And if they were highly correlated showing that they did track price together closely, those figures would all be close – much closer to 1.0 than they are to zero?

A. That's correct.

Q. Now, Dr. Zerbe, are you familiar with the literature that describes how a price correlation should be done – price correlation analysis?

A. I'm familiar with literature that talks about correlation analysis.

Q. Is there a particular author of an article that even Dr. Pozdena relied on that discusses how to do correlation analysis?

A. The article discusses market determination using correlation analysis.

Q. Who is the author of that article?

A. There are two authors. George J. Stigler and I think Mr. Sherman. Bill Sherman – Sherman.

Q. Do you know these individuals from your work in this field over the last 30 years?

A. I knew George Stigler very well. I worked with him. He was in Chicago. I have talked to him, gave lectures in his classes, talked about these kind of antitrust issues. He is now deceased.

Q. Now, Dr. Zerbe, Mr. Rasmussen used some charts [Tr. 17] yesterday to describe some things. I want to put on the screen some charts that you prepared. This is what has been marked as Exhibit 102, and it is entitled at the top and then I will zoom in: Correlation of Prices in Two Unrelated Industries.

Did you prepare this chart?

A. I did.

Q. And what was your purpose in terms – what were you trying to show with this chart?

A. I would make the following point: It is easy to find correlation prices that are close to one for goods that have no

relationship to each other. Any time you have prices that are trending upward, the correlation of the levels is going to be – usually would be high. Just because of the upward trend.

THE COURT: By "high," you mean the prices would be close together or far apart?

THE WITNESS: Not necessarily. I mean the correlation coefficient, that they would track would tend to be close to 1. It is the upward trend that gives it – would give that high correlation, Your Honor.

BY MR. HAGLUND:

Q. Now, in this top chart, you illustrate this point, and could you explain what you have shown here.

A. Yes. In the top chart you can see that there appears [Tr. 18] to be sort of some tracking between the red prices and the blue prices that is airline fares and poultry. But common sense would tell us that those aren't the same market.

When you look at the first differences, which are in this case, year-to-year changes in prices, and you look at the – I guess I'm getting ahead of your question, sir.

Q. In here, you are trying to examine two products that clearly are not in the same relevant market?

A. Yes.

Q. Airfares and poultry?

A. Yes.

Q. And if you just look at the way their prices are trending in this chart, what type of correlation do you get? Could you point that out.

A. It showed the intersection there between column 1 and column 2. It is the figure .938, which I would say shows high correlation.

Q. Now, does the Stigler article suggest that you can stop at this stage when you are trying to examine whether products are in the same market?

A. It suggests that you can stop at that stage if the correlation is low. That would suggest right at the start that they are not in the same market. But if the correlation is high, you cannot from that conclude that they are in the same market.

[Tr. 19] Q. And what then should you do, as an economist, to examine whether the products are in the same market? Would you explain what you then do and what you display in the bottom part of this chart.

A. Went to the second step, which in itself is also not definitive. The second step is to take the difference in the prices for both, in this case the airline fares and the poultry, and see if there is a correlation between the airline fares and the poultry. This is what was done in the Stigler/Sherwood article.

Q. Go ahead, sir.

A. The Stigler/Sherwood article often did this in terms of taking the logs and then taking the first differences of the logs. Some people – because it has an easier economic interpretation. I also did that for all of these hardwoods that were examined. The conclusion is the same.

Q. So when you say that you should examine the first differences, is that what you did in this lower chart on 102?

A. That's correct.

Q. And what does the correlation show?

A. It shows that there is no meaningful correlation. And what correlation there is, it is negative. .068, the brackets indicate, indicate a negative correlation.

Q. And having performed this first differences analysis, [Tr. 20] what conclusion are you able to draw regarding the

question regarding whether airline fares and poultry are in the same market?

A. That they are not.

Q. And is this the analysis that Mr. – you performed this same first differences analysis with Mr. Rasmussen and he described it in the chart as he displayed yesterday?

A. That is correct.

Q. I would like to ask you to now look at Exhibit 103, which I will also display.

Dr. Zerbe, could you explain what you were trying to show in Exhibit 103.

A. It is the same thing. I have two prices for airline fares and tomatoes. I did the same sort of analysis. You can see that if you look at the first chart, the two prices seem to track very well. If you look at the first differences, they don't track very well.

Q. So looking at the top chart, we see in the graphical illustration here that the prices seem to be moving together or fairly close?

A. Yes.

Q. And is the correlation coefficient that you calculated high?

A. It is. .94.

Q. Very close to 1?

[Tr. 21] A. Yes.

Q. But you can't stop there. And you went to the second step which is, again, what type of analysis?

A. Correlation of the first differences.

Q. And what does the chart show here when one plots the first differences?

A. Well, you can see they don't seem to track very well, the two prices.

Q. And what does the calculation for the correlation coefficient show?

A. It shows that the correlation is negative, about .3.

Q. So, Dr. Zerbe, based on this analysis, are airline fares and tomatoes in the same market product?

A. They are not.

Q. If one returns to the Exhibit 85A and examines the correlation coefficient for alder superior compared to the top grades of those 17 species, are the correlations high or low once you do the first differences analysis?

A. They are low.

Q. Those 17 hardwood species are not in the same, relevant product market as alder?

A. That's right. In the Stigler article, when they are talking about items in the same market, they are talking about correlation coefficient, first differences or the – or using the logs. Either way, they are talking about .9, [Tr. 22] .8 maybe, high correlation coefficient.

Q. In your opinion, you need to be in the .8 to .9 area on a first differences analysis to come to the conclusion that the products are in the same market. Is that correct?

A. It sounds about right, yes.

Q. Now, I forgot to ask a couple of questions, Dr. Zerbe. You stated earlier that you examined the materials that Dr. Pozdena has filed in this case that detail his testimony, his opinion regarding whether alder lumber is in the same market as other eastern hardwood species. Is that correct?

A. That's correct.

Q. And he concludes that they are all in the same market. Is that right?

A. That's right.

Q. When it comes to this correlation analysis, how many steps did Dr. Pozdena perform?

A. Well, he performed two.

Q. And what were those?

A. First, he correlated the price levels. Then he skipped the correlation of the first differences and moved to something which he called removal of the common factor.

Q. Did he follow the economic methodology correctly?

A. No.

Q. So you stand by your opinion that they are not in the [Tr. 23] same market, alder –

A. I do. There are three steps. You correlate the levels, you correlate the first differences, and only then do you go on and talk about whether or not there is a common factor. Because you could have a high correlation/level of first differences and have it explained by some common factor.

Q. So let me make sure I understand. Under the literature there, there can be up to three steps of a price correlation analysis?

A. There could be more. But there could be those three, yeah.

Q. And if you have a low correlation, at any one of those stages you stop and conclude they are not in the same market?

A. That's correct.

Q. Do you skip a step?

A. No.

Q. Is there any support in the literature for what Dr. Pozdena did?

A. There is not. In the Stigler/Sherman article it makes it clear that you don't go considering the common factor before you calculated the first difference. It is only after you have done that that you do that.

Q. And Dr. Pozdena's materials refer to the Stigler [Tr. 24] article?

A. Yes, they do.

MR. HAGLUND: Your Honor, we move the entry of 102 and 103.

THE COURT: Any objection?

MR. SIMON: Cumulative with the expert's testimony?

THE COURT: They will be received, 102 and 103.

(Exhibits 102 and 103 were received.)

BY MR. HAGLUND:

Q. Dr. Zerbe, as part of your preparation to testify here, did you review a number of articles and speeches prepared by Weyerhaeuser's top executives in the two or three years ending in 2001?

A. I did.

Q. And did you review Exhibit 466, an article by Richard – let me start over. Did you review Exhibit 466, an article by senior Weyerhaeuser vice president for timberlands in the Western Forester. If he could be handed 466, 469, 470 and 472. Go ahead and take a minute to make sure that those are among the speeches or articles by Weyerhaeuser senior executives that you looked at.

A. I looked also at some material from Mr. Hanson that I don't see here.

Q. 466 should be one by Mr. Hanson, and I think you're [Tr. 25] right, I failed to ask that you be handed 471, which is another article by or a speech by Mr. Hanson.

Professor, did you look at those in preparing to give testimony here probably some months ago?

A. I did.

Q. Now, calling your attention to Exhibit 466, the second page of that exhibit.

A. That's the one with the Western Forester logo at the top.

Q. This is an article by senior vice president of Weyerhaeuser Richard Hanson. Do you have that now?

A. Yes, I do.

Q. I would like to call your attention to the second page of the article from the November/December 2000 issue and ask you to look at the section called Consolidation and the first paragraph which states: Forest products is still one of the most fragmented of all industries, and fragmentation creates inefficiencies that hurt profitability.

What does that suggest to you, Professor?

A. The paragraph?

Q. Yes.

A. The paragraph speaks of the need for consolidation. It says the company must choose between being a consolidator and a consolidatee.

Q. You are referring down lower to what I have [Tr. 26] highlighted?

A. I would interpret that to have a large market share or to exercise market control.

Q. You would interpret that – I didn't quite hear that.

A. That, I would interpret that as the desirability of having large market share.

Q. And what's the purpose of having large market share in any segment of a market?

A. Being able to control a price.

Q. Being able to control price has what impact on profitability if you are successful in raising price? What's the impact on profitability?

A. It can increase profitability.

Q. Now, turning now to one other of those articles, Dr. Zerbe, I'm going to ask you, if you would, find Exhibit 472?

A. Yes.

Q. Is this a copy of a speech by Steve Rogel, chairman, president and CEO of Weyerhaeuser pulled off of their Web site that was given to an industry association in October of 2001?

A. I don't know all that. All I know it is identified as remarks by Steve Rogel.

Q. At the end of that line, does it show October 15, 2001?

A. Yes, it does.

[Tr. 27] Q. Now, I would like to turn to page 2 and go down to the bottom part, the bottom probably quarter of that page. Have you reviewed this section of this speech by Mr. Rogel in which he talks about the positive character of consolidation?

A. I have.

Q. And does he make reference to – as you look at this here, he talks about what has been going on in the European pulp and paper industry between 1974 and 2000. Is that right?

A. That's correct.

Q. What's he saying here?

A. Well, as we often see, the words here are: These marginal producers have long made it hard to avoid price wars and demand for paper has fallen.

Q. He is quoting with approval something from a magazine called The Economist just after he has talked about that even after several bouts of consolidation –

THE COURT: Point it out on the screen and let him look at the screen. It would be easier.

MR. HAGLUND: Sure, Your Honor.

BY MR. HAGLUND:

Q. He is making that comment about The Economist just after he has discussed what, Dr. Zerbe?

A. The problem, the fragmentation in the industry, the [Tr. 28] lack of consolidation.

Q. And is he discussing the fact that there has been significant consolidation in the pulp and paper arena in Europe but still not enough?

A. Yes.

Q. Now, let me ask you a couple of follow-up questions. In a competitive market, Dr. Zerbe, with lots of producers, could you briefly explain what happens to prices given the laws of supply and demand in a competitive marketplace?

A. Well, supply and demand determine the price. An individual producer has no control over the price.

Q. So if we look at the last part of this article where it talks about avoiding price wars when demand for paper has fallen, in a competitive marketplace where demand – where the condition is falling demand, what should happen to prices?

A. Price will fall; you can't avoid it.

Q. In a marketplace dominated by one or a few large companies, where demand is falling will that condition prevail, prices fall?

A. Prices may fall.

Q. If one company is dominant, will they fall?

A. Prices may fall.

Q. Does the dominant company have the ability to avoid the fall in prices?

[Tr. 29] A. Yes.

Q. Dr. Zerbe, based upon your review of the Weyerhaeuser senior executive speeches, what's your opinion about their objectives in any of the wood product market segments in which they compete?

A. In general, taking all the statements together, they are consistent with the policy of gaining monopoly power and gaining industry control.

Q. Now, yesterday you heard the testimony of Paul Ehinger, and I want to specifically ask you – you heard his testimony regarding barriers to entering the alder sawmill business in the Pacific Northwest?

A. Yes.

Q. I want to call your attention and ask you some questions about one of the particular factors or barriers he mentioned. That was the dominant presence of Weyerhaeuser in the alder industry in Oregon and Washington. My question for you, Professor, is: Is there any recognition in the antitrust economics literature about a dominant firm being a barrier to entry into that market?

A. Yes. It is a recognized barrier.

Q. Could you explain why.

A. Well, it is really common sense. If you have reason to believe that the dominant firm is in a position to squeeze your margins, then that makes entry problematical.

[Tr. 30] Q. And when you use the word "problematical," what do you mean?

A. Risky.

Q. And in your judgment, based upon your assessment of – I will withdraw that.

MR. HAGLUND: Thank you very much, Dr. Zerbe. No further questions.

THE COURT: Cross-examination.

MR. SIMON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Good morning, Dr. Zerbe. Michael Simon. Good to see you again. In your discussion with Mr. Haglund, when he was asking you about the example with the Sunkist oranges, in a grocery store like we all might go to, are Sunkist oranges different from other oranges?

A. Not as far as I'm aware.

Q. If the price of Sunkist oranges were to go up, would you expect consumers to switch to other brands of oranges?

A. I would expect some switching, yes.

Q. As a matter of fact, if the price of oranges generally went up, would you expect that some consumers would switch to other types of fruits?

A. There would be some switching but less, much less.

Q. In the discussion of your background that you gave to

* * *

[Tr. 35] A. It makes it more difficult.

Q. Very good. Now, if you don't have data that will permit that, then one can use a regression analysis in order to adjust for those type of common trends like inflation, can't you?

A. The difficulty is identifying all the possible common factors.

Q. But it can be done with appropriate regression analysis?

A. If you can identify all the common factors.

Q. And correlation of residuals is a type of regression analysis, am I correct?

A. Correlation residuals is a type of regression analysis.

Q. Thank you, sir. You stated that the presence of a major or dominant firm can be a barrier to entry. Did I hear that correct?

A. You did.

Q. The reason for that is what, sir?

A. Well, as I stated, it is particularly the case. If you think the dominant firm is in the position to make your operation less profitable or even unprofitable.

Q. If a dominant firm achieved its position of dominance or its market share it has because it is either more efficient or better run, that ultimately is in the interest of consumers, am I correct?

[Tr. 36] A. Well, you have a trade off here it, don't you? It is not necessarily in the interest of consumers.

Q. Is the underlying purpose of our antitrust laws to protect consumers?

A. Yes.

Q. Is it helpful to consumers or harmful to consumers to encourage firms to be more efficient and better run?

A. It is helpful.

Q. Do you believe that a firm that is efficient and better run is a barrier to entry to a poorly run or poorly managed entrant?

A. Yes.

Q. Anything wrong with that?

A. What do you mean by wrong?

Q. I will move on. With regard to your opinion regarding lumber, if I heard you correctly, if I heard you correctly you said you believed that finished alder lumber is an economically distinct market or a relevant market. Did I hear that right?

A. Yes.

Q. Now, in fact, when you prepared your expert opinion on this matter and when you gave a deposition to me, this was your opinion: That there is a relevant market for hardwood lumber that is international in scope but you believe that there was a submarket for finished alder lumber. Do I have

* * *

[Tr. 46] paragraph. I'm not going to read it out loud. I prefer you not read it out loud, but I'm going to ask you a question when you are done. Take a look at page 802, please. It is numbered in the bottom right-hand corner as 802. Do you see that page?

A. Yes, I do.

Q. Read the top paragraph to yourself, please, and let me know when you are done.

A. Yes.

Q. Now, does that refresh your recollection that you were informed by your research assistant, Mr. Bellis, that the Siletz Tribe's mill has been maintained so it may start operations if market conditions become favorable?

A. Yes, it does.

Q. Did you or Mr. Bellis draw the conclusion from that that presents a difficult issue for this case?

A. I don't think we drew that conclusion.

Q. Did you or Mr. Bellis draw the conclusion that if the mill can be maintained in a condition so it can start operations when conditions are good, Weyerhaeuser would have to continue to engage in its challenged actions indefinitely?

A. That's Mr. Bellis' words, not my words.

Q. You are aware, are you not, Dr. Zerbe, that when there is a downturn in lumber prices, stumpage owners or the [Tr. 47] owners of standing timber, begin to take their trees off the market. You are aware that's a phenomena that occurs, aren't you?

A. It is a logical assumption. I'm not aware of the practice.

Q. Let me ask you from that logical assumption if is the following a correct economic conclusion: If there is a downturn in lumber prices and the stumpage owners or standing timber owners take their trees off the market, would you agree that those trees coming off the market would cause an increase in the price, whether the stumpage price or the log cost?

A. If the logs – if the timber was in the market in such a way that it affected the supply of available timber, and if that supply was then taken off the market, then it would tend to increase the price.

Q. And under those circumstances log prices could increase even though lumber prices were decreasing, under the circumstances you just described, am I correct, sir?

A. That's possible.

Q. With respect to your testimony regarding monopoly, let me talk about monopoly first. Then I am going to come to monopsony.

With respect to your testimony regarding monopoly, did I hear you correctly say to Mr. Haglund and the Court

* * *

[Tr. 61] with prices going down. Of course, both – it could be happening for both reasons at the same time.

Q. So the answer to my question would be yes?

A. Yes.

MR. SIMON: Thank you, sir. Nothing further.

THE COURT: Further questions?

MR. HAGLUND: No, Your Honor.

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**[Vol. 4-A (Apr. 11, 2003)] [Testimony of Ludwig Rabold]**

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[Tr. 80] mills who wanted to retain it?

A. Uh-huh.

Q. The PLIB did not go, at least in the last 20 or 30 years, did not go to the Northwest Hardwoods mills on a regular basis to do any inspecting or grading or checking of the Northwest Hardwoods product at their mills?

A. Not since the proprietary grade. But I have done – when you mentioned it earlier, I have done with Northwest Hardwoods at the beginning, yes.

Q. And that was –

A. On a monthly basis.

Q. That was quite a while ago?

A. That was in '76. I'm not sure when that switch was made.

Q. After Northwest Hardwoods came out with its proprietary grading system, no more after that?

A. No, sir.

Q. So only on occasion would you see some of the Northwest Hardwoods' product when another mill or customer would ask for your help in evaluating that?

A. That's correct.

Q. On occasion other mills, including Ross-Simmons, would bring on board or buy Northwest Hardwoods' proprietary graded product to ask for help in understanding that. Am I correct?

[Tr. 81] A. Pretty much so.

Q. Now, it is correct that most of the other hardwood mills that make alder lumber in the area try to copy or emulate Northwest Hardwoods' grading systems, correct?

A. I don't know how to answer that. That was a mill's choice.

Q. Was that your perception, that that's what most mills you were working in were doing?

A. Yeah, I would say that. But like I said, it is like Ross-Simmons. Ross-Simmons, they had two different grades than what Northwest Hardwoods had. It was a custom cabinet and then the comm. shop.

Q. With respect to the concept of proprietary grading, the idea there was to deliver what the customer really wanted?

A. Yeah.

Q. And to deliver it consistently?

A. That's right.

Q. And that's why we have the proprietary grades?

A. Yeah.

MR. SIMON: Thank you. Nothing further.

THE COURT: Any further questions?

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Based on your experience, is it true that some customers preferred alder lumber that was knife planed [Tr. 82] rather than abrasive planed?

A. Yes.

Q. Is it a fair statement that an abrasive planer hides more defect from the grader than a knife planer?

A. I wouldn't call it a defect. I would call it – let's say, for instance, you get the pin knots. It is not a defect, but it is a mill's choice – how should I say that – lumber sense. In other words, you have several pin knots, the orders of invoice depend on that fact. So how many can we have on a board? Sometimes you find the pin knots scattered all over the board. That's a mill choice that we only have a few.

Some mills are probably harder; some mills you don't or probably separate that. That was probably tougher to spot on the abrasive machine over the knife planer. The other thing, the skip is more apparent on the knife planer than the abrasive machine.

Q. What is skip?

A. Skip is a roughness that is on the surface or sanded off. The little undersides or whatever you have, then you have that roughness showing.

Q. It is an abrasive plane –

A. All it is, it is a little touch over the area. It covers a little. It is more apparent on the knife planer.

Q. Okay. Take stain in alder lumber –

[Tr. 83] A. Stain, blue stain, you can see that on both abrasive and also knife planer. Not much difference there.

Q. Stain does lower the value of the lumber product?

A. Oh, yeah, definitely.

MR. HAGLUND: Thank you. No further questions.

MR. SIMON: Nothing further.

THE COURT: You may step down. Thank you, sir. Call your next witness.

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**[Vol. 4-A (Apr. 11, 2003)] [Testimony of Mel Kayser]**

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[Tr. 83] MR. HAGLUND: Plaintiffs call Mel Kayser.

(The witness was duly sworn.)

MR. HAGLUND: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Kayser, are you here pursuant to a subpoena?

A. Yes, I am.

Q. Did you have foot surgery yesterday?

A. Yes, I did.

Q. I appreciate your coming in despite that. It is my understanding, Mr. Kayser, that you graduated from high school in 1952 and immediately went to work in the woods, spending 46 years with ITT Rayonier or Rayonier Company in various logging and log-buying positions; that you retired but then worked for 14 months for Wasser and Winters as a log buyer in '99; and then for approximately a year and a half, part of '99 until September of 2000, you were a log [Tr. 84] buyer for Ross-Simmons in Longview. Is that all correct?

A. No. In the beginning, I did work for ITT Rayonier until about the last ten years. Before that I was self-employed contract logger.

Q. Okay. So from '52 to '89 you were ITT Rayonier?

A. No. I worked independently from '52 until like '82. Then I went to work for ITT.

Q. I really messed it up. Thanks. So '52 to '82 you were a contract logger?

A. Correct.

Q. In what area of this region?

A. Southwest Washington.

Q. So have you logged all over southwest Washington?

A. And up into the Mount Hood National Forest.

Q. For that 36 years?

A. Correct.

Q. Then you were a quality control wood supervisor and log buyer for ITT Rayonier?

A. Correct.

Q. Now, I would like to ask you some questions about the experience you had at Ross-Simmons. That was 18 months of its last two years of operations?

A. Correct.

Q. And where do you live, sir?

A. In Castlerock, Washington.

[Tr. 85] Q. Now, were there problems procuring logs for the Ross-Simmons Longview operation when you worked at the company?

A. In the beginning, no.

Q. What problems developed thereafter?

A. Later on the problems developed. The payment to their loggers was the problem.

Q. How so?

A. They didn't pay their bills.

Q. What impact did late payment to loggers have on your ability to source logs in the last year and a half?

A. They went somewhere else.

Q. Did that affect the quality of the logs that you were able to procure for Longview at – Ross-Simmons at Longview?

A. No. Basically we procured the same quality of material we had before, but we had a little more problem procuring the volume.

Q. Did you have to buy higher prices partly because of that problem?

A. No.

Q. Who was Ross-Simmons' primary competitor?

A. Weyerhaeuser – Northwest Hardwoods and Cascade Hardwood. Cascade Hardwood always paid more than anybody else.

Q. Now, your direct competition was – also included the [Tr. 86] Northwest Hardwoods mill at Longview?

A. Correct.

Q. Now, you knew who the log buyers were at Northwest Hardwoods?

A. Absolutely.

Q. And you had known them from years before in the logging business?

A. From years I sold logs to them when I was with Rayonier.

Q. Now, in your experience over all those years, have you observed log buyers from Northwest Hardwoods increase their original bid in the face of a competing bid from you or another supplier?

A. That's just about a standard operating practice. In other words, the people who own the wood market, it is just like anything else. You market it. If you don't do a good job

marketing it, you give away the wood. What they will do, they will have a log buyer come out and offer so much.

They call the next log buyer and come out, and they never tell you what the other guy says. They will say: What are you willing to pay for it? They will tell them. They go through this circuit and come back and say: You guys are a little short; maybe you could come up. Sometimes you come up. Other times you look at the quality and it wasn't there, and you say: Their profits are deeper than [Tr. 87] ours; they can have it.

Q. During these years of experience relative to Northwest Hardwoods, did you see their log buyers increase their original bid as a supplier went around this circuit of shopping their wood?

A. No, I have never seen Weyerhaeuser – Weyerhaeuser was always pretty firm. If they say basically $60 a ton as price, they say $60. You couldn't get any more than $60 out of them. They were set.

Q. When you were at Ross-Simmons, did you observe Northwest Hardwoods' log buyers increase their bids above the first bids they made?

A. No.

MR. HAGLUND: No further questions.

THE COURT: Any cross-examination?

MR. SIMON: Yes, please.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Good morning, Mr. Kayser.

A. Good morning.

Q. If I heard you correctly responding to Mr. Haglund, you said in terms of procuring logs for Ross-Simmons, in

the beginning it wasn't a problem for Ross-Simmons, correct?

A. Correct.

Q. And then about when would you say the problems really [Tr. 88] began? What time period? Year or month if you can possibly give us that.

A. The month was in June. I'm not sure – 2000. I think it was 2000, in June.

Q. And you are aware that Ross-Simmons closed its operations in May of 2001, correct, sir?

A. Yes, sir.

Q. What started happening in June 2000 that caused these problems? What were you observing?

A. Well, how I become aware of the problem was I got a phone call from the vice president of timber at Longview Fiber and told me he was shutting off our logs because of a lack of payment.

Q. What did you do about that?

A. I went to the office and checked to see that – I didn't doubt his word for one second. I went to the office and asked what was going on and they said: Yeah, we are a little behind.

Q. Now, Longview Fiber had a history of supplying – of having a supply relationship with Ross-Simmons, am I right?

A. Right.

Q. Would you tell us about that history. Before the problems arose in June of 2000, what was the good history between Longview Fiber and Ross-Simmons?

A. Well, Longview Fiber bought the chips from [Tr. 89] Ross-Simmons, and it was pretty handy because they were only a couple, 3 miles away. They could get chips if they

needed them instantly. Of course, Longview Fiber wanted to see Ross-Simmons stay in business because of the competition.

Q. I take that there were no problems that you were aware of with the Longview Fiber supply relationship with Ross-Simmons until June, 2000?

A. That's when I became aware of it.

Q. Now, with respect to the log purchasing that you observed, and before that in your role as a logger, are you aware generally what happened to log prices, alder log prices between 1990 and 2000?

A. Oh, yeah.

Q. What happened to them?

A. Well, they continued to go up because of the law of supply and demand. Alder is not a crop you jump into. It is a subspecies, and there is a limited supply of it.

Q. You mentioned, in responding to questions from Mr. Haglund when he asked who were some of the other major competitive buyers out there for alder logs, you mentioned Northwest Hardwoods and Cascade. I wrote down Cascade always paid more than anybody else. Would you expand on that. What did you mean by that? What did you observe?

A. Well, being in the log buying business, we never were able to figure out Cascade because there was no rhyme nor [Tr. 90] reason as to what they would pay. One day they would offer a small amount; the next day there was no limit to what they would offer. Their log buying practices is helter-skelter.

Q. What type of effect did that have on Ross-Simmons as far as you could observe?

A. Well, if they wanted a particular parcel of timber and the logs come off it, it didn't look to us like money was no object. They just went after it and they were going to get it.

Q. That put pressure on Ross-Simmons' prices –

A. It forced the price up for everybody. It forced the price up.

Q. That would include Northwest Hardwoods, too?

A. Northwest Hardwoods had to pay more if they wanted it, too.

Q. There has been some talk in this trial about the issue of staining with respect to alder logs. Would you tell us what you know in terms of log buying and how long logs can basically be stored and what one can do to try to lengthen the time that one can store a log?

THE COURT: Is this part of the direct? Let's get on with this case.

BY MR. SIMON:

Q. With respect to, Mr. Kayser –

THE COURT: I will make my own objection on that.

[Tr. 91] MR. SIMON: I understood that to be such, Your Honor.

BY MR. SIMON:

Q. You have told us about Ross-Simmons competing for logs against Cascade. How is the relationship between Ross-Simmons competing for logs against Northwest Hardwoods/Weyerhaeuser?

A. Northwest Hardwoods wasn't as hard to compete with as Cascade because they had their own supply. Then they just bought outside logs to fill in for the volume needed. They were never as aggressive as Cascade.

Q. Now, before the problem started, before the June, 2000, problems, who were the major suppliers of logs that you bought from or that Ross-Simmons bought from besides Longview Fiber. You told us about them. Who were the others?

A. We bought from Campbell group. We bought from Champion International. We bought from several large private landowners. Basically those were how we sustained our volume coming into the mill.

Q. Based upon your observations, did you ever see anything being done by Northwest Hardwoods or its log buyers that you considered anticompetitive or out of line in any way?

A. No, nothing out of line. The only thing I can say is when I sold logs for Rayonier, I sold to both Ross-Simmons [Tr. 92] and to Northwest Hardwoods. I, at times, did have the Northwest Hardwoods buyer tell me that he would just as soon I sold my logs to Ross-Simmons because they had ample supply of wood. But they always thanked you for the opportunity to bid on it and what have you. But he would say: Well, we just as soon see you sell it to Ross-Simmons.

MR. SIMON: Thank you, sir. I appreciate your time.

THE COURT: Further questions?

MR. HAGLUND: Yes.

REDIRECT-EXAMINATION

BY MR. HAGLUND:

Q. When you were with ITT Rayonier, isn't it true it was common for log buyers in the alder industry to bid back and forth for a particular supplier's wood?

A. Specifically ITT's or overall?

Q. Overall.

A. I really didn't get too concerned about overall. All I was concerned about was marketing the wood for ITT.

Q. Do you remember being deposed by Mr. –

MR. SIMON: Ms. Markley.

BY MR. HAGLUND:

Q. Ms. Markley back in last September?

A. Yeah.

Q. And I want to read a question and answer. Page 29,

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**[Vol. 4-A (Apr. 11, 2003)]**
**[Testimony of Wayne Demarest]**

* * *

[Tr. 95] did you source logs for?

A. Longview.

Q. Did you supervise any of the log procurement for the Joint Venture in Toledo?

A. No, I did not.

Q. Were you aware of what was going on in connection with the sourcing of logs for the Toledo mill?

A. Yes, I was.

Q. If you could, Mr. Demarest, could you generally describe the typical process that a logger or landowner goes through when they have alder logs to sell?

A. Normally they would contact one or more of the hardwood sawmills, if they have strictly alder to sell, the alder. If it was mixed in, you get prices and sell to the highest bidder.

Q. Is it a fairly common practice for them to shop the wood around the circuit more than once?

A. Oh, yeah. Yeah. Depending on their location, I suppose.

Q. Very common practice?

A. Yes.

Q. Now, while you were at Ross-Simmons, who was your primary competition?

A. Northwest Hardwoods in Longview.

Q. Did you compete with any of the Northwest Hardwoods [Tr. 96] mills outside of the Longview mill?

A. Centralia and Garibaldi.

Q. Based upon your experience and observations, was it your perception that log buyers from the Northwest Hardwoods mills at Longview, Garibaldi and Centralia were willing to increase their original bids in the face of a competing bid from you?

A. That was my perception.

Q. You observed that in the marketplace?

A. Yeah.

Q. Now, what did you observe about the conditions or what happened in the log market in the Toledo area that you observed during the '96/'97 time frame?

A. Without knowing the log prices prior to that, I would say they were $100 to $150 higher than the Longview area.

Q. Did you have discussions with Mr. Nelson about this problem?

A. Excuse me?

Q. Did you have discussions with Bill Nelson about this problem?

A. Nothing to any length. I was aware of it because we shared an office.

Q. You and Bill Nelson were actually in the same room?

A. Same room.

Q. Two different desks?

* * *

[Tr. 99] MR. SIMON: We will have this up on the screen very briefly, Your Honor.

THE COURT: Yes.

BY MR. SIMON:

Q. This is a letter that you sent to log suppliers dated June 17, 1998?

A. Yes.

Q. You sent it when you were working for the Ross-Simmons Hardwood Lumber Company?

A. Yes.

Q. The first sentence reads: As a result of adverse market conditions, Ross-Simmons hardwood is forced to begin curtailing log deliveries at the Longview mill.

What were the adverse market conditions, sir, that you were referring to in this letter?

A. I don't recall.

Q. Is it correct, sir, that at this time Ross-Simmons was having difficulty selling all of the lumber that it was making as a result of the Asian economic crisis that beganthe year before?

A. That's possible.

MR. SIMON: Thank you. Nothing further.

THE COURT: Any further questions?

MR. HAGLUND: No, Your Honor.

THE COURT: You may step down. Thank you. Call

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**[Vol. 4-B (Apr. 11, 2003)] [Testimony of Sonny Powell]**

* * *

[Tr. 5] A. That's surface to finish lumber.

Q. And who was the person who handled the pallet sales primarily?

A. John Hand.

Q. Now, during the time that you were sales manager for Ross-Simmons, did the company have a proprietary grading system?

A. Yes, we did.

Q. And were those in an effort to basically copy the system Northwest Hardwoods had in place?

A. Yeah, basically. It was a product that they started developing, then we developed our own, and was to get a better product to the end user.

Q. And you had quite a number of grades that were very similar to Northwest Hardwoods' but with slightly different names?

A. Yes.

Q. And you also had some of your own grades that were slight variations of theirs?

A. Yes.

Q. Now, during the 1990s, through the time that the mill closed, how would you compare the quality of Ross-Simmons lumber to that of other competitors in the marketplace?

A. We were always competitive.

Q. Pardon me?

* * *

**[Vol. 4-B (Apr. 11, 2003)] [Testimony of Steve Fitzgerald]**

* * *

[Tr. 21] assuming, yes.

Q. Okay. Do you have any recollection of what you were referring to in that sentence, sir?

A. At this time, I really don't. That's why I take notes, I need them.

MR. SIMON: I have nothing further.

THE COURT: Any further questions?

MR. HAGLUND: Just one question.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. There were curtailments during your time at STEDCO?

A. Oh, yes.

Q. Due to lack of logs?

A. Due to lack of logs.

MR. HAGLUND: That's all.

THE COURT: You may step down. Thank you.

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**[Vol. 4-B (Apr. 11, 2003)] [Testimony of William Blaney]**

* * *

[Tr. 38] deciduous, the leading alder; the conifer they would keep for themselves.

And the others would be other small business programs, other small private landowners that we would purchase alder from as well. The International Forest Products, they potentially had a lot of alder associated with some of their licenses up at the north end of Vancouver Island. And we didn't actually have an agreement with them. We purchased a small volume from that, but at the time when Coast Mountain was sold, we hadn't really culminated that agreement in full.

And Western Forest Products, was the same situation. They were located up at Fort McNeil, the north end of Vancouver Island, and they had some very nice alder stands over on the east coast of Vancouver Island, which we were also negotiating for, but, again, never really saw any of that wood come in, but it certainly was a potential purchasing source for the company at that time.

Q. Okay. Turning to the lower part, MacMillan Bloedel was purchased by Weyerhaeuser in '99?

A. Yeah. I believe that was the year that sale went through, yes.

Q. And down below, you show the potential coming from your licenses. Is there some flex in the utilization of your licenses?

[Tr. 39] A. Yeah. The utilization of the licenses in any one year, licenses on the coast – well, licenses in the province volume-based tenures have annual allowable cut that you can take in any one year. Then you have to balance plus or minus 10 percent in five years, and then in any one year of harvest, you can be plus or minus 50 percent.

So depending on when the cutting permits were issued and when the actual licenses started, we may have had to, you know, accelerate the harvest in some years in order to balance, you know, at the end of five years, plus or minus 10 percent.

Does that answer your question, Mike?

Q. Yes, it does. Now, relative to these licenses, all five are exhibits in this case, is each – if I am referring to 309 through 313, is each exhibit approximately a 20-page document that is a contract with the provincial government, each of your licenses?

A. Each of our licenses is a contract with the government, that's correct.

MR. HAGLUND: If he could be handed those.

BY MR. HAGLUND:

Q. I don't know that you'll need to look at them, but, Mr. Blaney, are these exclusive contracts to harvest that annual allowable cut within that 11-million acre area of leading deciduous stands or leading alder stands?

[Tr. 40] A. Well, the licenses as represented on that map, and I'm just briefly looking through this. These are the actual contracts we had with the government. Basically gave – these were the only alder licenses in the Vancouver forest region; so, therefore, we were the only company that had a right to harvest leading alder stands on Crown lands within the TSA.

Q. Are they, outside of the five licenses that you've been handed, 309 through 313, are there any other leading alder licenses in the province of British Columbia?

A. No, there are not, within the province of British Columbia.

Q. Right.

A. I'm sorry. Within the province, but certainly in the Vancouver forest region. In the interior of British Columbia, for instance, you know, there is licenses that include aspen and leading deciduous stands, but certainly on the coast for leading alder stands, we had the only licenses for leading alder stands in the Vancouver forest region on the coast of B.C.

Q. And in terms of where alder grows, there aren't any leading alder licenses anywhere else in the province other than these five?

A. No, there are not.

Q. Okay. Now, Mr. Blaney, when you take the combination [Tr. 41] of the MacMillan Bloedel alder within their tree farm licenses, and the five Coast Mountain licenses, what kind of a position does it put Weyerhaeuser in in the end of 2000 after purchasing your company in terms of the alder resource in British Columbia?

A. Well, I mean, it puts – certainly puts them in a good position. I mean, we have the only deciduous licenses. And Weyerhaeuser at that time through the M&B purchase had a lot of deciduous leading stands on their TFL in their private land, so it put them in certainly a good position within costal British Columbia; and, therefore, the province, because that's really where most of the alder was.

Q. When you say "TFL," what does that mean?

A. Tree farm license. That's an area-based tenure. MacMillan Bloedel, you know, has area-based tenures on the coast. A dominant one where a lot of the alder is is around the Powder River area and the Sunshine Coast.

Q. And as you described earlier, there are generally two types of licenses, tree farm licenses where a company is granted an area and then volume licenses that are elsewhere like the one that – the ones the Coast Mountain has?

A. That's correct.

Q. Now, would you consider the position of Weyerhaeuser with Mac-Blo, the MacMillan Bloedel acquisition and the Coast Mountain acquisition, to be in a dominant alder supply [Tr. 42] situation in the province?

A. That would be correct.

Q. And your – as part of – you mentioned early when I was restating your background and experience, included in that was mention of consulting assignments for Cascade Hardwoods and for Northwest Hardwoods. Based upon your knowledge, experience and consulting assignments, in your opinion, is it possible to develop another alder sawmill of the size of Coast Mountain in the Province of British Columbia, given the volume of alder supply that Weyerhaeuser controls?

A. The answer to that would be no. An alder mill of the size of Coast Mountain hardwoods, no.

Q. And what was the production of Coast Mountain Hardwoods in the last year when you worked there on an annual basis?

A. I can't remember exactly: 43, 44 million board feet a year.

Q. And that would be the same board feet measure used in Oregon and Washington in terms of lumber production, correct?

A. Yeah, sure. The reason I say that, Mike, is, you know, that would be good. There's scribner and there's board foot; but actual board foot production, that's correct.

Q. Now, Exhibit 308, it's in evidence. I'll just ask you a couple of quick questions about it. I'd like to display [Tr. 43] the first page of Exhibit 308, and what does this show? This is a summary page.

A. Well, if you just take a look at the very top of that exhibit, it shows that when the volumes were compiled and

they went into the inventory files for leading alder stands greater or equal to 50 percent by volume at greater or equal 200 cubic meters per hectares.

Utilization level of 17.5 centimeter top, excluding environmentally-sensitive areas. ESAs are environmentally-sensitive areas. Ownership which would be excluded, such as private TFL and everything else, low sites were excluded. So basically this is a representation of the leading alder land base greater than 50 percent by volume, greater than 200 cubic meters per hectare in those timber supply areas, and that's area.

Q. The table that I've blown up on the screen basically communicates what?

A. Well, it communicates that in the Kingcome, the Arrowsmith, the Strathcona and the Sunshine Coast, the good, medium and poor are classifications that the timber stands are growing on. And they have several different site attributes associated with them, and the overall total is the volume or the area – I'm sorry, in hectares, of those leading alder stands. So you see 18 million 514.5 – 18,514.5 hectares of leading alder stands.

[Tr. 44] Q. Okay. Then I just want to display Page 5 of Exhibit 308, and this shows what?

A. This basically shows the volumes associated on those sites as – they have the file volumes, which were the inventory file volumes that were used by the Ministry of Forests. The VDYP was another type of calculation on the same-land basis, so one showed 6 million cubic meters and the other showed 5.9 million cubic meters.

Q. And if you – so rounded, do those four licenses have a total alder inventory of 6 million cubic meters?

A. I don't quite understand your question.

What this identifies are the leading types within those timber supply areas. Our licenses had an annual allowable cut that we could harvest on within this area.

Q. Okay. But is the total volume –

A. The total available for harvest in these TSAs, with those exclusion factors on there was 6 million cubic meters; that theoretically we could apply cutting permits on and harvest, though our licenses would have to be extended for that.

Q. Okay. Do you have an estimate of what 6 million cubic meters translates into in terms of board feet?

A. We used to – for budgetary purposes, we would use 300,000 cubic meters a year to cut 42 to 44 million board feet a year, so we'd usually use a conversion – at our [Tr. 45] mill, we were getting about 230 FBM, foot board measure, for every cubic meter of log that we put through the mill excluding pulp log.

Q. So if you were to translate that, is this in excess of 700 million board feet?

A. It is, about 780 – well, 780 at a 200 FBM per cubic meter conversion factor, so it would be a little less than 230. I don't have a calculator with me.

Q. Okay. Now, these licenses have what terms?

A. These are – well, there was a variation on the term. The four licenses as shown on the past exhibit in the Sunshine Coast, the Strathcoma, the Arrowsmith and the Kingcome TSAs had a 15-year term. The one in the Fraser Valley actually had a 20-year term, but by the time we came down in 1992, I believe those licenses were issued in about '88 or something like that.

I can't remember the exact date, so that license had been running for a number of years, although very little volume had ever been harvested on it.

Q. Now, Mr. Blaney, is it true that these licenses have a language in the contract that says they are nonrenewable?

A. That is correct. The Province hasn't issued renewable licenses for a number of years.

Q. Now, do you have experience with these licenses throughout your last 30 years?

[Tr. 46] A. Yes, I do.

Q. Do you – in your experience, if Weyerhaeuser continues to operate the mill it acquired from your company, Coast Mountain Hardwoods, and stays in compliance with the terms and conditions of these five licenses, do you have an opinion about the probability that they will be able to get those licenses reissued for another 15 or 20-year term?

MR. JOHNSON: Objection, Your Honor, speculation.

THE COURT: The objection will be overruled if you know the answer or have an opinion, reasonable probability.

THE WITNESS: Reasonable probability, that they would be. The government, you know, could certainly – they would take a look at the land base that had been harvested, the land base that is not harvested and identified for a harvest, and the likelihood is they would readvertise those licenses for the simple fact that jobs are predicated upon harvesting that land base, so obviously if the continuation of harvest was not permitted on that land base, a lot of people would lose their job.

BY MR. HAGLUND:

Q. And does each license contain the requirement that the alder logs generated from annual harvest be processed in the sawmill that you used to work for there?

A. I think the actual wording is "in the Vancouver area."

Q. So there's a requirement that the logs go to a mill in [Tr. 47] the Vancouver area in order to comply with the license?

A. Yes.

Q. Now, lastly, regarding the licenses, referring to Page 2 of Exhibit 307, does this contain a valuation of those licenses in Canadian and U.S. dollars?

A. Yes. As I say, that valuation was not done by myself. It was done by a consultant that had been hired by the bank when we were trying to get some financing, so basically we provided him with the licenses, the annual allowable cuts, the remaining term, and the estimated conifer percentages, and he worked those numbers through.

So the base information used in his assumption was certainly provided by us based upon the licenses that we had with the Province, you know, at that time. The only exception to that would be the mid coast and the north coast where there are some minor alder volumes available that were not at that time, and I don't think they have been to date awarded to any licensee. There is just a potential there.

Q. Okay. Thank you. Now, I'd like to talk to some questions about your experience at Ross-Simmons. What was your – what was your task as part of the turn-around team that showed up in October of 2000?

A. Well, we had be hired, myself and Wayne Kidd and Craig Spencer, to come down and to try and help out Ross-Simmons Hardwoods, who was one of the first hardwood mills actually

* * *

[Tr. 51] They worked with us. They wanted to see an alder market established in British Columbia, but it really meant a lot of communication and a lot of just really sharing the fact that, guys, we're having some financial difficulties

here and we need you to work with us if alder is going to be established on the coast.

So there was a lot of – a lot of humble pie comes into that, but the people were – they could see that we were genuinely trying to improve the situation in British Columbia, both for them, because they had alder on their lands and it wasn't generating any value, so they wanted to see a market established, so they worked with us.

And as a result of that, and our ability to keep to our word and to pay them as we said we would, we became very well known and really did very well from that point on.

Q. Now, as you arrived on scene in Longview, did you – were there problems with slow pay to log suppliers at Ross-Simmons?

A. Well, sure. I mean, Ross-Simmons had experienced some very hard financial times. As a result of that, you always want to pay your people first. Log suppliers can tend to be set aside and you're hoping to pay them the next week and next week, so they were very much in that sort of a deficit situation with many log suppliers; had generated a bit of history with some of the larger suppliers that they hadn't [Tr. 52] paid and they owed them monies in excess of 60 day's payment, some a lot longer than that, you know, approaching a year.

So that's certainly a handful to go and talk to those folks and try to explain to them that we're going to really try and turn this thing around and get you your money, so our work was cut out for us there.

Q. If you had adequate time and enough financial resources, could you have turned Ross-Simmons around?

A. Well, we believed we could. The forecast that we did to the bank, which was really predicated upon the knowledge that we had gained at Coast Mountain, and really we face the

same situation with coniferous in the interior of British Columbia.

I've always worked for smaller companies who really didn't have a lot of access to existing Crown land, so my job was basically to find wood that wasn't in the wood box, so to speak, and to find a utilization – to try and utilize those species and create markets that weren't there before. So based upon that, yeah, we could have done that, I believe, if things had gone well for us.

Q. How much time did you think you needed?

A. Well, it can seldom be done. I mean, just convincing the major suppliers that you need so badly that, gee, we're new boys in town here and we can turn things around.

* * *

[Tr. 56] A. As a result of the acquisition?

Q. Following the acquisition.

A. I could not tell you whether that was true or not. I can't see how that would be so as a result of the acquisition.

MR. JOHNSON: May I approach, Your Honor?

THE COURT: You may.

BY MR. JOHNSON:

Q. You mentioned TSAs, the five forest licenses you were talking about. Now, during the time you were at Coast Mountain, you could not export any of those logs into the United States?

A. No, we could not. Well, I mean, the only way we could export logs is if we could advertise them first and there was no domestic need, and then under the export rules in British Columbia, then you could put them up for export.

Q. And that is the same for private lands, too?

A. Private lands are the same, yes.

Q. Now, since Northwest Hardwoods acquired Coast Mountain, that's no longer true.

MR. HAGLUND: Objection. What's no longer true, the rules in place?

BY MR. JOHNSON:

Q. I'm sorry. When you were at Coast Mountain, if a private landowner wanted to export logs to the United [Tr. 57] States, they had to go to something called the Timber Export Advisory Committee; is that correct?

A. Well, that's right.

Q. And what does that group do?

A. Well, that group, basically, if you wanted to export logs you would make an application for log export. And the application goes before them. It's advertised. If there is any interest on a domestic need, an offer would be made, you know, for a domestic offer. And then the Advisory Committee would take a look at those offers, feel if it was a fair domestic offer, they would turn down the export of those logs.

Q. Okay. Now, while you were at Coast Mountain Hardwoods, when private land would come up for bid through that TEAC, you would bid for it?

A. Yes, we would.

Q. And that would block it from going into the United States?

A. Well, if the Export Advisory Committee decided it was a fair domestic offer, that's correct.

Q. And that's what usually happened?

A. That's what usually happened, yes.

Q. Now, since Northwest Hardwoods acquired Coast Mountain Hardwoods, Northwest Hardwoods can't do the same thing; isn't that right?

[Tr. 58] A. Well, your own people from Weyerhaeuser can tell you that a little bit better. There was some discussion about that because of the type of licenses, you know, that they had – you mean they couldn't block logs? I don't actually know how that played out after I left Coast Mountain Hardwoods.

* * *

[Tr. 62] BY MR. JOHNSON:

Q. 38, Line 16 to 21.

"What was said about the management difficulties that Ross-Simmons had experienced?

"Answer: They seemed to be lacking people with a sound knowledge base of the hardwood industry running the company."

A. I think you've answered your own question there, because the question that you gave me was people, not management.

Q. Your first impression of the Ross-Simmons Longview mill was that it was a tired mill; isn't that correct?

A. That's correct.

Q. And when you started at Ross-Simmons you were told that the head rig was not set up properly; isn't that correct?

A. It was one of the evaluations that were done by Craig Spencer and Wayne Kidd.

Q. And you were told that John Simmons was the person who had set up the head rig controls?

A. I believe that's correct.

Q. When you came to Ross-Simmons they had a reputation for not paying their bills?

A. That's correct.

Q. And Ross-Simmons had not paid its bills in quite a while; isn't that right?

[Tr. 63] A. That's correct.

Q. So many suppliers were not coming to Ross-Simmons; isn't that correct?

A. That's correct.

Q. And even if they bought a good log, they didn't have the breakdown equipment to recover maximum amount of lumber; isn't that correct?

A. That's correct.

Q. One of the factors in Ross-Simmons going out of business was the rise in natural gas prices; isn't that correct?

A. Yes.

Q. One of the reasons Ross-Simmons went out of business was the poor management before you got there; isn't that correct?

A. Well, that was over a number of years. I mean, that was certainly one of the factors.

Q. One of the factors in Ross-Simmons going out of business was the lack of investment; isn't that correct?

A. The lack of investment, meaning what?

Q. Capital investment in the mill?

A. Reinvestment. They obviously had spent capital investment in the mill; otherwise, it wouldn't have been running.

Q. When you started there in 2000, Global Ventures and you [Tr. 64] and Mr. Kidd made a business plan for 2001?

A. Correct.

Q. And you predicted that there would be a profit at the mill?

A. Correct.

Q. And actually when the mill closed its doors, your log costs were under plan?

A. That's correct.

Q. Mr. Blaney, you think competition sets the price for logs in Washington and Oregon?

A. Yes, I do.

MR. JOHNSON: I have no further questions.

THE COURT: Any further questions, Mr. Haglund?

MR. HAGLUND: Just a couple.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Is it an advantage to Coast Mountain when you were there relative to your 135,000 cubic meter licenses to get 40, 50-percent conifer in what you harvest?

A. Oh, most definitely. That gave us a cash flow in which we could go out and buy deciduous. And that was one of the requirements on the license, was we had to basically buy, you know, prove that we purchased alder with the revenues from the conifer.

Q. So in your experience under those licenses, were you

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**[Vol. 4-B (Apr. 11, 2003)] [Testimony of Wayne Kidd]**

* * *

[Tr. 70] Q. When you arrived at – or did your investigation into taking on the assignment to turn around Ross-Simmons, what was your impression of the crew, the people there?

A. The people were very good. I was really impressed with the people at Ross-Simmons. These are the type of people you move mountains with. When I first went in there and met with them with my management team, they were genuine. You just had that feeling. The atmosphere was good.

They were a little down, the morale was a little [Tr. 71] low, but these were good people. And a lot of the people had been there for quite a few years. An example of this is there was a family that used to come in every year to celebrate their son's birthday, and they would come with a cake, the sandwiches, the juice, everything.

And I witnessed that in my time when I was there and this guy's parents were in their late '70s and early '80s. It was a family affair. They were great people. I can't say any more about them than that, they were just great.

* * *

[Tr. 76] A. Not my very first visit. It was the second visit that I was there, I got a call from Dave Bosley.

Q. What did he say?

A. He wanted to know what I was doing in Washington at the Ross-Simmons mill. And I did not answer the question too truthfully. I didn't want anybody to know where I was. I was there looking at it and so I waited, getting into any discussion exactly where I was. So I didn't say I was there and I didn't say I wasn't there.

Q. Did he – had you told anybody you were considering a consulting engagement for Ross-Simmons?

A. No, no, because at that time I wasn't even – I just nicely had finished the dealing at Coast Mountain Hardwood, and we wanted to see the mill and talk to people.

Q. So you had no idea how Mr. Bosley of Weyerhaeuser learned you were at Ross-Simmons that day?

A. Well, I had no idea for sure, but Ross-Simmons mill is right on the road to their Arlington mill, and being from British Columbia, was the place. Maybe that's where it was picked up, I don't know.

Q. Now, when you showed up to take on this turn-around project at Ross-Simmons, how would you compare the situation that you faced in Ross-Simmons in the fall of 2000 to what you faced at Coast Mountain in 1992?

A. Ross-Simmons was a jewel. I would wish that Coast [Tr. 77] Mountain would have been in that same position or condition when I first went to Coast Mountain. Coast Mountain was in very poor shape. We were under CCAA. I don't know the terminology here, but that's receivership. We didn't have any equipment that was capable of doing the hardwood. Our people were good people, but not trained in the sawing of the hardwood, so Ross-Simmons was light years then ahead of us.

Q. And at the time you showed up, was there some – was there a capital improvement project nearing completion?

A. Showed up at?

Q. Pardon me?

A. Showed up where?

Q. Was there a capital program going on that was about to be completed when you arrived in the fall of 2000?

A. As Ross-Simmons?

Q. Yes.

A. Yes. There was lumber started being put in when I arrived there.

Q. Were you able to make immediate improvements in operations?

A. Yes. With Craig Spencer, who is the manager there, yes, we were.

Q. How many days a month or every couple weeks did you spend in your role as head of this turn-around team?

* * *

[Tr. 82] boards. And a grader that's doing 85 to 90 board feet a shift doesn't have a chance to take a look at it so many times. So it kind of camouflages it so it blends in, and that's the reason you're able to hold the grade up.

A finish board is shiny like the board that is in front of you, and most of you people have painted, and when you paint, you'll get a hair that will come out of that brush and it will stick on that paint. And you'll see it forever and a day until you get rid of it, it will bother you.

But if it's on an abrasive planer, abrasive surface like this, it's there. You'll see it, but it won't bother you to the same extent, because it doesn't highlight itself so much. Am I making sense?

BY MR. HAGLUND:

Q. The jury doesn't get to back and forth.

A. Sorry.

Q. Let me turn to just a couple more questions.

During the – in '97 and again in '99, 1997 to 1999, did Weyerhaeuser make offers to buy Coast Mountain Hardwoods?

A. Yes.

Q. Do you remember how much they offered to pay?

A. If my memory serves me right, the first offer was in '97, I think it was for $15 million, and this is U.S. [Tr. 83] dollars. Later, in '99, it was 15 to 17 million, and I'm not sure of the exact number.

Q. And did Rob Taylor ever make a statement about the maximum Weyerhaeuser would ever pay for Coast Mountain?

A. Yeah. On numerous occasions Rob Taylor said to me they will not ever pay one cent over $15 million U.S. for this operation.

Q. In the spring of 2000, were there discussions with representatives of Ross-Simmons to purchase Coast Mountain Hardwoods?

A. Well, the discussion started with Global Ventures and then later Ross-Simmons were in the picture, yes.

Q. So going back to the spring of 2000, you're president and CEO of Coast Mountain Hardwoods. Do you remember what amount of – what the amount was of the proposal that Ross-Simmons made in conjunction – or made in the spring of 2000?

A. It is in the neighborhood of $26 million U.S.

Q. Was there any interest shown in pursuing further discussions with Ross-Simmons at that time by Coast Mountain?

A. Well, I got a call from Gordy Boyd asking if we were interested in selling the operation, and I said, "Yes." He come up and seen me the next day. We sat around, we talked and we threw figures around. And I explained to him at that [Tr. 84] time that I'd have to get ahold of the people from Advent and my boss to be here to finish the negotiations.

And that was Dennis Costello of Advent and Tony Haight, who was my immediate boss. And they come up and met with Gordy Boyd and his associates and Mr. and Mrs. Simmons, and John Simmons, the son.

And it looked like it was going to take some six months to put the funding together, and Advent was not prepared to wait six months, because Weyerhaeuser was interested in the operation, and they were not prepared to wait six months. They wanted to move on.

Q. Mr. Kidd, what did Weyerhaeuser buy Coast Mountain Hardwood for?

A. In the neighborhood of $26 million U.S.

Q. Do you have an opinion, Mr. Kidd, about the capacity and reputation of Rob Taylor for truth and veracity?

A. I don't know if I understand the question.

Q. Do you have an opinion about the truthfulness of Rob Taylor?

A. Well, during our dealings, there was definitely things that were said and he agreed to –

MR. SIMON: Objection, Your Honor. I think that the question should be answered either yes or no and then his opinion should be stated.

THE COURT: You're correct.

* * *

[Tr. 86] BY MR. HAGLUND:

Q. What - do you consider, based upon your experiences, Robert Taylor to be a truthful person?

A. No, he was not a truthful person at the dealings that we had.

* * *

[Tr. 87] BY MR. SIMON:

Q. Mr. Kidd, Michael Simon, attorney for Northwest Hardwoods and Weyerhaeuser.

When you went down to look at the Ross-Simmons mill before becoming involved with it, you looked at the mill and you concluded that they had not spent a lot of money in upgrading and keeping up with that operation, correct?

A. Well, when I first looked at it, I didn't know how much money they had spent on the upgrading. I would have to say my views of the operation was it was a tired operation, but I did not know how much money they'd spent on doing anything.

Q. You saw that the roll cases were jerky?

A. Yeah. I would say that the roll cases were not running smoothly, there was chunks on the belts. By saying that, I'm saying it's a tired operation, yes.

Q. You saw that the rolling stock was in very poor shape?

A. No, the rolling stock was in real good shape. They had just leased a whole bunch of equipment: Some fork lifts, a button top, and a front-end loader. No, the rolling stock was very good. I don't know where you got that information.

Q. From your deposition, sir. And we don't need to put this on the screen. I'll try to save time and just tell you [Tr. 88] that on Page 33, Line 23 – excuse me, Line 18, through 34, Line 5, you were asked this question and you gave this answer during your deposition, sir, didn't you?

"Question: Now, in your initial discussions with Ross-Simmons or Global Ventures, did anybody discuss with you, anyone, what the capital investments had been or made over the last few years?

"Answer: Yeah. We discussed that and there hadn't been much. They were in the process of putting in a tray sorter when I first looked at Ross-Simmons, and they had gone out and leased five fork lifts, button top and front-end loader. Rolling stock was in very poor shape, too."

A. That's rolling stock. The fork lifts and front-end loader, that's rolling stock.

Q. Did you give that answer to that question, sir?

A. To what question?

Q. The question that I just read.

A. You asked me about the rolling stock, and I said, "Yeah, they leased rolling stock, forklifts button tops, front-end loaders."

Q. I'm move on.

When you were at the company, the Ross-Simmons Company, you know that they put in a new tray sorter?

A. Yes.

[Tr. 89] Q. You knew that they were over budget on the tray sorter? A. Excuse me, did you say when I went there, I knew that?

Q. No, no, no, no, no. While you were there, you learned that they were over budget on the tray sorter?

A. Yeah, that's correct.

Q. To the amount of about $300,000?

A. I would say that would be in the ballpark, yes.

Q. And you knew that they financed that, that additional amount they went over, out of operating expenses, correct?

A. The extra – I don't know if I understood your question.

Q. Sure. Did the company finance this extra $300,000 by taking the money out of operating expenses, as opposed to getting another loan or something like that?

A. Part of it was on an additional loan that we got, the $750. The rest was taken out of operations, yes.

Q. All right. Now, they put in the tray sorter before you got there, right?

A. That's correct.

Q. However, you would have done other things. You would have made other improvements and given them higher priority than putting in a tray sorter; am I correct, sir?

A. Yeah. I would have, yes.

Q. As a matter of fact, when you got there, you saw that their canter was atrocious?

[Tr. 90] A. That's correct.

Q. You saw that their piling techniques on their green chain were in poor condition?

A. Their who?

Q. Their piling techniques?

A. Explain what you mean, "piling techniques."

Q. In the interest of time, I'll withdraw it and move on.

You also knew that the Ross-Simmons mill in Longview could not handle a small log properly. Am I right, sir?

A. That's – did not handle it efficiently, that's right.

Q. You knew that the canter would overfeed?

A. Yes.

Q. And that there was no control on the feed and it would throw the log through the canter?

A. Yes.

Q. And that with respect to the Cambio barker, you saw that the barker tore up the wood very badly. Am I correct?

A. Two Cambio barkers.

Q. And they tore up the wood badly?

A. Correct.

Q. And that gives you poor recovery. Am I right?

A. Yes.

Q. And it damaged the wood?

A. Oh, yeah.

[Tr. 91] Q. Now, before, as a priority, instead of putting in a tray sorter, you certainly would have optimized the board edger. Am I correct?

A. No. I would have gone with a small log thing before I had optimized the board edger.

Q. Okay. Fair enough. And certainly before putting in a tray sorter you would have optimized the board edger, right?

A. Are you asking me what I would do?

Q. Yes.

A. Yes.

Q. Now when we took a look at the saws, you saw that the saws reflected very poor maintenance. Am I right?

A. No, they didn't reflect poor maintenance. The maintenance in the saws were okay. The saws themselves were no good.

Q. I stand corrected.

Now, you knew that sales were dropping off. You were experiencing that, correct?

A. You said I knew it was or –

Q. I'm sorry. When you were at Ross-Simmons, sales were low. Am I correct?

A. When we first arrived there, the sales were pretty good, but they started to dwindle, yes.

Q. Do you recall one instance where a customer purchased a million dollars worth of timber on a 60-day term?

[Tr. 92] A. Yes.

Q. And you were then able to use that purchase order to draw down $800,000 from your bank line of credit. Am I correct?

A. That's correct.

Q. And then that customer basically cancelled the order and said they couldn't take the million dollars worth of lumber?

A. I don't know if the customer cancelled the order for sure. All I know is the customer did not pay for the lumber.

Q. And the customer did not take the lumber?

A. That's right.

Q. And because the customer didn't take the lumber, it stayed in inventory?

A. We put it back into our inventory, yes.

Q. And then you had to advise the bank that you were $800,000 overdrawn in your inventory?

A. Right.

Q. And the bank didn't like that?

A. I don't think so, no.

Q. With respect to John Simmons, you got to know him when you were down at Ross-Simmons, correct?

A. I met Mr. Simmons, yes.

Q. And you concluded that – well, what was your [Tr. 93] impression of Mr. Simmons' knowledge with respect to the operations of a sawmill?

A. Well, you know, like you said, "I knew Mr. Simmons," and would you explain what you mean by, "I knew Mr. Simmons'?

Q. Okay. When you got to know Mr. Simmons and his background, did you come to any conclusions about whether or not he knew much about the operations of a sawmill?

A. I don't think Mr. Simmons had spent a lot of time in a sawmill. I don't think he had an overabundance of knowledge. That would be my opinion, yes.

Q. Your view of the equipment that you found in the Ross-Simmons mill in Longview, would it appear to be dated 10 to 15 years before 2000, correct?

A. Yeah, that's correct.

Q. Who was Jim Wood?

A. Jim Wood is a partner in Global Ventures.

Q. And was he acting on behalf of Ross-Simmons when you were down there, working with you on Ross-Simmons?

A. He would come down and look at the financials, yeah. He was doing some work, yeah.

Q. He was part of the Ross-Simmons team from Global Ventures, correct?

A. No, not when we got there. When we got there, the team to turn around Ross-Simmons was basically Bill Blaney, Craig [Tr. 94] Spencer and myself, and we reported to Gordy Boyd and Jim Wood.

Q. Now, Mr. Wood explained to you some concerns that he had about the financial aspects of Ross-Simmons, correct?

A. I don't know.

Q. Fair enough. I'll withdraw that and ask this. Did Mr. Jim Wood tell you that some of the biggest problems Ross-Simmons was facing financially was they paid themselves big dividends?

A. Mr. Wood mentioned to me that he thought that Ross-Simmons had made a poor investment, and that they had paid themselves some dividends. But he figured the worst thing that Ross-Simmons had done was they made a poor investment in the Siletz sawmill.

Q. The mill in Toledo, Oregon?

A. I don't know where the mill is. I can't tell you where the mill is.

Q. The Joint Venture with the Siletz Tribe is what you are referring to?

A. Yes.

Q. Okay. Now, did you have discussions within the management team at Ross-Simmons about rising energy costs?

A. Yes.

Q. Did you conclude that that was one of the reasons why John Simmons should not be part of the management team?

**[Vol. 5-A (Apr. 14, 2003)] [Testimony of Delores Pigsley]**

* * *

[Tr. 8] met the Simmons family at a dinner, and it was just to meet and say hello and know who we were. But the actual relationship was between STEDCO and Ross-Simmons.

Q. And Mr. Rilatos would be most knowledgeable about that as executive director at the time?

A. He was the executive director at that time.

Q. Of STEDCO?

A. Yes.

Q. Now, why was the Joint Venture shut down in your opinion?

A. Well, in my opinion, it was shut down because we didn't have enough logs to run the mill. It was always a point of contention with the tribal council. We got reports from STEDCO, and it was an issue of when are we going to make money and please give us a forecast. We had regular reports from the executive director of STEDCO about the mill.

Q. Now, were either Terry Lane or Jeff Valentine members of the Siletz Tribe?

A. No.

Q. Now, after the Joint Venture was closed, the tribe has kept the property on which the mill was sited. Is that right?

A. Yes.

Q. And does the Siletz Tribe have any immediate plans to reopen the facility as a sawmill?

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**[Vol. 5-A (Apr. 14, 2003)] [Testimony of Leo Sheehan]**

* * *

[Tr. 28] Q. And you are referring to the accounting personnel at Ross-Simmons?

A. At Ross-Simmons, yes.

Q. Now, what, sir, did you observe about the profitability of Ross-Simmons during this period of '63 through '97?

A. Well, they – when Mr. Ross and Mr. Simmons bought the mill, Mr. Ross was an experienced softwood, fir and pine. He used to own Medford Lumber Company. And Mr. Simmons had a distribution yard in LA.

So when they first bought L.R. Smith, L.R. Smith was taking the alder and was cutting it in small pieces and a lot of the sales were to the companies who remanufactured the do-it-yourself, like table legs and other things, like picture frames and things like that.

I think Mr. Jack Rose became the first general manager. We had talked and thought we should cut lumber; that the best realization would be the lumber. At that time hardwood chips were a valuable commodity for any paper plant because it gave you a sheen and you had in Longview – you had in Longview two large paper companies, the Longview Fiber Company, which was started in '23, and the largest single plant in the world at that time, and Weyerhaeuser.

And being so close, that mill being so close to those, only a little over to a mile to Longview Fiber, they had a ready market for their waste for the sawdust – I mean [Tr. 29] the bark and everything because they could use that for power that ran the plants. They didn't have a long haul. You couldn't buy hog fuel from somebody in Oregon. The freight would be so high. But you could buy chips because they used to kind of equalize.

If you lived close, you kind of still are buried in the price, but you were absorbing some freight. With the future of the chip market, and they liked the chips, they gradually kept building up and they modernized the mill. When L.R. Smith had it, I used to say it was held together by baling wire. It was a mess. And when I left in '96, they had a very modern sawmill. They had always improved it. They had tripled, quadrupled the production. It was a joy watching them grow.

Q. Specifically with respect to growth and profitability, what did you observe over that 30-plus years in terms of the profitability and net worth of Ross-Simmons?

A. Well, the net worth grew on that one exhibit where you give the history. The net worth grew. When we started in '63, the net worth was 88,000.

Q. Mr. Sheehan, let me interrupt you so the jury can follow along. Are you looking at page 4 of the stipulated facts?

A. Yes. If you look there, you can see how the company grew. If you look on the left, you can see that the volume [Tr. 30] of lumber – now, this starts in '67. It took a few years to get the mill up to par. I mean to grow and put in. Then you can see that they went along up through the '80s producing maybe 12 million feet a year and went down in the early '80s. And then it started to grow and eventually got up to 52 million feet of lumber in 12-31-95.

Q. And even higher than that in '96?

A. Yes.

Q. How about profitability?

A. Well, the profitability, it grew. It only had two loss years while I was there, and they had an excellent program with their employees. They had a bonus program with their employees. That motivated them. They not only rewarded the manager on a bonus, but the tallymen. One year, as I re-

call – it is in the exhibit which you gave me, an exhibit. I will get you the number –

THE COURT: I do think, Mr. Haglund, that all of these facts are in evidence.

MR. HAGLUND: Certainly.

THE COURT: Let's move on with the case.

MR. HAGLUND: Certainly.

BY MR. HAGLUND:

Q. So the profitability got stronger throughout this time frame?

A. Yes.

[Tr. 31] Q. Now, regardless of up or down markets?

A. Yes.

Q. Now, in 1983 do you recall that the Ross family negotiated to sell the company to Weyerhaeuser?

A. Well, it was – the Ross family and the Simmons family had an agreement to sell the company. By that time Mr. Ross had died and they – Weyerhaeuser – Northwest Hardwoods' subsidiary were to buy them. And I thought it was communicated –

MR. SIMON: Objection, Your Honor.

THE COURT: The objection will be sustained.

BY MR. HAGLUND:

Q. Do you recall what happened to stop the deal with Northwest Hardwoods?

MR. SIMON: Objection, Your Honor.

THE COURT: Objection will be sustained.

BY MR. HAGLUND:

Q. Mr. Sheehan, did John Simmons care about the sawmill?

A. Oh, yes.

Q. Was he proud of the jobs and the company's position as one of the largest employers in Longview?

A. Yes, they were. The whole family was.

Q. What was your sense of the crew? What type of crew did they have?

A. They had an excellent crew because they paid such nice

* * *

[Tr. 39] upon their historic growth rating?

A. Yes, I did.

Q. And is that growth rate approximately 8.9 percent?

A. Yes, it is.

Q. And is Exhibit 127 a listing of what the profit would have been in '96 through 2001 if you just trended the three year average of '93 through '95 forward using that percentage growth rate?

A. Yes.

MR. HAGLUND: Your Honor, I move the entry of 127.

MR. SIMON: We do object to it, Your Honor.

THE COURT: Objection will be overruled. 127 will be received.

(Exhibit 127 was received.)

BY MR. HAGLUND:

Q. Displaying and blowing up 127 on the screen, Mr. Sheehan, does this display the profitability of Ross-Simmons based upon the assumption that it could have, in the absence

of predatory behavior by Weyerhaeuser, continued its profitability on a going forward basis from '96 through 2001?

A. Yes.

MR. SIMON: Objection to the question. It is both leading and assumes facts not in evidence. And inadequate foundation.

* * *

[Tr. 51] Q. Yes.

A. This was to Ms. Mosebar (phonetic) at the U.S. Bank asked that I, and the directors asked, that I present to the bank under the loan agreement if they were going to take $600,000 out, they wanted to have the bank know it and approve it. So this was the introduction to Kay Mosebar who worked with Ms. Oliver.

Q. My specific question to you now, sir: It is correct in 1994 there was a dividend payment made to Victor and Violet Simmons in the approximate amount of $600,000?

A. Yes.

Q. Why was that payment made, sir?

A. Because, from what I learned, in my going down to the LA area and meeting, Simmons Hardwood – the Simmons estate left life income to his brother and sister. What Sid did, Sid thought he was much wealthier than he really was, and he gave money to everybody. He gave a thousand a month to these, but they never paid them.

So they hired an attorney. The attorney came in. The way that we could give them for their past thousands that they didn't receive a month was to pay a dividend from Ross-Simmons. Then the trust purchased an annuity and took care of the obligation and settled that.

Q. And that $600,000 dividend for Victor and Violet Simmons came from the Ross-Simmons Lumber Company?

* * *

[Tr. 59] will ask you: How did he go about coming up with that number?

A. I'm not a mathematician. I would have had to go to an actuary because I believe the 8.98 is a weighted average moving it forward. Mr. Rasmussen – I was told that was the figure, 8.98. But it seems reasonable because a closely held company has to make something. It isn't an exorbitant average.

Q. Now, you know from Mr. Haglund's instructions to you in terms of this calculation, you were instructed to assume that the only reason why the company did not make those profits from '96 to 2001 was based upon the alleged activities of my client, correct?

A. That is right.

Q. Did you perform any independent analysis to see whether there were other factors that could have been contributing to lower profits and even losses for Ross-Simmons in years '98, '99, 2000, 2001?

A. I was asked to do a before – what would take place based upon on the past history, what should have taken place if they used the prior earnings average.

Q. You believe you did a before and after approach in that respect?

A. Yes.

Q. In doing your before and after approach, what [Tr. 60] adjustment, if any, did you make for the existence of the Asian economic crisis that took place in late 1997?

A. I did not make any.

Q. In doing your before and after approach, what adjustment, if any, did you make for the difficulties that Ross-

Simmons experienced in selling its lumber as it was projected?

A. I did not.

Q. In doing your approach, what adjustments, if any, did you make for the fact that Ross-Simmons realized lower lumber prices –

THE COURT: I think, Mr. Simon, it is clear that he made just a mathematical calculation. So let's go on. You can argue these points that you are making. Move ahead.

MR. SIMON: I need to establish a few more things for the record.

THE COURT: You can put them on at the recess. Go to the next question.

MR. SIMON: I'm too limited in my cross-examination. I have nothing further.

THE COURT: You are wearing my patience, Mr. Simon. We will talk about this at the recess. The witness testified very clearly how he made the calculation and that he didn't do anything else. Yet you continue to ask all these questions. Any further questions of this

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**[Vol. 5-A (Apr. 14, 2003)] [Testimony of John Simmons]**

* * *

[Tr. 70] and highly contributory member of the Ross-Simmons staff for over 14 years. He had been mill manager during our most profitable years. So we engineered what I considered to be a very generous three-plus-year separation package.

Now in regard to the local community, I didn't feel it was at all appropriate to refer to his termination as anything other than a retirement, particularly since he had recently suffered a heart attack.

On the other hand, conversations with Sherry Oliver, who for 20 years or so had been the U.S. Bank's account manager, showed that she was very concerned about the losses. So in that context, it was essential that we emphasize that the change was deliberate.

Q. Now, Mr. Simmons, if you had known in May of 1998 what you now know about Weyerhaeuser's activities in the log and lumber markets, would you have ever terminated Bill Nelson?

A. Absolutely not.

Q. Now, it has been stipulated in this case, fact No. 18 in the jury notebook's, that Ross-Simmons borrowed $1.5 million in 1997 to pay off your father's estate and to buy out the interest of your sons.

In addition, the records also show, and I would ask that the witness be handed Exhibit 1105, that directors' fees totaling some $209,000 were paid to Simmons family members in 1997 for back directors' fees.

[Tr. 71] If you could look at Exhibit 1105, Mr. Simmons. Of the $209,000 in back directors' fees, how much of that sum did you receive personally?

A. $74,500.

Q. And you are referring to a resolution that was actually passed in January of 1997?

A. That's correct.

Q. In the four years before 1997, and I'm referring specifically to the years 1993 through 1996, did you receive any directors' fees?

A. No, I did not.

Q. In the three years following 1997, '98, '99 and 2000, did you receive any directors' fees?

A. I received $60,000 in 1998 and $60,000 in 1999.

Q. Now, at the end of 1999, this $1.5 million promissory note that you signed to the company when the bank loaned the money for the reasons in the stipulated facts, when that note was cancelled at the end of 1999, sir, did you have the funds to repay the company?

A. No, I did not. Almost everything I owned was invested in Ross-Simmons Hardwood.

Q. Was that note cancelled on the advice of your tax advisors?

A. Yes, it was.

MR. HAGLUND: No further questions.

* * *

[Tr. 78] directors' fees paid to you and your sons in 1997, am I correct?

A. There may have been. I would have to see the numbers to confirm that.

Q. When Mr. Haglund asked you about how much personally you received from the one and a half million dollars

promissory note, you told us the answer. Your sons, in fact, received more than $800,000?

MR. HAGLUND: Objection, Your Honor. This is a matter of stipulation, fact No. 18.

THE COURT: Sustained.

MR. SIMON: Your Honor, if the Court takes a look at Stipulation 18, it is not in there. It is directly relevant to the question Mr. Haglund put to this witness. It is not in 18.

THE COURT: On your representation it is not in there, I will permit you to ask the question.

BY MR. SIMON:

Q. Did your sons receive $800,000 from that $1.5 million promissory note?

A. They received at least that amount. I think that's correct.

MR. SIMON: Nothing further.

THE COURT: Anything further?

MR. HAGLUND: No, Your Honor.

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**[Vol. 5-A (Apr. 14, 2003)] [Testimony of Philip Smith]**

* * *

[Tr. 84] BY MR. HAGLUND:

Q. Dr. Smith, it is my understanding that you received a B.S. degree in electrical engineering from Kansas State University in 1970; that you obtained an MBA with honors from the United States University of Oregon Graduate School Business Administration in 1975; that you secured your Ph.D. in business administration with an emphasis in quantitive methods also from the U of O Graduate School Business [Tr. 85] Administration in 1981. Is that a correct statement of your educational background?

A. That's correct.

Q. Also it is my understanding that you were an assistant professor of finance at Syracuse University from 1979 to 1981 and that you served in the same capacity as an assistant professor of finance at Portland State University from 1981 to 1986. Since 1986, for six years, '86 to '92, you were a principal in the firm of Willamette Management Associates, Inc., specializing in business evaluation.

For the last ten years you have been a principal in Columbia Financial Advisors, Inc., also a firm specializing in business valuations. Is that all correct?

A. That's correct.

Q. It is further my understanding that you co-authored a chapter in – co-authored an article in The Journal of Business Valuation regarding valuation of stock options in closely held companies and that you are a contributing author to the Second Edition of the volume entitled Valuing of Business: The Analysis and Appraisal of Closely Held Companies by Shannon Pratt?

A. That's correct.

Q. You are a senior accredited appraiser in business evaluation with the American Society of Appraisers. You teach for the last nine years. You have been teaching one [Tr. 86] to three times a year three-day courses with an examination in either Chicago or Los Angeles that are put on – that are business valuation courses put on by the Business Valuation Committee of the American Society of Appraisers.

Is that correct?

A. That's correct.

Q. You have also performed a variety of other teaching assignments regarding various aspects of business and employee stock ownership owned enterprises?

A. That's correct.

Q. Now, were you retained to perform a going concern valuation of Ross-Simmons and the Joint Venture?

A. Yes, I was.

Q. I want to first ask you about your analysis for valuation of the value, going concern value of Ross-Simmons. But first, what is your understanding of the going concern value of a business in a hypothetical situation like we have in this case?

A. I think it is important to understand that what I did was a hypothetical appraisal. I'm bound by my standards to state that. As far as it being a going concern appraisal, what that basically means is that you are assuming that the company is in operation and is going to continue in operation.

Q. Were you asked to make assumptions about certain levels [Tr. 87] of assumed performance and profitability under scenarios developed by Mr. Rasmussen?

A. Yes, I was.

Q. And just so the record is clear, I would like to put on the screen what's previously been marked as Exhibit 126.

Did you utilize these three scenarios to develop your hypothetical performance of Ross-Simmons?

A. I utilized the three scenarios, yes.

Q. So let's take them one at a time. We will zoom up to get scenario A.

First off, before I turn to A, could you describe the methodology that you used to develop your going concern valuations.

A. That's a big question. Let's just focus for now on scenario A. All three of the scenarios were developed in similar manners, although there are some differences. Scenario A that is shown here is a scenario in which different – a reduction in log prices was developed by Mr. Rasmussen. The actual numbers that I used from this particular exhibit were only the reduction in log prices of $89 in 1998, $83 in 1999, and $84 in 2000.

We did our own calculation of the volume of logs that were utilized. We did not depend upon Mr. Rasmussen's volume numbers. We did our own calculation of the volume number.

[Tr. 88] Q. Did they match up with what's shown on Exhibit 126?

A. Yes, they did. And so really the only thing we utilized from this particular exhibit right here would be what column one, two, three, the dollars per thousand board feet. That's an indication of the reduction in log prices for those years for this particular scenario A. The same thing is true for scenario B and scenario C.

Q. Then what did you do?

A. We took those reduction in log prices and treated them as indicative of the reduction in cost of goods sold. In other words, how much the logs cost. We did that by taking the volume of logs that were utilized by the mill times the

reduction in the log cost. And then we reduced the expense called cost of goods sold. In other words, you have got revenue and you got this expense, cost of goods sold. We reduced that cost of goods sold by the amount equal to the volume used in a particular year times the reduction in the log price.

From that we were able to produce various income numbers. The income number that we particularly focused on was something called earnings before interest, taxes, depreciation and amortization. Now, that's a big word but really what it is, in an income statement you have revenues and then a bunch of expenses. Then you have pretax profit and then you have taxes and then you have after-tax profit.

[Tr. 89] Well, earnings before interest and taxes is just pretax earnings and then you do not include – it is pretax earnings plus the interest that is paid on the debt that the company owes.

So in a sense you are just stepping up that income statement. Instead of going all the way to the bottom to net income or pretax income, you step up one more step up by not subtracting the interest as an expense.

Now, the reason we do it that way is because what we are trying to do is value the entire company. Well, the entire company is financed by equity, the shareholders, and by any loans that they get from the bank.

So when you are trying to value the entire company, what you are trying to do is look at, well, what's the value of the returns to all of the stakeholders; namely the stockholders and the loans from the bank or the debt. That return is equal to the earnings before interest, taxes – interest and taxes.

Now, because this is a manufacturing concern that has equipment that is depreciated, another way – another level of income is this earnings before interest, taxes depreciation and amortization. The thing about depreciation and amortization

is that they aren't real costs. There are not real dollars going out the door for that expense.

So we refer to earnings before interest, taxes, [Tr. 90] depreciation and amortization as cash flow to the invested capital, or the invested capital is the debt and the equity.

Q. You used the terms earnings before interest, taxes, depreciation and amortization. Does that long phrase have an acronym that is commonly used by business valuation experts, accountants and others in this field?

A. Yes. Earnings before interest and taxes and depreciation and amortization is called EBITDA. When I talk about EBITDA, that's earnings before interest, taxes, depreciation and amortization.

Q. Now, what I would like to do is have you stick with scenario A and display what has been marked as Exhibit 129 and look at – could you describe what you have done here – first of all, did you prepare Exhibit 129, this page?

A. Yes, I did.

Q. And is this display your valuation under these various scenarios of the going concern value of Ross-Simmons as of May, 2001?

A. On a hypothetical basis.

Q. Could you explain – under scenario A, let's get to the bottom line and then I will ask you to explain it. What was the going concern value of Ross-Simmons as of May, 2001, in your opinion?

A. It is indicated there in the box, going concern value of the company, $11,587,281.

[Tr. 91] Q. Now, Dr. Smith, would you explain how it is that you reached that conclusion to the judge and jury.

A. Yes. Let's start up at the top, that first number, 30,315, the volume of logs used through the mill, actually used through the mill in the year 2000.

For purposes of comparison here, I put the original EBITDA number, the original earning before interest and taxes – I don't know about your screen but mine is rather blurry.

Q. There we go. I'm sorry. Go ahead.

A. Thank you. So the first line there is the volume of logs purchased by the mill. I misspoke. I said a moment ago volume of logs put through the mill. We don't know the volume of logs put through the mill. We only know what they purchased. Some might have been left in inventory.

In any case, that's the volume of the logs purchased, 30,315 board feet – 30 million board feet. The original EBITDA was a negative 106,294. They had a loss in 2000.

The original EBITDA margin, which is the earnings figure, EBITDA divided by revenue, was a minus .6 percent. The original log cost as a percentage of revenue was 84 percent. So those are actual numbers that occurred in the year 2000 for Ross-Simmons Hardwood.

Q. There has been some testimony about log costs being the [Tr. 92] single highest cost in a sawmill. This figure, 84 percent here, bears that out for Ross-Simmons. Is that right?

A. Yes.

Q. Go ahead.

A. So in scenario A, as we saw in the earlier exhibit for the year 2000, Mr. Rasmussen developed a log cost reduction of $84 a thousand. So the reduction in cost of goods sold, the reduction in this expense item, cost of goods sold, is simply the 84 times the log volume of 30,315,000 board feet.

So the new log cost as a percentage of revenue, after the reduction for the log cost, is approximately 69 percent, 68.9 percent. The revised EBITDA number, because this simply falls through, this is a pretax number. There is no need to deal with taxes. The revised EBITDA number is this reduction in cost of goods sold plus the original EBITDA above, of a minus 106,294, or a revised EBITDA of $2,440,188. That's after the log price reduction. That is the amount of earnings before interest, taxes, depreciation and amortization.

Q. Then what did you do?

A. Well, then just explained the next number there. The 14.4 percent is simply the EBITDA margin, the EBITDA divided by revenues. That's the percentage EBITDA.

The three-year indication you see there is, I took a three year average. After making these calculations for [Tr. 93] '99 and 1998, I took a three-year average of the revised EBITDA, and that's what the $2,574,951 is. That's the average of 2000, 1999, 1998, revised EBITDA. And since our starting point for the evaluation – now, we have a financial fundamental that we can look to the market, to the market out there, as to how companies similar to Ross-Simmons might sell given this level of EBITDA.

Q. Is it common in the business valuation arena as it relates to companies across the spectrum, including wood products companies, to evaluate their values in terms of a multiple of their EBITDA?

A. It is common to evaluate their value in terms of many different – as many different fundamentals as you can develop. In the case of Ross-Simmons and in the case of this hypothetical appraisal and given our experience in the wood products industries, we have done several valuations over the years in the wood products industry, because it is a manufacturing concern and because it has a lot of equipment that is depreciated, it is our experience and the empirical evidence

confirms this that analysts, buyers tend to look it to EBITDA because the earnings before interest, taxes, depreciation and amortization is not biased by the way people do their income taxes. It is not biased by the way they depreciate their machinery. It is above those decisions.

[Tr. 94] So it is a pretty good solid number for a manufacturing concern, not just in a wood products company, but any manufacturing concern.

Q. So proceed with the balance of how you derived or came to the conclusion, that is, the bottom line displayed on the screen here.

A. Well, the next number in that column there is 4.5. That is the multiple that we used or we took times the revised EBITDA. So if I take the 4.5 times the $2,579,951, I get the number $11,587,281. That's the product of those two numbers. That's all it is.

Now the 4.5 is a very important number. It is really the critical number in the valuation. Obviously if that was 1, a completely different result. If it was 7, a complete different result would be obtained.

So you have to analyze as well as you can the characteristics of Ross-Simmons relative to whatever evidence you can gather out in the marketplace. So we went into the marketplace. We looked at a set of companies we called guideline companies because they give us guidelines as to what the multiples might be, the appropriate multiples might be.

We went to the public marketplace first and identified eight companies that are either in the wood products business or are customers of the wood products [Tr. 95] business. We have a cabinetmaker – I think a couple of cabinetmakers in there in addition to what you consider traditional mills.

We also went to the merger and acquisition market and found really – we found three transactions, two of which gave us some satisfaction. The third one wasn't all that

good. It was a multiple that was low. But it was not a necessarily comparable transaction.

We also, as a part of our ongoing work, collect what we call generic merger and acquisition multiples. In other words, we look at merger and acquisitions all over the map. It doesn't matter what industry they are in. Many times we are unable to find good candidates, and we kind of have to fall back on this.

Then the fourth source were two different analyst reports from F.S. Van Kamper and Goldman Sachs. They are both investment bankers who participate in buying and selling businesses.

Those two sources were – one of them had – I would have to look here to be specific and exact. I'm looking at my report.

The F.S. Van Kamper had 15 transactions in the wood products industry, transactions that involved International Paper. For example, Smurfit Stone, Champion International, admittedly large companies.

[Tr. 96] The Goldman Sachs report had 13 – they had 14 transactions, of which 13 had information, also in the wood products industry. So we attempted to gather information about multiples of EBITDA that these transactions occurred at.

In other words, if the transaction occurred at, let's say, $8 million, and the EBITDA of that company, the earnings before interest, taxes, depreciation, amortization was $2 million, then the EBITDA multiple is four. So that's how those multiples are determined.

In our research, and we know this from our experience, we weren't surprised when we went to the Van Kamper or the Goldman Sach's analyst reports that the only multiple they recorded on was EBITDA. They didn't report on a multiple of revenues or earnings or anything else. They reported

on a multiple of EBITDA because that's the way people who do transactions, who do deals, who buy and sell companies, that tends to be the way they look at wood products companies in terms of EBITDA.

Q. Now, what type of range – you picked 4.5 here. Before I ask you why you picked 4.5, could you relate what kind of range you observed in the investigative work that you performed that was part of your analysis and your report?

A. Just looking at some notes that I took, so I didn't have to flip through all the time. For the public company, [Tr. 97] the range of EBITDA was 4.5 to 18.6.

For the three forest product merger and acquisition candidates we identified, the range of multiple was from 3 to 10. The generic M & A range of multiples was from the 3.5 to 7.8. From these investment bankers, the Van Kasper was 4.6 to 11.9, and the Goldman-Sachs was 6.3 to 9.7.

Q. Why, Dr. Smith, did you select 4.5 as the multiple? It sounds like it is the low end of the range as you have just related for purposes of this going concern hypothetical valuation under scenario A?

A. When we have a lot of data like this, we tend to look at what is called the median, which is the middle value. If you have seven values, the median is the middle value, the fourth value down if you put them in order.

And the median range from about 7.8 – here is one, 7.6 to 9.5. So we started there. We started about in the middle of the 7. 7.6, 7.5.

Now, I'm not being absolutely precise here because what I'm trying to do is get a sense of the market. I'm just getting a sense in this time period what did companies that were similar to Ross-Simmons, what did they sell for in the marketplace, actual empirical evidence? When I say we are looking at a median here when we are looking at all these transactions of about 7.5, 7.6, these are big [Tr. 98] compa-

nies. Ross-Simmons is a small company. We wouldn't expect Ross-Simmons to sell for the same median multiple as these companies sell. Ross-Simmons is much smaller.

Ross-Simmons has less management depth. If we have somebody, God forbid, got hit by a truck, that's a problem for a small company. Ross-Simmons doesn't have the same access to capital that these big companies have.

If you look at – if we were panned back here and looked at the EBITDA over the five years, the revised EBITDA over the five years, we see that it is somewhat variable. It goes up and down, a low point there in '96, high point there in '98. So there is some variability here for Ross-Simmons. That introduces risk.

Now, recognize that these are revised EBITDA numbers. These are EBITDA numbers that are based on the log cost reduction.

So there are a lot of factors that make Ross-Simmons more risky than the companies that make up this whole set of companies that we looked at. That's why we picked a multiple of 4.5. It is approximate 40 percent discount from the median multiple that we observed in the marketplace because Ross-Simmons is more risky. It doesn't deserve the same level of multiple.

Q. Okay. Now, did you also perform a similar analysis for scenario B?

[Tr. 99] A. Yes.

Q. What was – scenario B included different log cost reduction numbers derived from the computer model that Mr. Rasmussen developed. Is that correct?

A. Yes. Could we go back a moment, Mr. Haglund?

Q. Certainly.

A. I didn't finish going down the line. I want to finish going down the line. Go back over so we can see that right there.

Q. Okay.

A. We had gotten to 4.5. We really hadn't finished our calculation. We want to finish our calculation. We have the revised EBITDA of $2.5 million. We have the 4.5 multiple. We get a number of $11,587,281.

Now, that number is the value of the equity plus the value of the debt. It is the value of the whole company. If there wasn't any debt outstanding, the value of the equity would also be 11.6 million, round number. If there wasn't any debt outstanding. The company is worth 11.6 million bucks in scenario A.

As a shareholder, though, I have to give my due to the debt holder, to the bank. In this case, the due was 3.9 – $4 million. So the number you see there, $7.6 million, is the value of the equity, the stock. But it is not the value of the company. It is the value of [Tr. 100] 100 percent of the equity. Because the company, if there wasn't any debt outstanding, there wouldn't be any subtraction there.

Q. So if, in fact, Ross-Simmons were to sell under this scenario with this EBITDA and a buyer were to agree that 4.5 is a conservative and fair multiple of EBITDA to determine value, what that seller would pay – or what that buyer would pay is this total $11.85 million?

A. The buyer would pay the $11.58 million to the seller and buy the stock for the $11.5 million – buy the company for $11.5 million in a stock transaction. But the stockholder has to pay the $3.9 million. So the stockholder is going to get $7.6 million.

But for somebody buying this company is going to pay $11.5 million under these scenarios and assumptions, and then the stockholder is obliged, let's say, to pay the debt. It is

kind of like when you have a house. You know, if you have your house that is a $200,000 house and you have $40,000 worth of equity in it, if you go out there and sell your house, What do you sell it for? $200,000. What do you do? What you have to do, you have to pay your bank, pay the mortgage off. What do you clear? What do you get to take away from the deal? You get to take away $40,000. But the house is worth $200,000. The company is worth $11.587 million under this scenario and these assumptions.

[Tr. 101] Q. Okay. Now, let's turn to scenario B. How is this scenario different than A?

A. Well, once again, you have to pan back to see the whole thing because you have different log price changes that were part of scenario B. The log changes along the top there, 135 in '93, et cetera. We did the same kind of calculation against the volume to get the reductions of goods sold and a calculation of the revised EBITDA. And the average EBITDA for that scenario B, over three years, was $2.8 million of EBITDA.

Now, you'll notice here in scenario B there is a different multiple of EBITDA. Scenario A, we had a multiple of 4.5. Scenario B we have a multiple 5. Why do we have a multiple of 5 instead of 4.5 in scenario B and, in fact, we have it in scenario C as well?

The reason is, once again, if you pan back the growth rate, the growth of earnings, the growth of EBITDA under this scenario B is much better than the growth of EBITDA under scenario A.

I mean, this is a growing concern in this particular case. In scenario A, it was flat to even declined there a bit at the last. So investors tend to be more attracted to growth than not and will pay more for growth than not.

So the five there is using the same empirical [Tr. 102] evidence as we talked about before. The five is just a 35 per-

cent discount from this median we talked about as opposed to 40 percent discount, recognizing in scenario B and C, given the log cost reduction assumptions, we have a more growing concern here. We are willing to pay a little bit more.

So the calculations are the same here. We get down to the three-year average revised EBITDA times the five multiple. We get $14.2 million and change, you see.

Once again, we go through the same calculation that we did a moment ago to calculate the equity. What our assignment was was to evaluate the going concern value of the company. We step up to the $14.2 million in scenario B. If you move it up there, Mr. Haglund, we can see what scenario C is, $15.2 million.

Q. So the record is clear, in scenario B, the total going concern value that you calculated or that you concluded as the going concern hypothetical value of Ross-Simmons as of May, 2001, was $14,226,220?

A. That's correct.

Q. And as to scenario C, you concluded that the going concern value of the company under that scenario, this is Ross-Simmons, was $15,176,282 as of May, 2001?

A. That's correct.

Q. Now, Dr. Smith, did you also perform a going concern [Tr. 103] hypothetical valuation for the Ross-Simmons/Siletz Tribe Joint Venture sawmill as of August, 1998, when it went out of business?

A. Yes, I did.

Q. And if I could display what's been marked as Exhibit 130. We will display it here. And then if you will tell me what you want – how you want me to zoom in.

A. Yeah. This is a little bit difficult for people to see. But what we have here is an income statement for STEDCO.

STEDCO is the Joint Venture. We have – starting over on the left-hand side, we have calculated the latest 12 months as of the close of business, August 31, 1998. In other words, that left most column there is the revenue and expenses and earnings of the Joint Venture as of August 31, 1998.

Now, we did not use that particular set of numbers here. We did not use that performance that existed at that time because, once again, we were doing a hypothetical appraisal. We wanted to see what the company's value would be under a set of assumptions that we were provided with.

So what we did, we stepped back to the end of '97, December 31, 1997. We were told that was a more normal operating year from which to make our – from which to incorporate the assumptions. And so if we move it over just a little bit further there, Mr. Haglund, a little bit [Tr. 104] further, a little bit further. Right there, please.

Let's ignore those first three columns labeled 12 months, 8 months, 8 months with August 31st and let's concentrate on these four columns. As a matter of fact, what I want you to concentrate on are the three columns there, without the last column, December of 1996.

We were told that the joint venture operated on a one-shift basis in 1996 and 1997 and, in fact, 1998. We were also told and informed by Mr. Nelson that if the company could have obtained logs, the plan was to go to a two-shift operation. So we needed to adjust this income statement from a one shift operation to a two-shift operation under the assumptions for our hypothetical appraisal.

We were provided information by Mr. Nelson about log costs, about manufacturing costs, and about labor costs necessary to operate two shifts as opposed to one.

So what we did is, we – and our results are there in that pro forma, 12-9 – I apologize. That should say 12-97, the pro forma column there. What we did, we doubled the reve-

nues and then we incorporated the manufacturing cost information, the log cost information and the labor cost information provided by Mr. Nelson into the calculation of earnings for the company and calculated an EBITDA, earnings before interest, taxes, depreciation and amortization, for [Tr. 105] what we call a pro forma income statement assuming that STEDCO operated on two shifts and that the information provided by Mr. Nelson was information that was important to determining what the earnings of the company was because there was an additional log cost, labor cost, and manufacturing cost.

Q. And you assumed that the information provided by Mr. Nelson was accurate?

A. I had to. I had no way to confirm it.

Q. And which number in this column is the EBITDA number that you derived under this two-shift scenario with the information provided by the then manager of the Joint Venture, Bill Nelson?

A. It is the next to the last number, $984,230.

Q. Now, then what did you do from there?

A. Well, then we performed a similar calculation in terms of we took that EBITDA times an appropriate multiple. It is down there to the right. There you go. Times an appropriate EBITDA multiple. Once again, we are using the same empirical evidence that we talked about before. Except now we have a company that is really in worse shape than Ross-Simmons was in that scenario A that we talked about before.

We don't have very much information here in order to determine risk. We just know that this company – we [Tr. 106] only have one year where we made this adjustment. For conservatism purposes, I didn't feel good about using 4.5 here. I thought 4 was a reflection of – this company kind of struggled from what I was told virtually from the beginning. So it is a more risky situation. We used the 4 multiple to take

into consideration – all these transactions that we saw in here had a median or middle multiple of 7.6.

So we took that four times the EBITDA. We get the market value of invested capital, or the value of the company, of $3.9 million. However, they are operating a second shift now. The working capital necessary to operate a second shift is greater than the working capital that was necessary to operate only one shift. In fact, we almost doubled the working capital. We had to subtract that out, the 450,000, to get our final indicated going concern value of the $3,486,918.

Could I say something here? I don't want you to think that we can come to these kinds of numbers that exact. That's why when I'm talking about it, I talk in terms – it is about $3.5 million. To put up $918, the reason it is like this, I didn't want any questions about the mathematics, but the value is $3.4, $3.5 million. The $918, that's just mathematics.

Q. So just so I have got a good, clear, clean record here, [Tr. 107] Dr. Smith, based upon the log cost reduction and information and the cost and other data associated with an assumed two-shift operation at the Joint Venture in Toledo, it is your opinion as of August of '98, when the company went out of business, or the Joint Venture went out of business, that the value – the going concern value of that business under this type of hypothetical scenario is the $3.48 million?

A. That's correct.

Q. Now, why did you not – I think you have explained it, but let me also ask it with respect to Ross-Simmons. For the Joint Venture, you made a deduction for a working capital investment associated with the second shift. We saw no such reduction in your Ross-Simmons three scenarios. Why not?

A. Ross-Simmons had operated with low or negative working capital balances for several years. They, in fact, had a negative working capital balance as of valuation date.

My reason for deducting this $450,000 was simply a recognition, not that STEDCO had too little working capital; it was a recognition that we were dramatically changing the operation of the company. With Ross-Simmons, all we did was reduce log cost. Same number of hours were worked. Everything was the same.

With this, we actually changed the operation. For our hypothetical appraisal, we changed our operation to two [Tr. 108] shifts. You are naturally going to require additional working capital because you have a two-shift operation that changed it that much. That's why it was subtracted here and not subtracted in the Ross-Simmons.

Q. Ross-Simmons had been operating profitably for over 25 years with levels of working capital close to the 1.0 area?

A. Well, certainly they operated at low levels of working capital. That's all I'm willing to say.

Q. Okay. Now, Dr. Smith, what does the term "debt to total capital ratio" mean?

A. Well, debt to total capital is an attempt in a very simple ratio to reflect the degree of leverage, the degree of debt that a company has relative to the total capital. That is financing the operation and the total capital that is financing the operation is debt and equity. That's where the money comes from to operate the place.

So the debt to total capital ratio is a ratio – and there are many, many different ways to calculate debt to capital ratio and there are many, many different leverage ratios. Debt to total capital happens to be one of them.

If you have a lot of debt relative to total capital, in other words, if your debt to total capital rate was 75 percent, what that says is if you had a million dollars worth of capital, $750,000 was coming from the bank, $250,000 was coming from the equity holder, so your debt to [Tr. 109] total capital

ratio 7.5, you could figure it out for yourself. That's a risky position – excuse me – that's a riskier position.

Q. Now, Dr. Smith, is it a fair statement that during your career as a business valuation appraiser that you have performed a great number of valuations that were engagements for wood products companies in the Pacific Northwest?

A. I was very fortunate when I started out to go to work for a company that valued wood products companies. Obviously our location up here in the Pacific Northwest, you have a lot of wood products companies. We don't actually count how many we did or do, but I certainly am involved in 10 or so, maybe 12 appraisals a year of wood products companies.

Q. In your career, is it a fair statement that you have done in excess of 200 wood products company valuations?

A. Yes. I want to be very specific. That's not 200 companies. That's 200 engagements involving wood products companies.

Q. Some companies for multiple reasons will come back to your firm year after year to do a valuation of the company?

A. Yes, sir.

Q. Now, regarding this term that you discussed a few minutes ago, debt to total capital ratio, my question, Dr. Smith, is: Is that term one of the commonly used means [Tr. 110] of looking at the leverage of companies, big, small, private and public?

A. I could just say that it is a means of looking at the leverage of any company.

Q. And in connection with preparing to testify here, have you calculated the debt to total capital ratio both for Weyerhaeuser and for Ross-Simmons in the years 1996 and 1997?

A. Yes.

Q. And in 1996 what was the debt to total capital ratio for Weyerhaeuser?

A. Once again, we had to understand that the debt to total capital can be calculated in a number of different ways.

You can have all of the debt. You can have the long-term debt. If you incorporate all of the debt, I believe that's the way in this calculation that I did it. In 1996, Weyerhaeuser was 44.4 percent debt to total capital ratio.

Q. And what was Ross-Simmons?

A. 37.6.

Q. So Ross-Simmons actually had a lower level of leverage in 1996 compared to Weyerhaeuser?

A. Relatively speaking.

Q. What was Weyerhaeuser's debt to total capital ratio in 1997?

A. 40.8 percent, according to my calculations.

[Tr. 111] Q. In 1997, I want to – well, for 1997, for Ross-Simmons, did you calculate debt to total capital after discounting or ignoring the $1.5 million note from John Simmons?

A. Yes.

Q. So you take that off the balance sheet, it is going to increase the total debt to capital ratio. Is that right?

A. Yes. Because you won't have that asset there any more.

Q. Having taken that off, the 1.5 off the Ross-Simmons balance sheet, what does the total debt to total capital for Ross-Simmons work out to for 1997?

A. 43 percent.

MR. HAGLUND: That's all I have, Your Honor.

THE COURT: Cross-examination.

MR. SIMON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Good morning, Dr. Smith. Michael Simon.

A. Good morning.

Q. This was a hypothetical appraisal you have done here. Is that correct?

A. That's correct.

Q. How many others, not counting this one, how many other hypothetical appraisals have you done, sir?

A. This is my first one.

Q. You have done more than 200 wood products company

* * *

[Tr. 117] Q. I will move on now to the other area. I want to close this area with this question. I take it you were not supplied with any information that would explain why they were unable to sell the one shift of lumber, am I correct?

A. That's correct.

Q. Okay. I will move on.

With respect to the Ross-Simmons valuations, the scenarios A, B and C, those were all dependent upon the log cost assumptions made by Mark Rasmussen?

A. That's correct.

Q. I won't belabor this point, but I want to make sure I understand you. Just like your STEDCO valuation was a hypothetical assumption, so were your valuations on Ross-Simmons' value?

A. That's correct.

Q. You made no independent effort to verify or evaluate the reasonableness of any of those assumptions. Am I correct?

A. That's correct.

Q. When you first prepared your expert witness disclosure in this matter, the valuations that you gave, the going concern valuations, were several million dollars less than the going concern valuations that you have just testified to today. Is that correct?

A. That's correct.

* * *

**[Vol. 5-B (Apr. 14, 2003)] [Testimony of Jerry Martin]**

* * *

[Tr. 11] MR. SIMON: Thank you, Your Honor.

Your Honor, for defendant's first witness, we call Mr. Jerry Martin.

THE CLERK: Would you raise your right hand and be sworn, please.

JERRY MARTIN

Was called as a witness on behalf of the Defendant, was duly sworn and was examined and testified as follows:

THE CLERK: Be seated.

Would you state your full name and spell your last name for the record, please.

THE WITNESS: Jerry Martin, M-a-r-t-i-n.

DIRECT EXAMINATION

BY MR. SIMON:

Q. Good afternoon, Mr. Martin. I understand that you have been employed by Northwest Hardwoods since 1974, almost 30 years; that you have had almost every position one can have in a hardwood sawmill, including quality control for more than four years.

And from 1984 to 1996, you were the mill manager at Northwest Hardwoods mill in Centralia, and you are currently Vice President of Western Operations at Northwest Hardwoods. Do I have that correct, sir?

A. Yes.

Q. Thank you. I noticed that as you walked up here [Tr. 12] there's a little bit of a limp. Would you tell us very briefly about the back surgery you recently had.

A. Yes. I had two ruptured disks and a bulging disk in my back, and I'm just starting through therapy, and had both those operated on. And that's been first part of February.

Q. And I understand that sometimes it gets a little uncomfortable to sit for a long period of time?

A. Yes.

Q. If you are in pain about that, just please tell the Court.

Mr.Martin, I understand that Northwest Hardwoods purchased Diamond Lumber's hardwood sawmills in Eugene and Garibaldi, Oregon, in 1995; is that right?

A. Yes.

Q. Now, after that purchase was made, did you personally, sir, play any role in reviewing and then supervising the changes made at the Eugene mills regarding sawmilling optimization and value recovery?

A. Yes, I did.

Q. What was your role?

A. I was the project team leader or facilitator for Eugene, Garibaldi and Coos Bay.

Q. By the way, that phrase I used is a mouthful. What is sawmilling optimization and value recovery, in general terms?

[Tr. 13] A. In general terms, sawmilling optimization can mean a little different thing for each breakdown center, but it's technology that aligns the resource with the breakdown center.

Q. By 'breakdown,' I assume you mean cutting the logs?

A. That's correct.

Q. Okay. Now, with these mill improvements that you supervised, can you tell us generally what are the reasons or

purposes why Northwest Hardwoods makes these types of improvements?

A. Yes. We looked at three different opportunities there. We looked from a people standpoint or safety, environmental and training of our employees, and to improve and review the recovery and the yield at the particular mill.

Q. First of all, let's talk about recovery then. What do you mean by "recovery"?

A. Recovery means how much you get out of a log.

Q. How much what?

A. How much lumber you get out of a log, excuse me.

Q. What do you mean by "yield"?

A. Yield is what value you get out of a log.

Q. Now, how long did it take to make these improvements at the Eugene mill?

A. It's ongoing. We continue to improve and have been continuing to improve since we've acquired those facilities.

* * *

[Tr. 18] From that, they'll all flow down, each one of these will flow down to our main gang. And our main gang is basically just a box with saws in it, approximately 30 saws. We have an operator here that is making a grade decision process from a value uplift determining where each one of these blocks will go.

From the main gang, there's an opportunity to view that block; and if, in fact, there is a lot of sweep which alder certainly does have, we can send it over to our sash gang. And if I might be able to draw, just real quick.

Q. There are some markers for you here and there's some butcher paper.

A. I want to take just one second here to talk about the high – excuse me, the sash gang. Normally, if you have a straight type block or cant, we'll go through that to show you what that is in a moment, that will go though our main gang.

If, in fact, that block has a lot of sweep in it, which alder, being such as it is, there are quite a few of those, it will actually saw – this machine will actually saw on an arc, and it will actually saw that board like this (indicating) so recovery is paramount.

It's an opportunity to gain the full length and get longer boards versus shorter ones. Higher recovery, again, higher recovery. If that went through the main gang, [Tr. 19] however, you will see what would happen. If it's going in this way, you'd create a lot of short boards and a lot of product that's going to go into waste, into a chipper.

Okay. So we go up to the main gang. All these boards that need to be edged will come on over to an optimized board edger, over to this part here, and we'll talk about that again. Also, there's a person that is dealing these boards to optimized value and recovery.

From there it flows on down to our trim saws, out to our lumber stacker, has to be stacked and stickered automatically. We have an automatic sticker there with two people, in fact, recognizing the placement of those sticks and where they are going to go, from the dry kiln on out to the abrasive sander.

Now, I want to take it back one step here and we're going to follow from the main gang on out is our smaller cant-type pallet lumber, we'll be able see that in a moment, which flows on out to the pallet chop saw, and, again, we're chopping first before we go into our pallet gang.

Pallet gang is the same thing as a main gang here, just a box with saws in it, thin saws, and we'll get back to that. Then on out to the pallet stacker. This flow here is all green.

Q. What do I mean by "green"?

* * *

[Tr. 25] Q. Mr. Martin, what's pallet?

A. Pallet, as we talked about before, in our lineup as it goes through our main gang, going back through the pallet stack or the pallet gang, on out to the pallet stacker. If you went into Costco or Home Depot or into Lowe's, you would see material stacked on pallets. It's those boards or lumber that's made into a pallet that you see all around. Okay. And that's a sold out green. We don't make the pallets, we make the lumber for the pallets.

Q. Please continue.

A. Uh-huh. As opposed – as in Example B, which would be a higher value, higher grade cant, he or she would, in fact, then place that through all four-quarter, because we have determined that this portion is still of a higher value than a pallet.

Q. Okay. Are you done with this chart?

A. Yes.

Q. Now, you mentioned, when you took us through the Eugene mill flow, the high-yield mill. Using our next chart, take us through, what is this concept of a high-yield mill?

A. We start with, what I talked about earlier was an underutilized part of the resource, and that being the smaller size of the resource. If you were to put that through the standard configuration of a larger mill, the opportunities for value and the balance between value and [Tr. 26] volume would not be in harmony.

So what we do is on a four-inch small end diameter log, if this depicts a 40-foot log, five inches on the small end and four inches on the small end of this one, normally, I would say a lot of times people put this straight into a chipper or make pallet out of the whole thing.

What we will do is we will come back and segment this again cutting into blocks and take the seven inch, six, seven and eight-inch up blocks, ten-foot segment, into a specialized mill, low volume, highly-specialized mill that has a high degree of value. It's a value added part of our facility. And this depicts that harmony that you have to have between value and volume.

Q. Thank you. Our next chart is labeled saw kerf comparison. What is a saw kerf? What is a kerf?

A. Kerf is basically the tooth that is taking the bite out of the log. If you just think about it in thickness of saw, just thickness of saw. And if we go back to this one when I talked about – to remember the amount of saws, there could be up to 30 of these saws in here.

Each one of these lines is a saw. Extremely important because if, for dramatic sake, if you had a quarter-inch kerf in every one of those lines, as opposed to an eighth of an inch kerf, the recovery factor would go way down. You're making a lot of sawdust.

* * *

[Tr. 28] Q. It's right there.

A. Again, the thickness of the saw is the key. Okay?

Q. Mr. Martin, you mentioned that it takes additional training and skilled employees to operate thinner saws than thicker saws. Why is that?

A. The way that the saws are worked within this box, the thinner the saw you have, the larger opportunity for sawing deviation to hold target sizes, if you will, and we'll talk about target sizes in a moment, but that is extremely critical, to be able to maintain those target sizes. If you can't, you have to cut your lumber thicker just to make up for the inopportunity that you have with those thick saws.

Q. I think our next chart relates to lumber thickness. Are we ready to go there?

A. Yes. Again, these are actual – actual dollars, actual sizes. Could not hold tolerances, could not hold the target sizes that the Northwest Hardwoods' standards are. In four-quarter lumber alone, they were cutting one and a quarter, just to give you an example, and we are at 1.50.

As you look down through here, if you look at the savings just from a target – target sizing of the lumber, this is the size of the lumber now, annually is around $585,000 savings. To be able to perform that, train the people, be able to tie it together, get a recovery form, annually is $585,000. Those are actual numbers.

[Tr. 29] Q. Thank you. Now, for the next series of questions, if I can ask you to take back the witness chair and then we'll get you back down here a little bit later.

A. (The witness complies.)

Is it all right if I have some water?

THE COURT: You bet.

THE WITNESS: Thank you.

BY MR. SIMON:

Q. Mr. Martin, continuing with the exhibit that you prepared – if we can go to the next slide, please. There you go.

We have some photographs from the Eugene mill.

A. Yes.

Q. I'd like to take you through those photographs one at a time and basically ask you what they depict. So the first one is?

A. The first one shows the Eugene facility circa 1995.

Q. Go to the next photograph, please. Narrate us through, please. What are we looking at now? What does it show us?

A. Here, we're showing a log yard with a closed loop watering system. From an EPA standpoint, clear water, being able to use the same water in the makeup water to facilitate our log yard, extend our inventory shelf life and extract a higher value throughout the year.

THE COURT: Mr. Simon, let me ask you a question. [Tr. 30] These are in evidence. I don't think there's any dispute about the quality or efficiency of Weyerhaeuser's facilities, is there?

MR. KELLEY: No, there's not, Your Honor.

THE COURT: So let's move quickly to the issues involved in this case.

MR. SIMON: I will move quickly, yes, sir.

BY MR. SIMON:

Q. One of the issues in this case, Mr. Martin, deals with pavings of a log yard – a log yard that's paved or not paved. There is evidence in this case that the Ross-Simmons and STEDCO log yards were not paved, but gravel log yards.

Is the Northwest Hardwoods log yard in Eugene paved; and, if so, what difference does it make?

A. Yes, it is paved and it makes a lot of difference in these regards. The shelf life and the opportunity to keep your highly valued and extract the highest value out of the logs, keep them out of the mud, out of the grit, out of the rocks.

You cannot have a thin kerf sawing program, obviously, the thinner you have as the saws get thinner, you have a have a clean log. That is a big part of a thin kerf program, to be able to extract the maximum value out of that particular log.

Q. I am going to move quickly through the next few slides [Tr. 31] and then spend a little of time on the head rig. Our next slide, please.

A. Again, the barker area. You can see one before and after, and, again, that barker is taking off the bark, reduces our down time and increased value.

Q. Next slide, please.

A. It's a block deck to show that we are taking these blocks off the smaller diameter logs and improving the utilization and increased mill flow.

Q. Next slide, please.

A. Here we're seeing and depicting the old cutoff saw, bar-type style, as opposed to a newer 72-inch cutoff saw for improved recovery and less waste.

Q. Next slide, please. And we'll spend some time here on the head rig.

A. Yes. This is the head rig. And it shows the old head rig versus the new one. And we talked about saw kerfs and how important that is. We saw close to $600,000 improvement that we've had on target sizing at the head rig. And also installed our stereo scanning set work system.

Q. That is what I'd like to spend a little bit of time on, Mr. Martin, because there's been testimony in this trial that Ross-Simmons did not have a stereo scanning system, they had a curtain scanning system. Will you take us through the difference: What does it mean?

[Tr. 32] A. Basically, an optimized stereo scanning system is a three dimensional. It's showing about 180 degrees of log for what we call the best opening face. The repeatability of that versus the light curtain scanning, or, in fact, no scanning at all, is much improved. It's the next generation, if you will, and the improved opportunities there that you have

in the form of recovery, better grade utilization that leads to higher returns.

Q. Next slide, please.

Now, the high-yield mill you've already described for us, so I won't spend any more time here.

A. Okay.

Q. Next slide, please.

The main gang, you already described that for us. What's a horizontal resaw?

A. What we're doing there is on that portion of the block that we saw that I talked about had a number of defects, juvenile defects, if you will, on the interior of the log. When you take that pallet cant out of there, and what we'll do is, in fact, have a trained operator again review all four sides of that pallet cant, and if there's any clear lumber, any lumber at all, we will, in fact, extract that value off the side of that. And that's what this machine here will do.

Q. Go to the next slide. I do want to spend some time on [Tr. 33] the board edger, and then the next slide after that, I want to spend some time on edger optimization.

First of all, would you explain to us what is a board edger, and if you need to, if it will be helpful to you, we do have these samples you put together of 1458C, again, provided and disclosed on April 1, 2003. Will this be helpful at this time?

A. Yes.

Q. I'll ask the question, what is a board edger and how does it work?

A. Yes. If we were to envision this as an 8 or 10-foot board, 8 or 10-foot board, if you have a – this would depict an edger that is losing opportunity. We have nice square edges and this wane, or lack of wood is what wane is, you

can see here we have about a quarter of an inch of clear wood opportunity. On this side we have relatively about the same.

One-eighth of an inch misedged in out – in anybody's edger, one-eighth of an inch would show and equate to around $700,000 lost opportunity. Just to show you how just a small thing like that, if, in fact, we set the saws and we ended up with this board, as we depict here, an eighth of an inch on either side lost into the chipper, would equate right at $700,000. So this would be a misedged board.

[Tr. 34] f we just set the saws in clear wood and not just left clear wood, if you have a quarter of an inch saw kerf, and, again, we talked about the thickness of the saw, and we set just that into the clear wood, again, $700,000 loss annual opportunity.

Q. At any given mill?

A. At a mill that was one of our mills, depends on how many boards you're putting through that machine, yes.

Q. Thank you, Mr. Martin.

The next slide focuses a little bit more on edger optimization. Did you put in an edger optimizer in Eugene?

A. Yes, we did. And I might add, if I might talk a little about that, this fellow, when we took over, was down in a hole, and was just – and I can relate to this because I've done this job – just buried with lumber.

And to be able to – and he's still there and he works with this machine now, and he just deals the boards into this optimization that is scanned, the lumber is scanned. And depending on the scanning, the program we have in there, and depending on the grade of the board, will determine on where they edge the lumber.

Q. Mr. Martin, and I'm not going to show the videotape, Plaintiffs' Exhibit 1, but I will ask you: Before trial, did you review the videotape of Plaintiffs' Exhibit 1?

A. Yes.

[Tr. 35] Q. Did you see anything that looked to you as if it was ineffective edger sawing? What did you see on that?

A. Yes. It showed strips coming off of the edger and it appeared to be easily all clear wood, and we know that just an eighth of an inch is close to $700,000 a saw, that's just an estimate, I would say around a quarter –

MR. KELLEY: Your Honor, at this stage, I am going to object. He is giving expert testimony and he was never designated as an expert.

THE COURT: Yes, I will sustain the objection. The amounts that he's talking about are opinions as to expert testimony. The objection will be sustained and the previous testimony of the witness about the amounts of money saved is stricken and you're instructed to disregard it.

You may proceed.

MR. SIMON: Your Honor, I was intending to ask that as a fact question, not an opinion question. I think the evidence is fact testimony, not opinion testimony.

THE COURT: I haven't seen any figures and it's not in his statement. I looked to see if there were any estimates of any figures given in his statement and I didn't find any.

MR. SIMON: I'll move on, Your Honor.

THE COURT: All right.

[Tr. 36] BY MR. SIMON:

Q. With respect to the trim saws, let's cover these briefly, and then spend a little more time when you get to the boiler and the silo. What do we see here?

A. The older antiquated trim saws that had issues from a value recovery, the new one is at the bottom, and a safety and ergonomic standpoint.

Q. Okay. Next slide, please.

Briefly, what do we see here?

A. Manually-pulled lumber versus a lumbér stacker, automatic stacking.

Q. Okay. Next slide, please.

Tell us with about the boiler and the silo and the relationship between what you do with the sander dust and how that affects your energy costs?

A. The boiler and the package that you would put on there basically is a suspension burner. And you are blowing the sander dust into this big boiler, and that, in fact, creates the steam for the dry kilns, these big ovens, and we're about 90 percent effective with that versus natural gas, with the ever-rising cost of natural gas.

Q. I take it that the picture on the bottom is the kiln and that's used to store what – not the kiln, the silo?

A. Yes. That shows the building of the silo where the dust is being stored.

[Tr. 37] Q. Go to the next slide, please.

Kilns, we've talked about.

Go to the next slide.

More kilns.

Let's go to the next side, please.

You talked about the abrasive planer.

Let's go to the next slide.

Log yard. Now, this is not Eugene, this is at Garibaldi; is that correct?

A. Yes, this is at Garibaldi.

Q. What do we see here?

A. This shows the five-and-a-half acre project as far as paving our log yard.

Q. Go to the next slide, please.

Please, continue.

A. Yes.

Q. Now, what does this show us?

A. This shows a recovery. We talked about recovery and what that is. That's how much you get out of the log and over the years and with improvements and with some of the things we've been able to do at our Eugene facility from acquisition to where it is today, basically a straight line of improvement.

Q. Let's go to the next slide, please.

And now do we have similar with Garibaldi?

[Tr. 38] A. Yes, this is Garibaldi, recovery history, similar results.

Q. All right. Thank you. That ends this particular exhibit.

Let's move on to another area, Mr. Martin. Did you have a meeting with the Board of Directors of Ross-Simmons sometime in the early 1990s?

A. Yes, I did.

Q. Where did you meet with them?

A. I met with them at a restaurant for a casual dinner. The Tyee is the name of the restaurant in Olympia, Washington?

Q. Who did you meet with?

A. Present was John Simmons, Marie Simmons, David Simmons and myself.

Q. How did that meeting come about?

A. There was an inquiry if I would like to visit with them about an opportunity as a general manager of Ross-Simmons.

Q. Tell us about that conversation, that dinner conversation, that you had with the Board of Directors at Ross-Simmons that evening?

A. It was a casual meeting, just a dinner meeting, and we talked about sawmilling concepts and general ideas.

Q. And did they make you an offer or present you with an opportunity?

* * *

[Tr. 41] THE COURT: We're not going to argue about the efficiency or the quality of Weyerhaeuser's facilities now, are we?

MR. KELLEY: No, Your Honor, I'm not.

THE COURT: All right. Let's get on with that.

CROSS-EXAMINATION

BY MR. KELLEY:

Q. Mr. Martin, your title right now, is Director of Western Operations. Is that what you said earlier?

A. Vice President of Western Operations, yes.

Q. And how long have you held that title?

A. May or June of '97, I believe.

Q. And there's been no change in the name of that title since '97?

A. No.

Q. Do you recall being deposed in this case back on June 11th, 2002?

A. Yes.

Q. Do you recall at that time saying your title was Vice President of Alder Operations?

A. I might have.

THE COURT: I am going to raise this objection. I don't let lawyers generally summarize what's been said in a deposition. I like to hear the questions and answers that have been used here before, so there's no misunderstanding.

* * *

[Tr. 47] Q. And are these all state-of-the-art mills now?

A. It is never ending.

Q. Garibaldi, I notice that you only showed one slide on that. Does the Garibaldi facility have a dry kiln?

A. No, it's a green facility.

Q. Okay. And does it have this abrasive planer that we've heard so much about?

A. Being a green facility, no, it would not.

Q. So am I correct then that all of the lumber produced at Garibaldi would be trucked to where, the Eugene facility?

A. Yes.

Q. The there it would have to be dried and then planed and graded; am I correct?

A. That's correct.

Q. You have driven around this entire area, have you not, sir, to the various mills in the area?

A. Yes.

Q. Do you know where Toledo is?

A. Approximately.

Q. Do you know where Ridgefield is?

A. Ridgefield, I do, yes.

Q. Okay. Would you agree with me that the approximate travel distance between Toledo and Ridgefield and from Garibaldi to Eugene are comparable?

A. I couldn't comment on that.

[Tr. 48] Q. Now, you talked about a meeting that you had with members of the Simmons family. Do you recall when that was specifically?

A. No, not specifically. I know late '80s, early '90s, could be '92 or '93, right in there.

Q. You didn't perform a lot of due diligence in terms of what you were –

A. No.

Q. You didn't even go into the mill and look at the equipment; is that correct?

A. That is correct.

Q. Talk to any of the crew?

A. No.

Q. Look at financials?

A. No.

Q. The meeting with senior management that you just told Mr. Simon that you'd been attending since mid-1997, just a few questions for you, sir.

MR. KELLEY: If I could have the witness be handed Exhibits 400 through 405.

THE COURT: You may.

BY MR. KELLEY:

Q. Mr. Martin, can you see Exhibit 400 on the screen?

A. Yes.

**[Vol. 5-B (Apr. 14, 2003)] [Testimony of David Bosley]**

* * *

[Tr. 54] of our quality control people at one of the mills to learn about the quality control process, which we think is very, very important to understand our products.

Q. You mentioned some travel. What type of travel do you do?

A. I have traveled probably on an average of one to two weeks a month for I don't know how many years. My travel includes international travel to Asia. I traveled to Latin America. I traveled to Europe, within the United States and Canada. Basically, I travel to see new markets and visit with customers.

Q. Mr. Bosley, as a salesperson at Northwest Hardwoods, how would you define the overall sales philosophy at Northwest Hardwoods?

A. Our sales philosophy at Northwest Hardwoods is what I would call a value sales philosophy. We try to understand what our customers need and we try to match our products with that need. That requires, as I mentioned earlier, an incredible amount of understanding of the customer's manufacturing processes and how that relates toward our products.

Q. Mr. Bosley, we've heard some testimony in this trial about proprietary grading systems for lumber. From the perspective of Northwest Hardwoods, what is proprietary grading?

[Tr. 55] A. Proprietary grading, in a nutshell, is providing a product that meets a customer's needs. Sounds real simple, but by providing a product that meets a customer's needs, that improves the customer's yields, that makes the customer more profitable, and we want profitable customers.

Q. And Mr. Moody is putting up on the screen one of the grades, this from Exhibit 1461. What is this exhibit?

A. This exhibit is one of our proprietary products. It's a superior grade. This happens to be alder, but we have a superior grade in Wisconsin mills as well, and the Wisconsin mills are producing red oak, white oak, cherry, and a variety of other hardwoods. The superior grade, I would have to say is our top of the line product.

Q. What types of applications is superior used in?

A. Superior would be used for any application where the customer needs long cuttings, long, clear, two-face cuttings. A door maker may want to use superiors. A cabinet maker and molding maker – now, alder does not lend itself real well to molding, but there are moldings made out of alder.

So in any case, it also would lend itself to a customer who doesn't have – maybe a smaller customer who doesn't have a lot of options for its products, so maybe a small cabinet shop would want to use superiors.

Q. Now, relative to the other grades that Northwest [Tr. 56] Hardwoods offers, what is the relative expense level of the superior?

A. Well, we talk about everything in terms of FOB mill prices, prices at our mill. This is on a net tally. This is the actual footage within that unit on a four-quarter basis. We're talking, I believe, in the low 1600s right now.

Q. That is $1600 per thousand?

A. Excuse me, per thousand board feet.

MR. JOHNSON: Mr. Moody, could you show the next?

BY MR. JOHNSON:

Q. What is the cabinet grade that we see here?

A. The cabinet grade is a proprietary product that was basically developed in the – I would say the late '70s, early '80s. That was when I was in quality control at our Arlington sawmill.

The cabinet grade is the result of working with one of our customers at Oregon, a company called Diamond Cabinet. I believe they've been bought by Schrock since then. This goes back a long ways. I think they are owned by someone else.

But the cabinet grade is a product that we developed out of the number one shop. And the number one shop grade has both a cabinet grade and a custom shop grade in it. But working with Diamond Cabinet, they said, "Well, [Tr. 57] the number one shop is a great grade, but there are certain boards then that we just can't use."

So working with them at our mills, the quality control people were involved, head of quality control was involved, our sales people were involved, our mill personnel was involved, we developed the cabinet grade for cabinet manufacturers.

MR. JOHNSON: Mr. Moody, thank you.

Your Honor, if I may approach and show a larger exhibit.

THE COURT: You may.

BY MR. JOHNSON:

Q. Could you step down, Mr. Bosley.

A. (The witness complies.)

Q. Mr. Bosley, I am going to show you Exhibit No. 1384. What is this exhibit, Mr. Bosley?

A. This exhibit is an enlargement of an advertisement that we had in the Hardwood magazine. I cannot remember exactly what year it was, but we have the cover of the Hardwood magazine every March. The Hardwood magazine is a magazine that's distributed throughout the United States and I think in foreign countries as well, intended for buyers of hardwood lumber.

Q. Who is this gentleman?

A. This gentlemen here, his name Jesse Arenus (ph).

* * *

[Tr. 77] Q. What percentage, as you understand it, of alder – what percentage does alder represent of the production of the [Tr. 78] Pacific Northwest?

A. It's approximately 95 percent.

Q. Now, you talked earlier a little bit about proprietary grading systems?

A. Correct.

Q. Real briefly, how many grades does alder have?

A. Alder has within – let's say four-quarter, that's probably where we have most of our grades, I would consider alder having 30 grades.

Q. And how many grades would – let's take an example, cherry from the East Coast. Typically, how many grades would cherry have?

A. For us?

Q. Yes.

A. I don't know exactly. We may have 10 grades.

Q. Is it a fair summary that alder, in your experience, has more specific grades than any other hardwood species?

A. Well, no, I wouldn't say that, because I think some of our glacial products out of Wisconsin have a lot of grades as well because it's further color sorted. For example, we have a red oak superior wheat color, we have a red oak superior tan color, we have a red oak superior pink color, and red oak superior off color, basically.

Then we have the same thing with cabinet grade, we have the same thing with custom shop grade. We have a frame [Tr. 79] grade, so those grades add up as well. I don't know

exactly how many there are. They might be maybe a little bit less than alder, but there's quite a few of them.

Q. Are you aware, since you've been on senior management since 1997 that Weyerhaeuser carefully tracks its market share of alder lumber?

A. I'm not on senior management.

Q. Are you aware that Weyerhaeuser carefully tracks its market share of alder lumber?

A. I am not sure what you mean by "carefully tracks."

Q. Let me, sir –

MR. KELLEY: If the witness could please be handed the jury notebook, please.

THE COURT: That's it right there.

THE WITNESS: This? Okay.

BY MR. KELLEY:

Q. Excuse me, Mr. Bosley. If you would look, please, at Exhibit 409. Have you ever seen that document before?

A. Yes, I have.

Q. Is this a document that you typically at meetings throughout the year see documents similar to this at Weyerhaeuser?

A. No, I would not.

Q. Okay. Is this the only such document you've ever seen that identifies the market share of the various hardwoods?

[Tr. 80] A. There may have been other ones I've seen.

Q. You see on Exhibit 409, Weyerhaeuser estimates its share of the alder finish market at 75 percent?

A. Yes, I do.

**[Vol. 5-B (Apr. 14, 2003)] [Testimony of Arnold Curtis]**

* * *

[Tr. 87] together.

Q. Now, you say industry grade. Where did this industry grade come from?

A. From the National Hardwood Lumber Association who promulgated the grades for hardwood lumber species of all types.

Q. So how did these industry grades that you referred to, how did they compare or relate to the proprietary grading system that you and Northwest Hardwoods developed?

A. Well, the first thing we found on the industry grades is that they had not been designed for the end user's needs. And so when we got into evaluating what the real needs of the end users were we found that there was a lot more value to them if we sorted the grades into our own what we call proprietary grades, where they were much more specifically designed to certain types of end-user applications.

Q. Now, what about other techniques or other improvements in the milling process, in the sawmilling process or the drying standards? What did you and Northwest Hardwoods do there with respect to this development of alder lumber?

A. Well, part of our strategy was to, first of all, create this improved value in the marketplace. But then, secondly, to increase the yield out of the logs in our mills through state-of-the-art technology, we developed a new thin kerf rotary sawing system.

[Tr. 88] It was the first one used which was followed by an abrasive planer instead of a knife planer that surfaced the lumber. And then a number of other things over the years, all of which were designed to either or both increase the value to the end users or improve the yield of the logs through the sawmill.

Q. And when you refer to end users, what types of businesses are you referring to?

A. Well, they are primarily kitchen cabinet manufacturers and furniture manufacturers of all types. There were others that made all kinds of different things out of the hardwoods; but those, plus the grocery pallet manufacturers, were the largest.

Q. Now, how were these end users, in particular the furniture manufacturers and the kitchen cabinet manufacturers, how were they receiving what you've been developing in terms of alder lumber of Northwest Hardwoods?

A. Extremely well.

Q. Tell us about it.

A. Over the years that we were in the business, most of the time that we were sold, which meant that most of the time we had more demand for what we were producing than we could supply.

Q. So what did that prompt Northwest Hardwoods to do?

A. Well, to expand. Most of the years that we were in the [Tr. 89] business, we were out looking for more capacity to get more product for people who wanted to buy it from us.

Q. Mr. Curtis, earlier in this trial, a man named Jim Harrison, part of the family who owned Diamond Wood down in Eugene testified. Did you have discussions with any members of his family as part of your negotiations to purchase Diamond Wood?

A. Yes.

Q. What, if anything, did you tell the members of the Harrison family, the owners of Diamond Wood, about Northwest Hardwoods' intentions or plans in Oregon? Describe that for us, please.

A. Well, we had plans to gain capacity or the resource which included Oregon. And we had be looking at available mills down there to have – to acquire capacity, so when they offered their mills to us, we were very interested.

Q. You say "they offered their mills" to you. Who actually initiated that sales transaction? Was it your company or was it Diamond Wood?

A. No, it was Diamond Wood. It was the Harrison family who actually contacted a senior vice president at Weyerhaeuser's headquarters because they were offering a package, most of which involved a number of tracts of timber most of which were softwood. The hardwood mills were part of the package that they offered.

* * *

[Tr. 93] Q. You just mentioned log now. That's a good time then to transition to talk about logs. With respect to the issue of log procurement or going out and getting logs for your milling operations, what were the companies, Northwest Hardwoods' objectives in buying logs and buying alder logs in particular? What were you trying to do?

A. Well, again, our raw material strategy stemmed from – we were trying to create the value in the marketplace, so we wanted the best quality of logs we could get for starters. And, secondly, we were trying to extract the maximum value of the logs going through the mills. And basically all we did besides that was try to make the best buy that we could on the logs at each mill based on the value of those logs.

Q. How did you know, how does one know how many logs to buy for a mill? What's the strategy there?

A. Well, each of our mills put together an annual plan and a quarterly plan. And we sold our lumber – in order to give more consistency to the end users, we sold our lumber in advance on a quarterly basis, so we were selling 90 days out in advance of our production at the start of each quarter.

So we had a pretty good idea of how many saw logs especially that we would need.

Q. Mr. Curtis, while you were at Northwest Hardwoods, while you were president at Northwest Hardwoods, did that company at any time have a strategy to raise log prices or

* * *

[Tr. 96] time. So you try to go into that time of the year with your maximum log inventory, and you try to balance it out so that you don't run out through the winter months.

Q. There has been some testimony in this trial about Northwest Hardwoods' log inventory. Do you have any particular recollections of seeing any log inventory issues while you were at Northwest Hardwoods?

A. Not on the saw logs, although there were a couple of times we did run out of saw logs at one or more of the mills.

Q. Let me stop there then for a minute. What happens when you run out of saw logs?

A. Well, your whole system falls apart. You have a problem with your reliability of the customers, because you don't produce the lumber that you expected. And obviously it creates havoc with your bottom line to lose money if you run out of logs.

Q. Okay. Now, I interrupted you. You were saying with respect to log inventory issues, not with respect to saw logs, but that was when I interrupted you. Please continue.

A. Now, with respect to pulp logs, we had especially a situation in the Longview area where Weyerhaeuser also owned a very large pulp mill in Longview right near our sawmill. And they were big users of hardwood chips to make pulp and paper out of, but they were not as good at forecasting their [Tr. 97] usage as we were.

And we had two or three years where during the summer months we bought pulp wood real heavily to cover their expected needs the rest of the year. And between that time and the winter months, two or three times, their markets fell or curtailed their use of it, and we were stuck with big pulp log inventories two or three times, as I recall.

Q. Do you remember what years they were?

A. It think '89 and '93. Those were the ones that I remember most.

Q. Okay. I take it then that those were pulp logs that were purchased by the Northwest Hardwoods mill in Longview. Where would they have been stored, those pulp logs, before they're made into chips?

A. Well, we stored some of them in a log yard at the mill. We stored a lot of them in log rafts in the Columbia River, because alder will last longer if you store it in water than if you put it out on land. And then Weyerhaeuser had another yard about a mile away from our mill that we used on one occasion to store pulp logs.

Q. And then after those pulp logs would have been turned into chips by the Longview Northwest Hardwoods mill, they would be shipped over to the other Weyerhaeuser mill, the pulp mill in Longview?

[Tr. 98] A. Yes. They went from our mill into the pulp mill to be converted into pulp and paper.

Q. And approximately what's the difference, if you know, between Northwest Hardwoods' sawmill in Longview and the Weyerhaeuser pulp and paper mill in Longview that bought these hardwood chips, approximately?

A. About two miles.

Q. Turning to another area, Mr. Curtis, a man named Cliff Chulos testified earlier in this trial. Do you know Cliff Chulos?

Do you know Cliff Chulos?

A. Yes.

Q. Tell us generally who he is and how you know him.

A. Cliff was hired by Dave McCall who was our vice president of sales and marketing and worked for us in our Portland sales office for a number of years and was one of our better salespeople that we had.

In 1987, when we moved our headquarters of Northwest Hardwoods up to Federal Way where the Weyerhaeuser headquarters are located, we asked Mr. Chulos to be the manager of the Portland sales office, which he was.

Q. Now, Mr. Curtis, Mr. Chulos, in this trial, testified and made certain statements that he attributed to you about using log prices to try to get log pricers higher to hurt the competition. Did you ever make any such statements?

[Tr. 99] A. Absolutely not.

Q. Tell us what happened with Mr. Chulos and his position. What happened in the last couple years that he was employed by Northwest Hardwoods?

A. I can't remember the exact timing, but I think it was around 1990 that Mr. Chulos had a severe heart problem. I was notified that he was in Portland and had open heart surgery, and was going to be away from work for an extended period of time.

After he was released by his doctor to return to work, his doctor informed me that he had had a septuple heart bypass surgery. And I talked to the doctor about what limitations he should have, the doctor recommended that I not put him back into a high stress type job like he'd been in prior to his heart problems.

Q. What did you do?

A. Well, we were relocating all of our export sales staff to our headquarters in Federal Way. And I needed a good manager for that part of our business because it was growing real rapidly, so I offered Cliff a job as manager of the export sales group, which I thought he would really like because he really enjoyed the export sales program. And I felt that it would probably be somewhat less stressful than running the sales office in Portland.

Q. Did he remain in that position very long?

* * *

[Tr. 100] Q. Do you, Mr. Curtis, have an opinion regarding the [Tr. 101] character of Cliff Chulos for honesty and truthfulness?

A. Yes.

Q. What is your opinion, sir?

A. I would say that he is not very honest.

* * *

[Tr. 102] Towards the time that I was retiring, the softwood prices here in the Northwest started to come back down, mainly for the Douglas fir and the hemlock.

Q. Has there also been decreased logging of the Douglas fir and the hemlock and conifers generally?

A. Yes. There were couple of things that impacted that. One that's in the newspapers a lot was about the curtailment of logging on the federal property, on Forest Service and BLM land. But there was probably a bigger curtailment of future harvest by the riparian zones.

Q. What does that mean? Spell that out for us, please.

A. The riparian zone is the area on both sides of a stream. And if you are out in the woods or you fly over the forest, you'll notice that a lot of hardwoods grow following

the streams through the timberlands. So as the riparian buffers were set aside to protect the streams, the best that I can figure out, there's probably a third of the future potential harvest of alder was going to be lost.

Q. What did you observe then, say, the years from early 1990s until your retirement in the later part of the decade, what did you observe in terms of the availability and prices of alder timber ultimately turning into alder logs? What did you see?

A. That there was just a trend line was moving up.

Q. Why?

[Tr. 103] A. Well, again, part of it was because in the past most of the years I was in the business, we had a big surplus of alder in the Northwest. But with the curtailment going on of the harvest, and then a lot of the land had already been converted to conifer production, you could see the supply diminishing.

At the same time, the demand for alder was increasing, especially to the point where a lot of the veneer mills jumped into the business to start producing alder veneer. And a veneer mill buys the highest grade logs there are and they pay a lot of money for them, more than a sawmill can afford to, so those were all things pushing the prices upward.

Q. And that's what you've observed up until the period of your retirement?

A. Yes.

Q. Now, would you talk to us very briefly about the period of your transition from basically your retirement and your last year or two with Weyerhaeuser and Northwest Hardwoods. To whom was the managerial responsibility that you held? How was that transitioned and to whom?

A. Well, during 1997, I spent a lot of time turning over the operating management of Northwest Hardwoods to Rob

Taylor. And my role became more of one of advisory to him, reviewing strategies with him, but I was no longer what [Tr. 104] you would call a hands-on type manager of the business.

Q. Were you doing other activities for the Weyerhaeuser at the time?

A. Yes. In 1996, I became involved in the development of their pruned pine resource in the southern part of the United States, and development of their pine and hardwood resources in Australia, New Zealand and Uruguay.

Q. And then you ultimately retired when?

A. I retired in June of 1998.

MR. SIMON: Thank you, sir. Nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HAGLUND:

Q. Mr. Curtis, in that '97-'98 time frame you were still reviewing all of the strategies in place at Northwest Hardwoods, isn't that so?

A. Pretty much so, yes.

Q. Now, isn't it a fair statement, Mr. Curtis, that between 1980 and 1995, the end of that year, that Weyerhaeuser went from zero to 75 percent of the alder industry in the Pacific Northwest?

A. Yeah. Other than Weyerhaeuser before they acquired us in some years had been in and out of the alder business before. At the time they acquired us, I can't remember if they were still producing anything in their own mills, but it wouldn't have amounted to much, so I am pretty sure that they started around zero.

[Tr. 105] I don't know about the 75 percent. We never knew for sure how much other mills were producing. There were always some small mills that would jump in and produce when the demand was real hot. And there was always some multi-species mills, that if they felt they could make more money sawing alder than cedar or fir or hemlock, they would jump in and saw alder, so I never did know what percent.

Q. Wasn't your own estimate 70 percent by the time you acquired Goodyear-Nelson and Diamond in 1995?

A. Yeah, I would say I would guess about 70 percent.

Q. Okay. Now, isn't it true, Mr. Curtis, that in 1983, you planned with Juel Sheldon to open a log merchandising yard and both drive up and deprive – I am sorry, I am misstating this.

Isn't it true that in 1983, you worked with and directed Juel Sheldon to open a log yard in the Longview area and both drive up log costs and deprive Ross-Simmons of those?

A. No, that is absolutely not the case.

Q. Isn't it true, sir, that you on at least one occasion stated to senior staff members, quote, "There's only room for one alder sawmill in Longview"?

A. No.

[Tr. 106] Q. Isn't it true that you tried to buy Ross-Simmons in 1983?

A. We looked at it twice and I can't remember if the year was '83. It could have been.

Q. You thought you had a deal at one point, didn't you, with the Ross family?

A. We never did get into a definitive agreement.

Q. Well, isn't it true that John Simmons and Marie Simmons protested the proposed sale on antitrust grounds?

A. I think they did. I don't have first-hand knowledge of that.

Q. And isn't it true that within two years after the ownership of Ross-Simmons being consolidated in John and Marie Simmons that you convinced Weyerhaeuser Company to allow a conversion of the old Exeter mill that had been acquired from Stan Rose in Longview just down the street and convert it to a hardwood mill?

A. No. Weyerhaeuser came to me, I think it was in 1985, and told me that they were going to discontinue production of old-growth hemlock studs at that mill, and the mill was going to be shut down permanently and they were going to let all the employees go. And they asked me if I thought they could successfully convert it into a hardwood mill and operate as one. I said, "Yes," and we transferred it, and started it up as a hardwood mill.

[Tr. 107] Q. Isn't it true that you at one point tried to buy Cascade Hardwoods?

A. Yes.

Q. Isn't it true that you repeatedly directed Heinz Hohendorf, your Director of Operations, to use the log market to hurt competition?

A. Absolutely not.

Q. Isn't it true that a saw log can turn into a pulp log?

A. Yes.

Q. In fact, in your opinion, isn't it true that in the summer months alder log inventories can be compared to piling up lettuce in terms of their propensity for spoilage?

A. Yes, but let me clarify one question. You can't actually turn a saw log into a pulp log, but if you let it stain badly enough, it's not going to make good lumber.

Q. Isn't it true under the log grading system that's in place at your company or at Northwest Hardwoods that a log can stain enough to go into a very – into the low value category that's not much more valuable than a pulp log?

A. Yes. If it comes in in that shape. We would downgrade it when we bought it as a pulp log.

Q. Now, isn't it true sometime in the late '80s that you counseled your senior managers to stop talking about alder as a distinct industry and instead refer to it as a small part of a total U.S. hardwood market?

* * *

[Tr. 112] A. Yes.

Q. Now, in November of 2000, do you recall the chairman and CEO of Weyerhaeuser announced a hostile takeover attempt on Willamette Industries?

MR. SIMON: Beyond the scope of the direct, Your Honor.

THE COURT: Objection will be overruled. It's cross-examination and it relates to the subject.

You may answer.

THE WITNESS: Tell me the question again.

BY MR. HAGLUND:

Q. Do you recall that in November of 2000, the president, CEO and Chairman Steve Rogel announced that private negotiations with Willamette Industries' executives had not resulted in a deal and that Weyerhaeuser was commencing a hostile takeover attempt of the publicly-held company?

A. Yes.

Q. And I would like to put on the screen, Mr. Curtis, a map that's been marked as Exhibit 14. Do you recognize that part of Oregon and Washington. Longview is here.

A. Yes.

Q. Centralia is there?

A. Yes.

Q. Do you recognize all of the dark red as Weyerhaeuser tree farms in Southwest Washington?

[Tr. 113] A. Yes, it looks like it.

Q. And let me represent to you that the pink here is Willamette Industries' holdings in Northwest Oregon. You're familiar with their large tree farm in that part of Oregon, are you not?

A. I am not real familiar with it. Mainly, I know what I read about it.

Q. I want to ask you this question: I want you to assume that there has been some testimony in this case that in the last quarter of 2000, and the first quarter of 2001, that a turnaround business consulting firm on behalf of Ross-Simmons is attempting to market and sell Ross-Simmons as a company at its Longview location.

Wouldn't you agree, Mr. Curtis, that Mr. Rogel's announced hostile takeover attempt of Willamette Industries with its large holdings in Northwest Washington in combination with the holdings that Weyerhaeuser already had in Washington state, would have a chilling effect on the ability of that turnaround team to sell Ross-Simmons to a buyer?

A. Well, I don't know that I'd agree with that without knowing some more facts about it, but in the earlier years, as I recall, especially on the southern part of what I'm looking at as the orange here, that that material didn't really flow up into the Longview area. It was not a [Tr. 114] well-

developed area for alder logs down there. And I – as I recall, most of our logs and I suspect Ross-Simmons' logs came from much shorter distances than that area.

Q. Is it your testimony, sir, that Clatsop County where this land is located, referring to the Willamette that is in pink, not orange, that Clatsop County alder logs did not flow to your Longview mill as well as Ross-Simmons?

MR. SIMON: Objection, Your Honor, misstates the evidence. That's not Clatsop County.

THE COURT: Restate your question.

BY MR. HAGLUND:

Q. Is it your position, Mr. Curtis, that these Willamette lands in Clatsop and Columbia Counties in Northwest Washington, that your company as well as Ross-Simmons did not receive alder saw logs from that part of Oregon in the 1990s?

A. No, we did, but I was referring more to the southern part of that. That looks to me like it is getting down into Tillamook County.

Q. You're referring to this down here then? Can you see it on the screen?

A. Yeah, I see that. How about that other part?

Q. This is up by Astoria.

A. Okay. Out of Astoria, definitely, we had flow of logs coming from there.

[Tr. 115] Q. So if this is Astoria right there approximately, the little dot that I made.

A. The little dot, not the arrow?

Q. No. The arrow is further south.

A. Yeah, right. That's what I'm saying. About where your arrow is, you know, I wouldn't guess without knowing

for sure that those logs would tend to flow down to Garibaldi, but I don't know that for sure.

Q. You're familiar with log rafting, aren't you?

A. Yes.

Q. It's a pretty cheap way to move wood, isn't it?

A. Well, you know, since I've retired, I haven't seen any log rafts in the river anymore, so I don't know what happened to that business, but I don't.

Q. Let me ask this very simple question: You're aware, are you not, that in the 1990s, your Longview mill, which is closer than Garibaldi to at least the northern half of that Willamette Industries' land holding drew alder saw logs from Willamette in that upper northwest corner of the State of Oregon?

A. Yeah, we would have drawn some from there.

Q. And would you agree, Mr. Curtis, that a potential buyer of Ross-Simmons in the fourth quarter of 2000 or the first quarter of 2001, evaluating the resource supply situation, would have viewed the pending hostile takeover attempt of [Tr. 116] Willamette Industries as a potentially negative factor in looking at whether or not it made any sense to buy Ross-Simmons?

MR. SIMON: Your Honor, this is way beyond the scope of my direct. I object.

THE COURT: The objection will be overruled.

THE WITNESS: I have no idea what a potential buyer would do.

THE COURT: I am going to sustain the objection on the grounds it's argumentative.

MR. HAGLUND: I'll go on, Your Honor.

BY MR. HAGLUND:

Q. Isn't it true, Mr. Curtis, that Weyerhaeuser further enhanced its position in the alder industry with the June 1999 acquisition of the largest forest products company in Canada, MacMillan-Blodell?

A. This is after I retired. You know, I am not sure.

Q. Are you familiar with the fall 2000 acquisition of Coast Mountain Hardwoods, also in British Columbia?

A. Again, I heard about it.

THE COURT: I think this is argumentative.

MR. HAGLUND: Okay. All right. I'll move on.

BY MR. HAGLUND:

Q. Mr. Curtis, you said that you saw the – before you retired, you saw the alder supply decline. Isn't it true, [Tr. 117] sir, that between 1995 and the end of 2000, that the total amount of alder harvested in Oregon and Washington was basically flat for those five years. Are you familiar with that?

A. I don't know.

Q. You don't know. Riparian buffers, you refer to them as set-asides. Isn't it true, sir, that the forest practices regulations in Oregon and Washington allow considerable removal of alder within the riparian zones. You're familiar with that, aren't you?

A. Again, I really don't know. I mean, I know there's some that can come out and I have no idea how much. I know the numbers I was looking at in mid-'90s showed that there was going to be about a 35-percent decline in the hardwood harvest.

Q. But they really aren't set-asides, are they? Or you just don't know?

A. Yeah. I'm not sure what a set-aside is exactly.

Q. And isn't it true that your own company expected the impact, the regulatory impact, to really come in early – early in this decade of the 2000s, not in the '90s?

A. Well, yes. It was going to happen around the end of the century.

Q. Now, you also referred to a lot of veneer mills jumping in. Are you aware of any veneer mill, in Oregon or

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**[Vol. 5-B (Apr. 14, 2003)]**
**[Testimony of David McCullam]**

* * *

[Tr. 128] not sure.

Q. Would Mr. Cliff Chulos attend those meetings?

A. He began to attend those – what era are we in?

Q. Late '80s, early '90s?

A. Oh, yeah, certainly. Cliff was very much a part of that in the late '80s, yeah.

Q. What was Mr. Cliff Chulos' job during in the late '80s and early '90s at Northwest Hardwoods?

A. Cliff assumed a growing role in the entire marketing of our products. Beginning in 1987, he began to grow into that to a greater capacity. And that growth, along with the growth of our products and our production, continued right into the early '90s. He was an integral part of the team.

Q. What types of topics were discussed at these meetings, areas?

A. We would talk about performance, which was the past performance of a month or a quarter. We would talk about the potential of markets, where we thought the markets were going for the next three, six, nine and twelve months.

We would talk about the source of raw material, where it was coming from, what challenges they could foresee in the near term. And we would talk about our facilities, were we having problems, were we having expansions, where were we going.

Q. Were there any discussions about log inventories?

[Tr. 129] A. There would be, yes.

Q. And what types of discussions would there be about log inventories?

A. The log inventory discussions at those meetings always talked about maintaining the proper balance of lumber or logs to be assured that we would keep the sawmills running, they wouldn't run out of logs. And that was a very delicate balance because the supply of logs was seasonal.

It could be get very limited during the wet months where you might get snow or you might get closures in the woods, so we had to build inventory to get through those. On the other hand, you didn't want to get too much inventory because if you got caught with warm weather, the logs would stain. And then it became our job to sell stained lumber, and that was not a pleasant task and it was not a profitable task.

Q. So from your perspective as a salesperson, what were your views on lumber stain?

A. On lumber stain?

Q. Yeah.

A. We didn't like it. It was – it was a substandard product that resulted because of the uniqueness of the alder log, but it was not something that you jumped with joy when you had it.

Q. Now, at these meetings, did Arnold Curtis ever express

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**[Vol. 5-B (Apr. 14, 2003)] [Testimony of George Brulotte]**

* * *

[Tr. 136] wood was being marketed.

Q. To whom did you report at Ross-Simmons?

A. Mel Kaiser.

Q. Who were Ross-Simmons' major suppliers when you were there?

A. For wood?

Q. For logs.

A. For the logs? Oh, there were big corporate accounts like Longview Fibre that – they provided a big chunk of the wood, Campbell Group and Champion International. And then there were various and sundry – we had some loggers that were – would bring in the wood off their jobs to the mill. And then there was just a gob of just small vendors selling anywhere from, you know, 5 to 50 loads.

Q. And did certain kinds of suppliers do timber sales and certain kinds of suppliers would call you?

A. Yeah. Yeah, for an example, Champion had everything by timber sale, and they would put the wood on the market, and you would come up, look at it. You would make a bid on the wood, looking at it standing, and I – that's where my forte was.

And Mel handled the big accounts with Longview Fibre and Campbell Group, and they would basically bring it into there – in from their woods operations, funneling it into the mill. And Steve Remmick had a lot of contacts with [Tr. 137] loggers, and he would go out and purchase wood from these loggers that he had known from his previous – previous experience.

Q. So you would go out and look at the logs, give the vendor a price, and then what would the vendor say usually?

A. Sometimes – it varied from vendor to vendor because some people had been doing business with Ross-Simmons for many years. You give them the price and they'd say, "Okay," and they'd start shipping the wood in. Others were, you know, marketing it and getting a bid from all the potential delivery points and just weighing up the prices and they make the selection then. Sometimes you'd get the wood; sometimes you don't.

Q. Would you ever raise your price in the face of a competitor's bid that was higher than yours?

A. Well, that didn't happen. I mean, it – it wasn't that common in the business that I did. If somebody you know and most – because usually you had one shot at it, you know, and you put your bid in, and if it wasn't high enough, they'd say, "Well, you're going to send this someplace else," and they didn't come back and try to bump the price up, you know. There may have been a couple of times that did occur, but it – but it wasn't common, to my experience.

Q. And is the only time you were buying hardwoods is when you worked for Ross-Simmons?

[Tr. 138] A. That's correct.

Q. So you never told someone you'd like the last look at a log?

A. At Ross-Simmons, you mean, like last offered to?

Q. Right, that's what I mean.

A. No, I didn't do that.

Q. When you were at Ross-Simmons, who were your major competitors for the purchase of alder logs?

A. Northwest Hardwoods and Cascade Hardwoods here in Chehalis.

Q. Did you view those as your main source of competition or –

A. Yeah. Cascade Hardwoods, primarily because they were able to utilize or pay higher prices for the pulp-type logs.

Q. Do you know why they were able to pay higher prices for the pulp logs?

A. They had just – they had some small logs that were able, they were able to get a board or two off of every butt on the pulp, and it just gave them that edge. Instead of making chips out of it, they got a board, which, you know, a grade board, so that it increased their return out of that log, and typically it made a $4 a ton difference.

Q. Did you ever have any trouble buying enough logs when you were at Ross-Simmons to keep the mill running?

A. Yes. Yeah, it was – I don't remember the exact time [Tr. 139] frames or as far as what month it was or anything, but when Ross-Simmons lost the ability to – they ran out of working capital, so they lost the ability to pay for logs – their logs in a timely manner.

And at that point, there were many vendors that just wouldn't risk sending their logs to Ross-Simmons, and there were sometimes weeks on end that the mill was only running partially or just – or completely shut down and waiting for the – enough logs to – excuse me – enough logs to enter the yard to run the mill for a while, and that would have – well, let's see. I left in September. That would have been probably July and August of 2000.

Q. Okay. And when did you first hear that Ross-Simmons was having trouble paying its suppliers?

A. Again, I'm not exactly sure, but the first – probably the first four months of 2000, you know, the – the – historically Ross-Simmons had always paid. If you delivered, you

know, during one week, you would be paid. I think it was the following week, you know, so you got weekly pay.

And we were told it was on a – I just remember it was on a Friday, they came in and said, "You have to cut off the suppliers. Just tell them not to deliver because we don't have enough money to pay them," and –

Q. Who told you that?

[Tr. 140] A. The managers. There was, well, John Simmons and there was a guy there that worked kind of on a – he was a consultant.

Q. Gordy Boyd?

A. No. It was a Gayle something, but I don't remember his last name. He was just kind of – he was kind of analyzing, you know, before they hired a CFO, he was kind of filling in that capacity.

Q. So they brought you in one day and told you to stop buying logs, or what happened?

A. They – yeah. They – that's essentially what they said. "You've got to call all of your vendors and tell them not to deliver any more, because we – we can't – we don't have enough money to pay for the logs we have gotten this week – next week, and it was from that point on that the payment for the logs was slow for all – essentially all vendors.

Q. Did you have anything to say in response to John Simmons when they told you this?

A. I told him that it was the kiss of death. If you don't pay your log bills, it's – it's the kiss of death for a mill.

Q. And after you had that conversation, did you go out and call your vendors?

A. Uh-huh. If I could find my calendar, I've got it [Tr. 141] marked "Black Friday."

Q. And did the vendors stop selling and delivering to Ross-Simmons?

A. Yeah. You know, they stopped deliveries, and then I – I think it was – it was a panic. They – they had never had that happen before, I don't believe. It's just – it's like a panic thing. So then afterwards they had a chance to regroup, and then we went out and started, you know, buying logs, you know, again, after that, but –

Q. Did you buy them from the same vendors?

A. Many of them were the same vendors, yes.

Q. And –

A. But we did lose some customers because of that. I mean, you know, some vendors just weren't willing to take the risk.

Q. Can you recall any other supplier that was lost as a result of the late payments?

A. Well, there was Evenson Logging, which is – operates out of Northwest Washington, a privately-held family-owned company. And Evenson, you know, they were a pretty good size vendor. They owned, I don't know, 20 or 30,000 acres of land right around Longview. So they were – that was one of Mel's accounts because he had known them for a lot of years, and they – they stopped deliveries.

You know, they – they were delivering quite a bit [Tr. 142] of wood and so, you know, they weren't getting paid, so they – they just stopped. No point in putting – taking that risk. They just, you know – and there were others that – in smaller vendors, that would ask, you know.

Q. Did you ever observe any problems in Ross-Simmons' mill operations?

A. Yes. As far as the mill itself, it was a – it was an old mill.

Q. And when you say "old," do you mean – what do you mean exactly?

A. Most of the equipment was – was, although it was good equipment, it wasn't updated. They didn't have a lot of the computerized saws and things like that. There were some computers in the mill. I'm not a mill man, but it was no high tech mill by any means.

Q. While you were at Ross-Simmons, did you observe any new equipment purchases or investments in technology?

A. The only – the only major one was the – the stacker.

Q. What's that?

A. Basically, it replaces the green chain. It – it sorts and stacks the lumber as it comes out of the mill.

Q. And do you recall when that was made – that purchase was made?

A. It would have been – well, when I left in September, it was just – they were working the bugs out of it. It was [Tr. 143] just coming on line.

Q. Did you think that was a beneficial improvement for the mill?

A. Yes.

Q. And you said that you left Ross-Simmons on September 8 of 2000?

A. Yes.

Q. Why did you leave?

A. They let me go. They were –

Q. Do you know why?

A. It was a lack of money.

Q. Did you ever observe any problems in the management of Ross-Simmons' mill?

A. Well, I saw – there were some – some things that – I don't think John Simmons really understood mills, and he was the manager when I was there. Gary Nelson had just resigned just previous to me coming on line, so there was John Simmons, and Gordy Boyd at Global Ventures was assisting in the management.

Q. And what makes you say that John Simmons didn't understand mills?

A. He was a – he was a scientist, a NASA scientist, for all of his career. And he came to manage this family mill, and there were just – some of the decisions that he made were ill advised.

[Tr. 144] Q. Do you recall any of those decisions?

A. Well, he did things. He liked to pit one crew against the other on production, which could be a good thing, but the outcome was that they high graded the logs out of yard to –

Q. What did you say? They what?

A. High graded.

Q. High graded, what does that mean?

A. It means they pulled all – pulled all the logs out of the mixed decks, and so that there – their shift would have more production.

Q. Oh, I see.

A. Because you get more production out of the nicer, bigger logs. And the other thing that I observed that was – that the cutting of the logs was not done in a – in a most – to maximize the dollar out of each log in many cases.

Q. What do you mean by that? How does one maximize the dollar out of a log versus how was Ross-Simmons doing it?

A. Well, in lumber markets, the thicker the board, the higher the price. And, you know, I felt that – and this was just my impression in observing what was going on, but they would cut a lot of four-quarter because it was easy to sell.

And I always felt that they should have been [Tr. 145] cutting the six and eight-quarter, and letting the narrower stuff come out as fall down rather than being the primary cut.

Q. Did you ever discuss those issues with anyone?

A. Yeah.

Q. At Ross-Simmons? Who did you –

A. Talked to John Simmons about it.

Q. And what would be his response? What was his response?

A. He don't think that he – he didn't want to believe that they were not doing the right thing with the logs, but, you know, I pointed out that, you know, I felt that the logs had been mismanufactured, and he didn't – he disagreed with me.

But in the – after having made a public comment, you know, about my allegation, if you will, that they had mismanufactured the logs, that he acknowledged after a couple weeks when he saw the output from the kiln that I was correct.

Q. Do you remember approximately when you had that discussion with John Simmons?

A. Probably June or July of 2000.

Q. Did you observe any other problems in Ross-Simmons' mill operations while you were there?

A. That's all that I can think of. I mean, being an older mill, there's a lot of maintenance, you know, and that was [Tr. 146] just – maintenance was – was a problem. You know, the – it increased the costs.

Q. And maintenance, you mean maintenance of the equipment?

A. Yes.

Q. There in the mill?

A. Yeah.

Q. In this lawsuit, there is allegations against Weyerhaeuser of anticompetitive conduct. Have – did you ever observe anything while you were at Ross-Simmons on the part of Weyerhaeuser that would be what you would call – what you would consider anticompetitive conduct?

A. No. During the time frame that I worked there, I didn't see anything.

Q. You started shortly after Gary Nelson had left?

A. Uh-huh.

Q. That was December of 1999?

A. '99, yes.

Q. So you were with the company approximately 9, 10 months?

A. Nine months.

Q. Nine months. Okay. And –

A. Well, yeah, 10 months.

Q. So throughout your time frame, was Global Ventures present in terms of helping?

A. Yes.

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**[Volume 6-A (Apr. 15, 2003)]**
**[Testimony of David Princehouse]**

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[Tr. 5] middle of 2001. Would you tell us what is Cascade Hardwoods or who is that business?

A. Cascade Hardwoods was begun in 1991, or 1961. It was a processor of alder chips for the pulp and paper industry. In 1964, Cascade Hardwood leased a portable sawmill and began sawing alder lumber. Cascade Hardwood has grown over the years to become a major player in the alder hardwood business.

Q. As general manager throughout the 1990s, what were your responsibilities, Mr. Princehouse, at Cascade Hardwood?

A. My responsibilities were the management of the business, the entire business.

Q. Now, during the 1990s, while you were general manager of Cascade, did you consider, say, Weyerhaeuser's Northwest Hardwoods business to be one of your competitors?

A. They were the single most significant competitor that we competed with.

Q. Who were some of the other competitors in the 1990s? Who made alder lumber?

A. Ross-Simmons, Rose City, Morton Alder, Alexander Alder, Diamond in Eugene, Sedro Woolley and Northwest Hardwoods.

Q. Very good. That was about alder lumber. Can you tell me, Cascade Hardwoods makes finished alder lumber, correct?

A. Correct.

Q. Among other products?

* * *

[Tr. 7] or a dark finish. This is cherry that is here, and this is a lighter finish versus walnuts or darker woods. They decide they are going to have a light-colored product so then they go and take a look at what lumber is available. There is Europe beech. There is poplar, birch, cherry, linga, and then they decide they are going to select alder, hopefully, and then we sell them that product.

Q. And sometimes your customers select alder and sometimes they don't. Is that a fair statement?

A. Absolutely.

Q. When you talk about furniture products, are you including within furniture products cabinets?

A. Yes.

Q. Some people talk about some cabinet, some furniture. You are including cabinets?

A. You bet.

Q. I understand that Cascade Hardwoods has its own proprietary grading system. Is that right?

A. That's correct.

Q. Tell us about it and tell us its history and purpose?

A. When I went to Cascade in 1992, we graded our lumber on NHL grades, National Hardwood Lumber Association grades. Grading is really a sorting process. If you are to take a look at a beach, and if you take a look at all the rocks on the beach, you have got little rocks and big rocks, green [Tr. 8] rocks and purple rocks. If you sort all those up, you end up with different piles of rocks, big ones and little ones and different colors.

In lumber, you have got high-grade lumber, mid-grade lumber, specialty lumbers for different products. So you have sorts. When I went there, we had seven sorts. Those were adequate in 1992. But in 1995, we began our proprietary grading. The reason was is that the customers were demanding a finer sort.

Our proprietary grades differed from Northwest Hardwoods' proprietary grades in that our grades were based upon a 2-inch wide strip of clear lumber within a board. Northwest Hardwoods' grades were based on pieces of clear lumber within a board that resembled the NHL grade rules, which was a 3-inch wide by 6-foot long strip, 4-inch wide by a 4-foot long strip within a board.

Our proprietary grades were different than Northwest Hardwoods. The reason we did that is because we were focused on the panel manufacturing market, which ripped a board into thin strips, cut out the defect, and then laminated them into panels that were used in furniture or cabinets or shelves or that kind of stuff.

Q. When you retired from Cascade, how many different grades of alder lumber did Cascade have?

A. We had over 30.

[Tr. 9] Q. Did Cascade use those grades in helping to compete with other hardwoods?

A. Yes. By making the finer grades, what I say is the more specific sorts, we allowed the customer to not have to buy junk. In other words, they bought only the grade and the lumber product within that grade that they wanted. Under the old NHL grade rules, a customer would buy a unit of lumber and they may have had to waste 40 percent of that lumber because it had other grades in it that they weren't particularly looking for.

Today you have to have the specific grade that the customer is looking for almost within every board. And that's

why we went to the proprietary grades, much finer sorts, much more customer focused. It allowed the customer to have a higher yield.

Q. By the way, I take it – have you ever worked for Weyerhaeuser or Northwest Hardwoods, Mr. Princehouse?

A. Not to my knowledge.

Q. Okay. Thank you, sir. Now, you are familiar with the Washington Hardwoods Commission?

A. Yes, I am.

Q. What is the Washington Hardwoods Commission?

A. Washington Hardwood Commission was chartered by the State of Washington as a public commission in 1991. Its charter is to promote the planting, management and marketing [Tr. 10] of alder.

Q. Have you ever served on that commission?

A. Yes, I have.

Q. In what capacity and what time period?

A. I am the vice chairman of that commission today. I have been a commissioner since 1995.

Q. Now, in the mid-1995s, then, early to mid-1990s, did Cascade Hardwood, your company, receive or develop any information or beliefs about the future availability of harvestable alder timber in the Pacific Northwest?

MR. HAGLUND: Objection, Your Honor, calls for expert testimony.

MR. SIMON: Your Honor, I'm asking for fact testimony.

THE COURT: The objection will be overruled. You may answer.

THE WITNESS: I think you all remember the dramatic reduction in the federal timber harvest begun in 1992 – well, it actually begun in the mid-80s, but it really hit the Northwest in the early '90s. Les Aucoin, a congressman from this state, developed a bunch of grants that were aimed at mitigating the lack of the timber harvest.

One of those grants was a $400,000 grant that ended up with the U.S. Forest Service focused on hardwoods. [Tr. 11] The result of that was that the U.S. Forest Service, Washington State Department of Natural Resources, Washington Hardwood Commission, and several other cooperators developed a geographical information system based upon satellite, land satellite pictures of the state of Washington.

That total package, which was managed by the Washington Hardwood Commission, developed a picture of the state of Washington. That data focused on hardwoods. It developed a picture of all of the hardwood available in the state of Washington. That was about 20 billion board feet. It was right down to a 75-square foot section of the whole state. It identified the ownership, where it was located, and it identified the age classes that that hardwood was.

Then over that picture, there were various overlays that were put on. There were overlays. The reason – there were hydrographic overlays. There was land sliding overlays, parks, that kind of stuff. The reason that is important, each one of those overlays took a little bit of the available timber out of harvestability.

In other words, you are not going to harvest in a national park. You are not going to harvest in federal lands anymore. You are not going to harvest where there is riparian zones, around streams and that kind of stuff. The total reduction in the available harvest at that time was around 11 percent, which was significant, but it was not [Tr. 12] dramatic.

I presented that information to the Western Hardwood Association annual meeting in 1997. All of the major players – all of the players in the alder business had that data.

Q. By the way, was anyone from Ross-Simmons at that meeting?

A. Yes, there were. Marie Simmons was there. She was an owner of Ross-Simmons. Bill Nelson was there. Sonny Powell was there. Sonny Powell was the sales manager for Ross-Simmons.

Q. Sorry to interrupt you. Please continue.

A. What that data said was that the alder business was basically harvesting the mature volume. If you take a look at how alder has grown in the Northwest, it really started growing in massive quantities in the 1920s and '30s.

MR. HAGLUND: Your Honor, I am going to object. I think he is interpreting this data as an expert.

THE COURT: The objection will be sustained. I don't find it in the witness statement, either. Go ahead.

MR. SIMON: For the Court's information, it is on page 70 at the first and second paragraphs. I will move on to another area. I think we have covered this sufficiently. That's where it was, Your Honor.

* * *

[Tr. 13] BY MR. SIMON:

Q. Now, with the information that Cascade Hardwoods was receiving, as you described, did Cascade Hardwoods consider this information – can you tell us whether or not it considered this information important?

A. It was critical.

Q. Why?

A. To our business.

Q. Why?

A. Because it said the availability of alder logs was going to dramatically decrease beginning in 1997. There was a harvest in 1997 in the state of Washington of over 400 million board feet of hardwood, of which about 85 percent was alder, about 90 percent was alder. The GIS information said that in 50 years the harvest would be 188 million board feet with a steady decline.

MR. HAGLUND: Same objection, Your Honor.

THE COURT: Objection sustained.

BY MR. SIMON:

Q. Mr. Princehouse, given you have said this information was critical to the survival of Cascade Hardwoods, would you now relate to us what, if anything, Cascade Hardwoods did in response to this information?

A. Yes. We at Cascade Hardwood recognized that we had to extend our log supply and –

* * *

[Tr. 17] So we put in these computer controls, and it not only cost us money but slowed us down. So we ended up having to put in more kilns, too. What it did, it made a higher quality product for the customer, which allowed us to get a higher price.

Q. Thank you. We have been spending some time talking about the production of lumber. I would like to shift and talk about the sales of lumber as experienced by Cascade. Can you tell me, was there any experience that Cascade saw with respect to sales of its lumber products in 1997?

A. Yeah.

Q. What happened?

A. Well, up until August 27th of 1997, it was a seller's market. Our inventory at that date was around 800,000 board feet of finished product. We had customers lined up to take it away. It was the most marvelous experience anyone would ever want to have in business. August 27, 1997, the Thailand baht collapsed.

Q. What's a Thailand baht?

A. Their currency. Then the whole Pacific Rim quit buying alder lumber and our sales went from we could sell anything we wanted to we couldn't sell anything we made. Our inventory went from, as I said, 800,000 board feet to over 6 million board meet in three months. We could not sustain that, absolutely could not sustain that, so we curtailed [Tr. 18] production.

The way we curtailed production was to remove all overtime from the mill, remove all Saturdays, and we started buying a low-quality log and producing pallet because we could sell pallet.

Q. Is Cascade Hardwoods still in operation today?

A. Yes.

Q. Now, did the technology that you just told us about play any role in helping your company to withstand what happened in August of 1997?

MR. HAGLUND: Objection, calls for expert testimony.

THE COURT: Objection overruled.

BY MR. SIMON:

Q. You can answer.

A. The technology that we had put in increased our overrun significantly. Overrun – I'll give you an example. If our overrun is one and we are paying $400 for logs, the cost of the log and the lumber is $400. If our overrun is 1.5 and we are paying $600 –

MR. HAGLUND: Your Honor –

THE COURT: Mr. Princehouse, if you will answer his question directly first. Maybe it will save some time. We are in a little bit of a time crunch here. The question was: Did it play any part? And that's a simple answer.

* * *

[Tr. 20] when I retired. When the market collapsed in August of 1997, there was a dip, a slight dip in log costs, but it was not relative to what you would expect prior to that.

Q. Based on your experience and observations, why?

A. Because we had such good times from '92 to '97. We had invested in not only technology, but we had increased the consumption of logs. We built bigger mills. Cascade was one of those. Northwest was one of them. Virtually everybody was consuming more logs.

And the availability of logs was going down; the mill capacity was going up. And when the line crossed of available logs and mill capacity exceeding the demand for the availability of logs, now all of the profit went from the mills to the timber landowners.

So what happened is, log prices did not drop the way you would expect because the capacity was now larger than the available log supply.

Q. Why didn't the timber owners just sell the logs for lower prices?

A. I guess –

MR. HAGLUND: Objection, calls for speculation.

THE COURT: Sustained.

BY MR. SIMON:

Q. Based on your experience, what does it take to get lower prices from timber owners?

[Tr. 21] MR. HAGLUND: Objection. Outside the scope of his witness statement.

THE COURT: Objection will be sustained.

MR. SIMON: Your Honor, that's page 71, first full paragraph.

MR. HAGLUND: Alternatively it calls for expert testimony.

MR. SIMON: I was asking for his observations.

THE COURT: I don't find that. The first full paragraph you are talking about?

MR. SIMON: Starts with the words "The investments."

MR. HAGLUND: He is talking about the log market.

THE COURT: I think he has covered that already. The objection will be sustained.

BY MR. SIMON:

Q. Mr. Princehouse, let's turn to another area. That is, I understand on two different occasions you actually visited the Ross-Simmons mill in Longview. Is that right?

A. That's correct.

Q. What were the years of the two visits?

A. It was in late 1992 I visited as a courtesy. Juel Sheldon invited me down to tour the mill.

Q. Mr. Sheldon was still president of Ross-Simmons?

A. I'm not sure of the title. He was the head man.

[Tr. 22] Q. That was in 1992. I will come back and cover that with some more detail in a few moments. When was the second time you saw Ross-Simmons?

A. Shortly after they closed. I believe that was in 2001.

Q. Now, would you relate to us what you saw when you were there in 1992 and compare that to what you saw in 2001, please.

A. In 1992, I saw a mill that was in certain ways better than Cascade Hardwood. They had two things that I saw that were really better: The first one is they had a small log line, a V-drum chipper that made center cants and pallets and some furniture lumber which we didn't have. They were able to manufacture lumber out of small logs, much smaller logs, than Cascade could.

The second thing they had was very large log decks and barkers that allowed them to purchase the whole – all of the timber that grew on a piece of land so it became a much more preferred buyer of timber from a timber seller where with Cascade we could only buy sawlogs. Therefore, there was pulpwood that somebody would have to sell that to somebody else.

Q. That was 1992?

A. That's right.

Q. Things looked pretty good under Mr. Sheldon?

A. Yes, they did.

[Tr. 23] Q. What did you see when you came back in 2001? What did it compare?

A. I saw virtually the same mill. The first thing I saw when I walked in the door is that all the overhead wires were there. In the nine and a half years at Cascade we spent a lot of money –

MR. HAGLUND: Objection, beyond the scope of the witness statement.

THE COURT: Objection will be overruled.

THE WITNESS: Cascade spent a lot of capital putting our wiring underground. The reason we did that, every time

it rains on – not every time, but a lot of times when it rains on overhead wires, they short out. You shut the mill down. You have to get started again. We could not afford that downtime from a manufacturing standpoint.

The second thing I saw is that their V-drum/chipper/canter was still there and that technology was way gone. The overrun that you get from that kind of a machine –

MR. HAGLUND: Objection, Your Honor.

THE COURT: The objection will be sustained to his expert opinions. We will confine it to what he saw precisely.

MR. SIMON: Even under Rule 701, Your Honor?

THE COURT: Yes.

[Tr. 24] BY MR. SIMON:

Q. Mr. Princehouse, describe what you saw, without adding your own opinions to it, but in comparison to whether you saw improved technology or things like that.

A. I saw a curtain scanner that was not there in 1992. I saw a large lumber sorter –

Q. Any other improvements?

A. No, sir. I saw a large piece of mobile equipment. I think it was a Cat 988.

Q. When you described the curtain scanner, that was the same piece of equipment you were telling us about earlier when you were comparing a stereo scanner?

A. Exactly.

Q. I take it you didn't see a stereo scanner?

A. I did not.

Q. Let me move to another topic that would be an issue that comes up a little bit in this trial about whether one com-

petitor keeps an eye on what another competitor is doing. I would like to ask you about your experiences while at Cascade in the 1990s. Generally did Cascade try to keep abreast of what the other alder and hardwood mills in the area were doing?

A. Yes.

Q. Tell us what you did.

A. We did it in log buying and log inventories. Our log

* * *

[Tr. 26] temperatures over 65 degrees for a period of time. It is microbe that makes the wood bluish. It occurs in warm weather six weeks after a tree has felled. In cold weather it does not occur at all.

Q. I take it that it is not a good thing to have staining on your logs?

A. No, it is not. Again, if you take a look at this paneling in this room, it is very uniform. If there is staining in it, it changes the color. It is not desirable for fine furniture or cabinet manufacturing. A customer will not buy it for that product. So a stained product can only – the majority of stain product is used in a painted grade and has much lower value. Therefore, it competes with a much lower valued lumber.

Q. While you were general manager of Cascade, did you have to balance the risk of trying to avoid staining on your logs with making sure you had enough logs to provide wood to the mill?

A. Yes, we did.

Q. Tell us how you dealt with that balance at Cascade Hardwoods.

A. Well, we took a risk. The way the log flows, there is a large log availability in the summertime. So we would build log inventories from, say, June until October 15th. We

would go in June from a log inventory to maybe 400,000 [Tr. 27] board feet to a log inventory on October 15 to maybe 5 million board feet. We would slowly build our log inventory during that period of time.

Q. Sawlogs?

A. Sawlogs, that's correct. If in September 15 to October 15 we experienced a time where it got hot, we would end up staining our log decks and we have lost a lot of money. But it was a risk we had to take. We traded off a risk of staining versus the risk of running out of logs in February and March.

Q. Now, based upon your observations when you were at Cascade Hardwoods, can you tell us whether or not you ever observed log staining issues at Northwest Hardwoods – when you were at Cascade, did you ever observe log staining issues at Northwest Hardwoods' log yards that were greater, less than, or about the same as about what everybody was experiencing?

A. The same.

Q. Then the final area I would like to ask you about, Mr. Princehouse, based on your observations when you were at Cascade Hardwoods, did you have any observations about Ross-Simmons' log buying practices?

A. Ross-Simmons, as I stated to begin with, had the manufacturing capabilities in the early '90s of buying the whole range of logs –

* * *

[Tr. 30] Q. Now, didn't you tell them – didn't you tell them at some point that the biggest risk that Cascade Hardwoods faced in 1999 was lack of logs at a reasonable price?

A. I'm not sure that I told them that. I think the biggest risk that we faced in 1999 was our ability to sell what we could make in the lumber market.

Q. Okay. Now, proprietary grades. Ross-Simmons had proprietary grades years before your company, correct?

A. Yes, they did.

Q. And you didn't make the change until 1995?

A. That's correct.

Q. Essentially it is largely a replication of the Northwest Hardwoods system, isn't it?

A. Yes.

Q. And isn't it true, sir, that your company in terms of total production did not overtake Ross-Simmons until 1998?

A. I don't have the actual facts.

Q. Do you know that you certainly weren't – I have been provided that data. Is it a fair statement that you were in the 30s and 40s in the period of 1992 through 1996?

A. That's million board –

Q. Million board feet.

A. That's correct.

Q. If Ross-Simmons was in the 50s during a significant part of that period, they were well ahead of you in terms of [Tr. 31] actual total production, weren't they?

A. You bet. Yes.

Q. Isn't it true, sir, that you observed Northwest Hardwoods make their proprietary grade tighter in bad markets?

A. You bet.

Q. And they make them looser in good markets?

A. Yes, sir.

Q. Let's make sure the jury understands this. You observed Northwest Hardwoods take their 30-plus grade system

and when the markets are bad, they get tighter on the good stuff going into each grade?

A. Yes, sir.

Q. And when the market is good and there is lots of demand, lower grade lumber ends up in the grade. It is a looser system?

A. Yes, sir.

Q. Now, you don't know, based upon your visit in 2001, whether the wiring at Ross-Simmons –

A. 2002.

Q. – 2002 – whether the overhead wiring at Ross-Simmons resulted in breakdowns of the mill every time it rained in Longview, do you?

A. No, I don't.

Q. And you said early in your testimony that it looked

* * *

[Tr. 33] Q. Did you make efforts to derive how much higher the log costs needed to be to push those margins into the red?

MR. SIMON: Objection, Your Honor. That's argumentative. There are no facts about that –

THE COURT: Objection will be overruled. It is cross-examination.

THE WITNESS: Would you please restate the question.

BY MR. HAGLUND:

Q. In your monitoring of competitors at Cascade Hardwoods, family-owned independent company all these years, did you go so far as to try to calculate how much the log costs needed to go up in order to drive your competitors' margins as you calculated them into the red?

A. Well, first off, we did not calculate our competitors' margins.

Q. You did never did anything like that?

A. Secondly, the answer to your question is no.

Q. Thank you. Now, you were also asked about staining. You used some statistics that I want to make sure are clear. You related that the Cascade Hardwoods mill in the summer building up to the fall might have a log deck in the 400,000 board foot area and move all the way up to 5 million board feet.

A. That's correct.

[Tr. 34] Q. Now, let's take the later part of the '90s when your mill with some of its improvements had become No. 2 in the industry, say, '98 forward in terms of production behind Northwest Hardwoods. Wouldn't you agree, sir, that the total production of your mill at Chehalis is reasonably comparable to the total production at the Longview mill of Northwest Hardwoods?

A. Our production was 60 million board feet in 1998 – 1999.

Q. If we look at Longview in 2000 – in '96 it was 61. These are stipulated facts. In 2000 it was 55.3. In 2001 it was 55 million. In 1993 it was 67 million?

THE COURT: Is that a question or a speech?

MR. HAGLUND: I'll turn it into a question here, Your Honor. Thank you.

BY MR. HAGLUND:

Q. If the facts show, Mr. Princehouse, that Longview is in the 60 million board feet area, that would be comparable to what your mill was doing '98 on?

A. Well, we are over 70 now.

Q. Let's take '98, '99, 2000.

A. Yes, comparable. Yes.

Q. Now, can you imagine, sir, any reason why you would drive your log inventory up to 18 million board feet in the summer months?

[Tr. 35] A. No.

Q. You would have a serious stain problem if you did that, wouldn't you?

A. If I could keep my logs in the Columbia River, I would not have a stain problem. If I could keep it in raft form, I would not have a stain problem.

MR. SIMON: I object to this line of questioning. The only evidence about this number –

THE COURT: Objection will be overruled.

BY MR. HAGLUND:

Q. If the bulk of the volume is on land, you have got a serious problem?

A. Yes, sir.

Q. And it is true, isn't it, that sawlogs can become pulp logs if they stain?

A. Absolutely.

Q. Now, Mr. Princehouse, you were asked some questions about log supply. I want to make sure that your testimony is clear. Isn't it true, sir, that you testified that the projected impact from that 1996 study that you made a presentation on in 1997 showed an 11 percent impact associated with regulatory?

A. Yes.

Q. 11 percent?

A. That's correct.

* * *

[Tr. 37] Proceed.

BY MR. HAGLUND:

Q. Mr. Princehouse, do you see the 400 million board foot line here?

A. Yes, sir.

Q. Isn't it a fair statement from 1997 through 2000 that the level of timber harvest in alder in the Pacific Northwest was stable?

A. Well, no, it is not. What I was talking about was a harvest of around 420 million board feet in 1992. That's the green. That's the Washington portion. I'm not aware of what went on in Oregon at all.

Q. Okay. Let's just focus on the green part.

A. Okay.

Q. Doesn't it appear from 1997 through 2000 that the harvest in Washington state of alder was also stable?

A. Yes.

Q. And you said something that I wanted to follow up on. That was that during this time frame the mills are all consuming more logs?

A. That's correct.

Q. In fact, if this is what the harvest is, the amount of consumption is relatively stable, '97 through 2000, correct?

A. That's not correct. This green portion is sawlogs and pulpwood. What the mills did, again, through small log

* * *

[Tr. 39] A. Yes.

Q. Isn't it true, sir, that the actual consumption in totality of the Northwest Hardwoods mills stayed the same in terms of they actually produced the same or more lumber with the same volume of logs?

A. I can't speak for Northwest Hardwoods. I can speak for Cascade.

Q. Now, Mr. Princehouse, were you aware of very sizeable runup in lumber inventories at the Northwest Hardwoods mills in 1998, '99, 2000?

A. Yes, I was.

Q. Isn't it a fair statement that rather than curtail production like you did, they continued to build inventory to huge levels?

A. Yes.

Q. And isn't it true that that caused a negative impact on the market as you observed it?

A. Yes.

Q. Let me display what is marked as Exhibit 82.

Mr. Princehouse, this shows the lumber inventory levels of Northwest Hardwoods as a division from '88 through 2000. Do you see in this '98 time frame through 2000 their inventory levels rise to a peak of nearly 40 million board feet?

A. Yes.

* * *

**[Vol. 6-A (Apr. 15, 2003)]**
**[Testimony of Heinz Hohendorf]**

* * *

[Tr. 45] A. I drove about 40- to 50,000 miles a year on I-5 between the Canadian border and Coos Bay.

Q. When you joined in 1982 Northwest Hardwoods, who did you report to?

A. To Arnold Curtis.

Q. And did you report to Mr. Curtis throughout the time you were at Northwest Hardwoods?

A. I did all the time until I retired.

Q. Well, let's start with the operation side of your job. During the – first of all, what were your chief responsibilities in terms of overseeing the operations?

A. Okay. Beginning with the purchase of raw material, to make sure we had an adequate log supply for the mills and that the original, at the beginning, the two mills, Arlington and Centralia, they was somewhat distinctively different.

The Centralia mill had a very small log yard. We couldn't hold more than two weeks of production in logging inventory. The Arlington mill had a larger log yard and water storage in Everett. You could hold four to six weeks. But generally we didn't want to hold any logs longer than six weeks from cutting into conversion because the summer months, May to September, they would have a tendency to stain.

At that point you couldn't use them for furniture [Tr. 46] lumber any more. The value would go down to pallet grade or chips.

The second part was to visit the mills on a regular basis with my mill managers, tour the facilities, look at issues from safety to people management to machinery and equipment.

The third part was meetings, sometimes on a regular basis with the mill management, on a monthly basis to look at the numbers and log buyers, and on a more informal basis, lunch or breakfast meeting in between so they didn't have to travel too much.

Q. You mentioned overseeing capital expenditures, improvements made to the mills. During the 1990s, would you briefly tell the Court and the jury what types of improvements were made at Northwest Hardwoods mills.

MR. KELLEY: Your Honor, I believe this is cumulative of the testimony yesterday.

THE COURT: I will allow the answer briefly. Let's move through it quickly.

BY MR. JOHNSON:

Q. If you could just concentrate on 1990 to 1995.

Mr. Martin yesterday covered some of the improvements made at the Eugene mill starting in 1995.

A. We basically looked at extracting higher value of the existing log flow and raw materials. We tried from the [Tr. 47] smaller logs in particular to extract grade lumber. Some of the portions were chipped. So we installed a small log mill, which I referred to in Centralia and later on in Arlington. We added some production to it but more so we extracted more value out of the same log flow.

We put in a kerf sawing system in the mills. That means that the alder has a very crooked curvature, and it is not a very straight tree compared to softwoods. When you saw a segment that had a large curve, you run out of lumber on one end or the other. If you had a device to follow the curvature, that would increase our recovery of yield to value. So we installed such in Centralia, Arlington, Longview and Eugene. The base price of the machine was $350,000. So most projects were near a million dollars.

We also went with the people to a training program. We trained all our operators to be a rough mill grader, understanding basically what the value of a piece of lumber is, to make them aware that if we are somewhat affected the value of down grade, to maintain that. And if they came to classes and took a short exam, when they are qualified, and most did, we paid 25 cents an hour more for those who passed the exam.

Q. Mr. Hohendorf, you mentioned supervising the management of log inventories at Northwest Hardwoods as part of your job. Who would you work with to manage log inventories?

[Tr. 48] A. With the log buyers, because they are responsible for creating the log flow through the purchase activity.

Q. How would you go about working with those individuals to manage log inventories?

A. We had an annual plan, and we knew the consumption rat on a weekly basis for each mill. We knew the capacity of the log yards and we also looked out, as I explained before, for the seasons.

We didn't want to have large inventories during the summer months because these logs would be stained. They had to be timed with our suppliers to come in as fresh as possible. This was done on an informal lunch or breakfast meeting.

We had some statistics that showed us what our inventories were. I was aware of them because I visited all the mills at least once a week, walked through the log yard or drive through the log yard and had a pretty good idea of how large the inventory was.

You get a view of what you are looking at a pile of logs, how many board feet. You get a look at what the quality of the logs are and you are watching the mill deck. As you see these coming through, you watch the rotation that they were first in and first out.

Q. Mr. Hohendorf, there has been some testimony in this case about relatively higher levels of inventory at Longview [Tr. 49] in certain years in 1989 and I believe 1993. Would you explain to the Court and the jury what was happening during those time periods.

A. You would probably see in most of our mills beginning with October an increase with the inventory for the winter. What's happening here, during the summertime oftentimes logging was curtailed because of the weather. The loggers couldn't move out more than four or five days early in the morning and had to shut down by noon. Our flow would be low.

By September, October, logging would be heavier, the activity, and we would try to build some inventory for the winter months. When it came November, Thanksgiving through Christmas, logging in general slowed down, inclement weather would curtail logging or if you had frost in the road, trucks couldn't move. So we had to have for safety a little higher inventory.

The situation in Longview later was a little different. We were a large supplier of chips to our pulp mill internally. I believe in 1989 the pulp mill came to us. In order to guarantee a supply in the winter of chips, we had to store a significant amount, 20- or 30,000 bone dry tons on their pile, which took up a lot of space. Longview pulp mill had several products: Hemlock, fir, pine and alder. They are running out of space. They are also [Tr. 50] sometimes run into old chips, which ferment on the piles and give you poor paper quality.

So they said, could we maintain this inventory in some way of form of logs, and I said, yes, we can do that. We put these logs into the IP pond next to Longview mill.

Q. What is the IP pond?

A. It is right next to the Longview mill. It is an old log pond, International Paper old log mill from back in the '20s.

We put it in the pond. A, it had storage room there; and B, it would preserve for some sort of freshness so they wouldn't stain.

Q. Would these pulp logs at Longview be on the inventory books at the Longview mill?

A. They would be on the inventory books for Northwest Hardwoods. They were our logs.

Q. Could I ask that the witness be shown Exhibit 1456. Do you have the document?

A. Yes, I have the document. It is a letter addressed to Steve Stricker and signed by Davis Woods, our raw materials buyer at the time.

Q. Are you cc'd on the second page?

A. Arnold Curtis and I am cc'd.

Q. Who is Mr. Steve Stricker?

A. Steve Stricker was in charge of chip procurement for the Longview pulp mills, a Weyerhaeuser employee.

[Tr. 51] Q. Who is Mr. Davis Wood?

A. Davis Wood was the raw materials buyer in Longview at the time.

Q. Did you receive this letter in October of 1989?

A. Yes.

Q. And what was this letter referring to?

A. This referred back to the strategy we had. Instead of storing chips in the inventory on the Longview side, that we would hold the logs for them. At a weekly budget of 2,600 tons, chip up and supply the Longview pulp mill for this winter season. However, at the time, the Longview pulp mill, I think, ran into some market conditions and it did not run into that rate and slowed us down. They had not only us but other suppliers –

MR. KELLEY: Your Honor, other suppliers is beyond the scope of the question.

THE COURT: Sustained. Is there an objection to 1456?

MR. KELLEY: No, Your Honor.

THE COURT: 1456 will be received in evidence.

BY MR. JOHNSON:

Q. Mr. Hohendorf, in general, in that time period of late '80s, early '90s, how was the general flow of hardwood logs in lower Washington?

A. The flow was heavy; more than the general hardwood

* * *

[Tr. 59] before winter. We had targets of what we needed to wood the mills in a safe manner not to run out of wood.

Q. What about pricing? Did you ever direct your log buyers to raise the price of logs in order to raise the price of logs to competitors?

A. On no occasion did I do that.

Q. We have heard some testimony, Mr. Hohendorf, about monthly senior management meetings at Northwest Hardwoods. Were you a part of the senior management team?

A. Yes, I was.

Q. Explain what types of meetings were held in terms of the senior management.

A. We looked at the last month result. We looked at comparing the data to the plan. We talked in an overall view if it could be achieved, our profit targets, if we achieved our manufacturing cost targets. To my recollection, there was not that much time spent on raw material or cost of logs.

Q. Do you recall any discussions about the balance that you were talking about between having enough logs and not having too many logs?

A. The only issue was, in particular, having too many logs because of the danger of them staining and delivering an inadequate product to our market and losing value in that process.

* * *

[Tr. 64] we can recoup profits later when competition goes away?

A. I don't recall that.

Q. You don't recall that?

A. No.

Q. You are sure?

A. No, I don't recall that.

Q. Do you remember Mr. Curtis ever saying that to you?

A. No.

Q. Do you recall at any of these senior management meetings the issue coming up if, in fact, we continue to pay high log prices, competition will go away?

A. No. It was not our objective to pay high log prices.

Q. Do you remember Mr. Curtis ever saying that he was going to raise log prices and make Juel Sheldon's life miserable?

A. That would have to be before my time because Juel resigned within about eight months after I came to Northwest Hardwoods.

Q. Okay. The time between 1988 and 1992, stay in that time period with these questions, please, sir. Do you recall

that Juel Sheldon was manager and president of the Ross-Simmons Lumber Company?

A. Yes, I do recall that.

Q. Now, within the same time frame of those management meetings, do you recall Mr. Curtis saying he is going to

* * *

[Tr. 66] 1993?

THE COURT: Yes. Go ahead. He can ask the question if he wants.

THE WITNESS: What was your question again, please?

BY MR. KELLEY:

Q. An explanation in log inventories in the 1993 time frame.

A. If I read the graph correct, that inventory dropped down in January. This inventory is starting to be building apparently in the fourth quarter of '92.

Q. And would an inventory at the Longview mill, in all your years of experience there, approaching 18 million be excessive in your opinion?

A. This was in anticipation of the needs of pulp mill chips. This is a large portion of that is chip wood and not sawlogs. And we had a commitment. The Longview mill consumed about 140,000 tons of chips a year. On a weekly commitment of 2,600 to 3,000 tons, we had to build up for a significant amount of pulp. At the same time, I remember, '93 was a very good softwood market as well. We had a lot of come-along logging from the softwood activity; everybody in the industry had a lot of pulpwood delivered consequently with it.

Q. Did you maintain at Weyerhaeuser during this time frame [Tr. 67] inventories that would show sawlog versus pulplog?

A. We would have.

Q. Weyerhaeuser maintains those?

A. No, we did.

Q. Who did?

A. Northwest Hardwoods.

Q. And you maintained inventories on the pulplogs?

A. On the pulplogs.

Q. Your explanation, then, in terms of this apparent spike in the 1993 time frame relates mainly to the increase in pulplogs at the facility?

A. Correct.

Q. Now, Mr. Hohendorf, you mentioned earlier that one of your primary tasks while at Northwest Hardwoods was to obtain adequate supply obviously for your mills. Now, isn't it true, sir, in the mid '90s, prior to your retirement, you saw a decline in the alder resource coming, did you not?

A. We did see that coming.

Q. You personally did, correct?

A. So did most of the people in that industry.

Q. And you personally believed that that impact or decline in resource would be felt in either 2002 or 2005, in that time period, correct?

A. It is hard to tell. This impact would have to come on when the plantation wood would be logged that the industry

* * *

**[Vol. 6-A (Apr. 15, 2003)] [Testimony of Steven Carter]**

* * *

[Tr. 80] A. Again, there would be hundreds, especially for Eugene, but Garibaldi also.

Q. Now, are all of these log suppliers about the same size in terms of the company that is selling you the logs?

A. No, a broad range. You might get wood from, you know, a person that is clearing a home site and has one load of hardwood. Or you might get, you know, logs from a family-owned company that manages 40 acres or 100 acres, maybe somebody's retirement, up through the medium sized and larger corporations as well.

Q. Let's start with those. Could you give the Court and the jury some examples of some of these larger industrial landowners that supply logs?

A. Georgia-Pacific, for example, Hampton Industries, Boise-Cascade, Roseburg Forest Products, Stimpson, Simpson Timber Company, Weyerhaeuser Company, as an example.

Q. How about some of the median sized?

A. Probably less well known but Thompson Timber, A & E, Starker Forest, pretty well known, Mormel and Menasha (phonetic).

Q. How do you get these log suppliers to come back to you so that you can continue the relationship? How do you get them to come back?

A. We try to work closely with people when they move logs, try and be there, evaluate their log on value and be a

* * *

[Tr. 87] Q. So during 1996 and 1997 from which of those two tree farms was Northwest Hardwoods buying logs?

A. From each of them.

Q. And there has been – in 1998 and 1999 did Northwest Hardwoods have log contracts with Georgia-Pacific?

A. In 1998 and '99, yes.

Q. And to your knowledge, what was the duration of those log contracts?

A. They were one year contracts.

Q. Briefly could you explain your understanding of those contracts.

A. Yes. They were for the purchase of a portion of G-P's sawlogs produced from the Toledo tree farm in exchange for some conifer volume to be sold back to Georgia-Pacific.

Q. So the contracts did not concern the Coos Bay tree farm?

A. No.

Q. Did the contracts concern all of the logs coming off of the Toledo tree farm for Georgia-Pacific?

A. No. November of '98 I think it was 70 percent of the 8 inch or what was called the sawlog, and I believe that was it.

Q. Now, were you involved in any of the negotiations for either of those two log contracts?

A. Yeah. My role was to negotiate a price for that log [Tr. 88] monthly.

Q. But were you involved in the original negotiations of the actual agreements?

A. No.

Q. To your knowledge, who was that person?

A. Del Fisher.

Q. And to your knowledge, who was the person on the other side at Georgia-Pacific in the negotiations?

A. I don't know.

Q. Now, you were starting to relay your involvement in those contracts. What was your involvement?

A. I would negotiate the monthly price with Georgia-Pacific.

Q. So each month you would negotiate with Georgia-Pacific on the price for the logs?

A. Yes.

Q. And what would happen if you couldn't reach a price?

A. Then we would wouldn't receive any logs.

Q. Did that ever happen?

A. Yes.

Q. When do you recall that happening?

A. I recall one time that G-P informed me that they wouldn't sell us any wood, in fact, for a month because they wanted to use all of that hardwood volume for their pulp mill for a month.

[Tr. 89] Q. Now, with whom would you negotiate?

A. Larry Bray.

Q. And to your knowledge what was his job at Georgia-Pacific?

A. He had a job title similar to mine. We are not big on titles.

Q. Explain for the Court and the jury how those negotiations would come about. Where would you go and where would you sit down and talk?

A. We usually met in either Larry's office or mine, and we went and had a cup of coffee on what he needed for logs for the coming month and I had mine. Usually mine were lower than his, and we would reach usually an agreement somewhere between the two numbers that day.

Q. What evidence would you bring to him about what you thought the market price was for the logs?

A. Well, I'm buying wood at these levels; I think it should be at this particular level.

Q. From 1996 to 1999, what was the average – approximately what was the average intake into the Eugene sawmill from Georgia-Pacific in terms of the logs?

A. Probably about 10 percent of our usage.

Q. There has already been some testimony in this case about Northwest Hardwoods purchasing logs from Weyerhaeuser Timberlands. What is Weyerhaeuser Timberlands?

[Tr. 90] A. Weyerhaeuser Western Timberlands manages all functions associated, I understand, with the timberlands in Oregon and Washington.

Q. And do you purchase logs from – from 1996 to 2000, did you purchase logs from Weyerhaeuser Western Timberlands?

A. Yes.

Q. And how would those negotiations work in terms of the price?

A. We would meet monthly as well, but we would use a market comparative to set that price for the next month.

Q. Could you explain that a little bit. What do you mean by market comparison?

A. We would choose – agree on, oh, three to five major suppliers from the prior month to use as a comparative for

what their price is. Then we would largely use that for the Weyerhaeuser timberlands price.

Q. I want to turn now to a slightly different topic, Mr. Carter. I want to talk about during the period of 1996 to 1999, okay. Who were the other types of entities out in Oregon purchasing hardwood logs?

A. For the most part it would be used in, if not lumber production, in veneer production and pulp chips.

Q. Let's start with sawmills. What sawmills were purchasing logs in Oregon from 1996 to 1999?

A. We have Northwest Hardwoods and Rose City Lumber, [Tr. 91] Westwood Lumber, Morton Alder, as examples.

Q. What about veneer mills? What veneer mills are out there purchasing logs from 1996 to 1999?

A. HR Jones, LC Veneer, Roseburg Forest Products, Myrtle Point Forest Products, South Coast Forest Products come to mind.

Q. What about chipping facilities during that time frame, 1996 to 1999?

A. Yeah. Coastal Fibre, Pacific Fibre, Thompson Timber, Wood Recovery and Western Wood. Actually Coastal Fibre would have four different locations, or three anyway. Georgia-Pacific themselves.

Q. Now, in terms of the competition for those logs, how did Northwest Hardwoods compete with the chipping operations for logs?

A. Well, over time kind of historically, I guess you might say, the lumber mills kind of required a kind of larger diameter log. But what we have done work on is a lot of value extraction, research and investment and time that really helps us to compete and use and extract value from 6 inch

diameter logs, really, one of the larger – so today you see – at the end of the time you are talking about there, you see –

Q. I'm sorry. Go ahead.

A. Some of that wood that may have been in a chipping [Tr. 92] operation before.

Q. 1996 then, and again in 1999, how would the sawmills in Oregon compete with the veneer mills for logs?

A. We would use very similar logs.

Q. How similar?

A. Their mills, to my knowledge, would try and use a 7 inch to 9 inch or so diameter kind of log that they could chuck and put in their machine and rotary peel. We would use a lot of that volume as well.

Q. Now, recently in the last couple of years have any new hardwood sawmills begun purchasing logs in Oregon?

MR. HAGLUND: Objection. The requirement is through '01, Your Honor. He has asked the couple of years.

MR. JOHNSON: Excluding '02, sorry.

THE COURT: You may.

THE WITNESS: In the last few years, Cascade Hardwoods has made a stronger portion of it.

BY MR. JOHNSON:

Q. As a resource manager, do you have any supervisory responsibility?

A. Yes.

Q. What are those?

A. I supervise three log buyers.

Q. And what types of discussions do you have with those log buyers?

[Tr. 93] A. We will talk about log quality, inventories, flow, values, pricing.

Q. Do you ever give them any type of direction?

A. You bet.

Q. What type of direction do you give them?

A. They are kind of the experts. If their eyes are on the timber or on the logs, then they are kind of saying here is the value that I see, and we talk about, okay, here is a value that then, you know, is there perhaps for us. Might give them direction on we need to be sure that we are recovering, you know, this bid or the other one from time to time.

Q. Have you ever told any of the log buyers working in your offices, sawmills, to purchase more logs than you all needed in order to keep logs away from competitors?

A. No.

Q. Have you ever told the log buyers working in your offices and your sawmills to purchase logs at high prices in order to raise the costs to competitors?

A. Absolutely not.

Q. You said you worked for Mr. Hohendorf and you worked for Mr. Fisher. Did either of those individuals ever tell you that it was the strategy of Northwest Hardwoods to raise log prices to raise the log costs of competitors?

A. Absolutely not.

* * *

[Tr. 117] Q. So there was some tying in your experience in this contract of the pulpwood to the alder sawlogs?

MR. JOHNSON: Objection to the word "tying," Your Honor.

THE COURT: The witness can answer.

THE WITNESS: I don't know that.

BY MR. HAGLUND:

Q. You don't know that. Okay.

Now, let me ask you some questions about transfer pricing. Do you, as the resource manager, handle the negotiations with the Western Timberlands Division for the alder sawlogs that come from Weyerhaeuser tree farms in Oregon to the Eugene or Garibaldi mills?

A. Yes, I do that.

Q. And it is your representation that if we were to look at the underlying records in the boxes that relate to Eugene in this case that we would find that the price that is paid for the sawlogs coming from Weyerhaeuser Company lands are fairly close to the prices paid to third parties?

A. Yes. By species and grade, they would be close to those comparative contracts that I talked about earlier.

Q. And it is your understanding that that's how the transfer pricing system between the Timberlands Division of Weyerhaeuser and the Alder Division of Weyerhaeuser is supposed to work?

[Tr. 118] A. I'm sorry. I didn't hear that.

Q. Is it your understanding that setting the transfer price at fair market value as determined by third-party sales is how the transfer of price is supposed to be set between the Timberlands Division and your division of Northwest Hardwoods?

A. Usually you try and set an equitable – again, an equitable price by sort and species and diameter.

Q. Now, Mr. Carter, you changed words here on me. Equitable is a fairly vague notion. When you testified on direct, you talked about looking at what major suppliers were being paid. I want to be precise here. Isn't it a fair statement

that the way you understand the system is supposed to work, the prices that you pay to Willamette or to Hampton or to Roseburg Forest Products in a given quarter should be relatively close to the transfer price that you pay for company wood?

A. Yes.

Q. Okay. Now, Mr. Carter, you were involved, were you not, sir, in the process in 1999 under which Weyerhaeuser sought an exemption from Oregon regulations regarding the log export substitution rules?

A. Yes.

Q. And you were involved when the company first attempted to get a bill in the Oregon legislature, correct?

* * *

[Tr. 124] A. Yes.

Q. Mr. Miller, the government affairs person for Weyerhaeuser, was there?

A. I believe Mr. Miller was there.

Q. You heard – and Mr. Buck read the letter that is marked as Exhibit 446, a portion of which is displayed on the screen, into the record at that hearing, didn't he?

A. Yes, I believe this is the letter.

Q. You listened to him, didn't you?

A. Uh-huh. I did.

Q. I would like to call – well, I would like to call your attention to page 2 of Exhibit 446, in particular the third paragraph. Do you see there in the middle of the third paragraph, Mr. Carter, that the statistics that we saw in the earlier draft that was in June – this is a September 13 letter – have changed?

A. Yes. And I heard that when Mr. Buck read the letter.

Q. Now, you were involved in providing data in this whole process?

A. Uh-huh.

Q. You gave it to Mr. Fisher, correct?

A. Yes, I did.

Q. Did you get a chance to review the final draft of this letter?

A. No, I didn't.

[Tr. 125] Q. Now, when you heard Mr. Buck recite these statistics in a public hearing in Salem, you knew these were false, didn't you?

A. The 34 sounded high to me. The 50 percent, I believe, is okay. The 34 sounded high to me at the time, yes, it did.

Q. And you did nothing to correct it, did you?

A. No. I didn't say anything at the time.

Q. Didn't send a follow-up letter to the State?

A. I did not do that.

Q. Nobody from Weyerhaeuser did, did they?

A. I don't know that.

Q. And 34 percent is so high it is over 5 times high, Isn't it?

A. No, my work really should have supported about a 15 percent representation of what that volume would represent as far as available for future use for Eugene.

Q. Your data showed 15 percent?

A. Something close to that, I believe.

Q. Now, I'm not aware of a Weyerhaeuser exhibit that shows that. Have you been shown one in preparation to – you were the person referenced in a witness statement as coming to talk about this subject matter. Have you been provided any material to support your statement that there was 15 percent?

[Tr. 126] A. No, I haven't.

Q. I would ask – well, another couple of questions. Mr. Carter, isn't it true that in addition to the Georgia-Pacific contract that we have talked about that you, in this period of '96 through 2000, made it a regular practice to engage in trades with large forest landowners in Oregon where Weyerhaeuser tied a willingness to trade certain conifer logs to the buyers' willingness to pass back alder?

A. No, not at all.

Q. And it is your statement that you have no records reflecting that?

A. That's my statement.

MR. HAGLUND: I would ask that the clerk pull impeachment Exhibit No. 493.

THE CLERK: I have 490 to 492.

MR. HAGLUND: Your Honor, I have it specifically listed on the impeachment list that was submitted on February 14. It describes these four pages.

THE COURT: There are so many thousand of exhibits, I'm not surprised that we are having trouble finding one.

THE CLERK: Okay. They are in the back.

MR. JOHNSON: Your Honor, I object to the use of this document as impeachment. I don't think it is proper [Tr. 127] impeachment. This document was provided to Mr. Haglund in discovery.

THE COURT: That's not the relevant issue now. You may use it. You may proceed.

MR. HAGLUND: Has the witness been handed that exhibit?

THE WITNESS: Thank you.

BY MR. HAGLUND:

Q. Mr. Carter, your attorney is right. This was produced by Weyerhaeuser as part of the tens of thousands of pages of documents that we received. At the top it says: '97 and the letters "EUG" are at the end. Isn't this a document prepared in your log department in Eugene in 1997?

A. That could be. I have seen us take a shot at trying to estimate what our world looks around us and what log is flowing.

Q. And you have seen this document before, haven't you?

A. I'm not sure. I don't know that I would recognize this document.

Q. Your company has prepared documents like this in Eugene, hasn't it?

A. Yes.

MR. HAGLUND: Okay. We move the entry of 493.

THE COURT: Any objection?

MR. JOHNSON: Objection. The impeachment of this [Tr. 128] document has not been established.

THE COURT: Do you object to the authenticity? MR. JOHNSON: No, Your Honor.

THE COURT: It will be received. 493 is received.

(Exhibit 493 was received.)

BY MR. HAGLUND:

Q. Mr. Carter, we see this small type. Folks are going to have to bear with me. The very top we see: '97, Eugene. Right?

A. Yes.

Q. And we see a title, Market share in Western Oregon, do we not?

A. Yes.

Q. We see projected in million board feet on the left, correct?

A. Yeah.

Q. Above the supplier column.

A. Yes.

Q. Let me scroll down here and let me show you what it shows. Is it a fair statement that this lists suppliers in western Oregon according to your company's records in the log department that you managed?

A. Whenever I set down and tried to –

Q. Please answer yes or no, sir.

A. No, it is not.

[Tr. 129] THE COURT: He can explain. Restate the question. You can answer yes or no. If you can't answer yes or no, then you can explain. If you answer yes or no, then you can explain.

BY MR. HAGLUND:

Q. Isn't this document a listing of projected supply from the named suppliers on this list prepared in your log department sometime in 1996 projecting 1997?

A. Yes.

Q. If we look at the state lands, it is midway down the list, isn't it?

A. Yes.

Q. If we look at – there are two columns: One for Northwest purchase where you apparently believe you are going to buy the state sale or sales constituting 8 million board feet, correct?

A. Yes.

Q. And you think there will be another 4 million of state wood available at high bid?

A. That's correct.

Q. And 12 million board feet of total harvest is not 34 percent of your supply, is it?

A. No. 34 percent wouldn't be represented by that 12.

Q. Mr. Carter, this is western Oregon. This is the whole west side of Oregon, correct?

[Tr. 130] A. I believe so.

Q. So that part of this state includes both your Garibaldi and Eugene mills, correct?

A. Yes.

Q. Okay. Now, let's look at another column. That's the third column. This says: Available with trade.

A. Yes.

Q. And you list Georgia-Pacific, Roseburg Forest Products, Willamette Industries, Lone Rock Timber, Boise-Cascade, correct?

A. Yes.

Q. These are companies with which you will trade conifer volume and expect alder sawlogs back, correct?

A. No.

Q. Then what does this column say, sir?

A. Well, it is similar to a bid of a high bid – it is a hypothetical look at what might happen if circumstances change as far as high bid goes. As far as trade would usually refer to a hypothetical situation, once again, it is an exchange of similar type of product. We have never actually entered into a trade there.

Q. It is your testimony that your company has never had a trading arrangement with any of the people on this list?

A. I haven't – let me correct that. I haven't negotiated a trade with these people.

Q. Okay. So you haven't personally negotiated a trade, but isn't it true, Mr. Carter, that Weyerhaeuser has engaged in conifer trades in exchange for alder sawlogs in the state of Oregon in the period of '96 through '01?

A. I don't know that.

Q. You don't know that. You are the resource manager and you don't know that. Is that your testimony, sir?

A. That's right.

Q. Now, if we look at – it is a little hard to see it all, but I think it is visible if people pull up to their screens. This page also aggregates those categories, does it not, combines them, each column?

A. You mean the total harvest column?

Q. Yes.

A. Yes.

Q. And it also segregates these components of the sawlog market into percentages of that market, does it not?

A. You mean at the bottom?

Q. Yes.

A. Uh-huh.

Q. And would you agree with me, Mr. Carter, that the list of suppliers here on this list would be considered the industrial forest category of the mid-sized through large landowners who have alder on their lands in western Oregon?

A. From - plus miscellaneous.

[Tr. 132] Q. Well, I didn't ask about – well, I'm sorry. Plus the miscellaneous, I agree with that. But above the word "miscellaneous" we have a list of the major mid-size to large alder sawlog landowners in western Oregon, correct?

A. That's correct.

Q. And if we look at these columns, you are projecting that you are going to be able to, in the first column – let's focus on the first column. Doesn't this first column project that you are going to be able to go to these large landowners and negotiate deals without having to go to an open bidding situation?

A. No.

Q. Okay. Isn't the second column the one that talks about available at high bid?

A. That's what it says, yes.

Q. Isn't it true, sir, that Roseburg Forest Products is one of the largest private landowners in western Oregon, at least in the Roseburg/Eugene area?

A. Yes.

Q. And isn't it true, sir, that very small amounts of their volume go up for open bid, and for this period of '96 through '01 you just go down to their office and negotiate for it?

A. Actually, I don't know how much they might put up for bid. We do negotiate log prices with Roseburg Forest [Tr. 133] Products.

Q. And here, sir, aren't you projecting that you will negotiate for 9 million and there will be one that goes up for open bid with competition?

A. No, that's not what that means.

Q. Okay. Okay. Let's just go to the bottom here. 49 percent is in the Northwest purchase column, correct?

A. Yes.

Q. And 33 percent is in the available at high bid column?

A. Yes.

Q. 13 percent is in the available with trade column?

A. Yes.

Q. Now, Mr. Carter – if the witness could be handed Exhibit 14 up. I think it is in my stack here. It is actually 15 that I need.

You recognize that as a map of the state of Oregon, don't you?

A. Yes.

Q. Ah, here is mine. This is Exhibit 15. I take it, Mr. Carter, that you are quite familiar with the land ownership of your company in this state?

A. Yes.

Q. So you know right where the tree farms are in the Eugene area and west of Roseburg?

A. Yes.

[Tr. 134] Q. Let me represent to you that this data is as of August of 2000. Is it a fair statement that all the red on this map would be Weyerhaeuser tree farms?

A. It looks like it.

Q. And is it also a fair statement that the purple here is the Georgia-Pacific lands, largely in Lincoln County? That is the Toledo tree farm?

A. It looks like it.

Q. Is it also true, sir, that the blue represents state of Oregon public timber on state of Oregon forests?

A. Again, that looks accurate.

Q. Now, Weyerhaeuser started exporting sawlogs in 1999 from its Douglas fir tree farms, didn't it?

A. I don't know that.

Q. Weyerhaeuser ended up getting the exemption it sought in the process we described earlier, correct?

A. Yes, we did.

Q. I want you to assume that Weyerhaeuser started exporting. Okay. It sounds like you don't know that, but please assume it.

If your company had not gotten the exemption, Mr. Carter, the Clatsop and Tillamook Forests up here in Northwest Oregon would not – you would not have been able to buy any alder sawlogs from those forests, would you?

A. I believe so.

[Tr. 135] Q. Well, I'm not sure – I'm confused. It may be that we just miscommunicated. Had you not gotten the exemption and assumed your company was exporting softwood logs from the state of Oregon, you would have been precluded from buying any alder from the two state forests in Northwest Oregon, correct?

A. Correct.

Q. And the Garibaldi mill would not have had access to that volume, correct?

A. Correct.

Q. And isn't it true, sir, that the next closest competitor of Northwest Hardwoods for the alder sawlogs from the Clatsop and Tillamook state forests was Ross-Simmons in 1999 and 2000 until they closed their doors in 2001?

A. Ross-Simmons was one of the competitors.

Q. They were the closest competitor to the Clatsop and Tillamook, were they not?

A. HR Jones was pretty close.

Q. HR Jones was closed by the end of '01, wasn't it?

A. I don't know that. I don't remember.

Q. All right. Let's take Westwood Industries, Mr. Carter. You know where they are, don't you?

A. Yes.

Q. They are down by the Elliott State Forest near Coos Bay, correct?

[Tr. 136] A. Yes.

Q. Same question: If you hadn't got the exemption, Westwood would be able to draw alder sawlogs off of the Elliott state forest without competition from your Eugene mill, correct?

A. We would have been ineligible from purchasing logs from the Elliott State Forest.

Q. Now, I forgot to ask you: Did you participate in any communications to the Port of Garibaldi or to the Tillamook County Commission in soliciting their support for the exemption that was received from the log export substitution rules?

A. No, I don't recall any communication I had with those people.

Q. Did you see their testimony read into the record on September 13, 1999?

A. I don't recall that either.

Q. Do you recall seeing information where Weyerhaeuser was threatening to close the Garibaldi mill if it didn't get the exemption?

A. No, I don't recall that.

Q. You don't remember that? Okay.

MR. HAGLUND: No further questions.

* * *

[Tr. 142] FURTHER EXAMINATION

BY MR. JOHNSON:

Q. The work that you did in late 1996 and 1997, were you doing future projections of state timber harvest or sales?

A. Yes.

MR. JOHNSON: No further questions.

THE COURT: Well, you better look at the letter and verify that so we don't have any confusion about that.

FURTHER EXAMINATION

BY MR. HAGLUND:

Q. This is, again, Exhibit 446, page 2. This is dated September 23, 1999.

Let's look at the highlighted sentence here, Mr. Carter. Let's look at the first part of the paragraph. Doesn't it talk about the current rules to impair our parent company's ability to compete if we sell softwood logs. If we go export, we would be disqualified from buying hardwood logs produced in Oregon state forests. And, sir, doesn't this sentence say those logs are estimated? Isn't that a historic statement, not a future projection?

A. I don't know that.

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No. 05-381

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## JOINT APPENDIX – VOLUME II

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**[Vol. 6-B (Apr. 15, 2003)] [Testimony of Roy Burke]**

* * *

[Tr. 11] Q. So you don't know anything about contracts that were signed in 1998 just as another competitor was starting up a mill in Northwest Washington?

A. I know about some alder contracts, yes.

MR. HAGLUND: Okay. Let me ask that you be handed Exhibits 432 and 433.

MR. SIMON: Objection. Beyond the scope of the direct, Your Honor.

THE COURT: Let me look –

MR. HAGLUND: This is to explore bias, Your Honor.

THE COURT: I'll allow it, within limits, if it is limited to that. I need to see the exhibits, though, before I make a final ruling.

(Pause in proceedings.)

THE COURT: I'll permit very limited examination on those.

Do you know about those contracts, Mr. Burke? Were you aware of them?

THE WITNESS: Yes.

THE COURT: All right. You can inquire very generally as to what they are, not in detail.

BY MR. HAGLUND:

Q. Is it a fair statement that these contracts committed all of the volume from Crown Pacific tree farms in Northwest Washington to Weyerhaeuser?

[Tr. 12] MR. SIMON: Objection, Your Honor. That is not general inquiry about the contracts.

THE COURT: To the extent that he knows, without referring to them, he can testify.

THE WITNESS: I am pretty sure these contracts were done by my former boss; but, yeah, we had contracts with Northwest Hardwoods.

BY MR. HAGLUND:

Q. And you were aware that those contracts in '98-'99, committed the alder saw log volume from –

THE COURT: I'll sustain objection to counsel's statements about what the contracts called for.

BY MR. HAGLUND:

Q. Okay. Just a couple other questions. Mr. Burke, isn't it true that you got a call from Bill Nelson shortly after this lawsuit was filed?

A. He called me wanting to buy some logs.

Q. Didn't he tell you about –

MR. SIMON: Objection, Your Honor, hearsay.

THE COURT: Objection will be overruled. You may answer it.

THE WITNESS: I am pretty sure he didn't say anything about it.

BY MR. HAGLUND:

Q. And you didn't tell him that you couldn't afford to [Tr. 13] testify against Weyerhaeuser?

A. No, absolutely not.

Q. Your company has been on the sales block for the last two-and-a-half years, hasn't it?

A. Oh, yeah. That's common knowledge.

* * *

**[Vol. 6-B (Apr. 15, 2003)] [Testimony of Robert Taylor]**

* * *

[Tr. 19] So as I moved to the east United States and the eastern business, those same criteria held true, the same processes, which was excellent for me. And then when I was appointed in the role I am today in the late 1990s, it gave me an opportunity to then go to customers, new customers, and really sell the value of that product, but know how alder substitutes in and out with a number of species.

Q. Would you describe that for us a little bit.

A. Well, you know, the customer really determines what species they use. It's all about style, it's about taste, it's all about experience and look for them, as well as how well it machines and how well they are able to control their costs, and make a good margin of profit by processing it.

You know, the alder clearly can be substituted for other products as well as be substituted out based on those styles and trends. So when we are around the world, what we're trying to do is understand the customer, understand what they're trying to produce, and look to see how we can fit a product into their need.

And sometimes that's alder and sometimes it's other products for alder, so it's a real advantage we have by being close to that customer to understand what their needs are.

Q. Now, there has been testimony in this trial about various technological improvements that have been made at [Tr. 20] Northwest Hardwoods, and other witnesses have gone into detail, the various pieces of machinery, how they're operated. Let me ask you from a big picture perspective, why does Northwest Hardwoods make the investments it makes?

A. Well, it starts with understanding where value is created; and, secondarily, understanding the resource that's

available and trying to put equipment in that extracts the most value out of that resource.

Starting with a sawmill, if logs are small and crooked, you have to put equipment in that maximizes the value and the amount of lumber that comes out of that log in order to then protect that as it moves through the entire manufacturing process. We also install technology to help improve the decision by the employee that's handling the wood.

Unlike softwood lumber, every employee that handles a piece of hardwood is making a decision based on the value of a piece of lumber, that log, that block. And it's important that we provide those tools to the employee, whether it be equipment and/or education in order for them to protect the value and get more value out of it, so we really design our mills in order to do that.

And then hopefully if we've done our job well, and sometimes we don't do our job as well as we could, we limit the amount of – of loss from the time that log lands at our [Tr. 21] facility until the time the customer receives the lumber. We take ownership during that entire process. We will not pass on to the customer any defects, to the best of our abilities.

Q. Let's change topics a little bit and talk about some of the experiences that Northwest Hardwoods was seeing in its lumber sales market in the late 1990s, in particular directing your attention to the latter part of 1997, early part of 1998. What was the company experiencing?

A. There was a lot of – I guess turmoil might be a good word, going on in the world marketplace. We had an Asian crisis beginning to occur, and the demand primarily in Japan was reducing. Their economy, their bubble economy had kind of burst and things were tough there.

In Europe, things were also slowing down, and customers that would use alder for the building of furniture needed less.

And then the third component was the eastern U.S. furniture producers were starting to move offshore. And all of those things started to occur, even though minor, some of those, and we had to change our focus on customers that we sold to.

Q. Tell us about that. What exactly were the changes? What were the changes that Northwest Hardwoods started making in response to this economic situation?

A. Well, first of all, the cabinet industry in the United

* * *

[Tr. 30] A. From – in the early '90s was eastern business vice president.

Q. And from time to time, would you have meetings with Arnold Curtis and the managers of Northwest Hardwoods?

A. On occasion, but they didn't occur very often.

Q. Did you hear Mr. Curtis or Mr. Hohendorf ever express an opinion that Northwest Hardwoods should maintain high log prices?

A. Never.

Q. In the year 2000, were there any recommendations from Weyerhaeuser, or decisions made with respect to modifying the accounting of corporate and business level costs?

A. Yes.

Q. What happened?

A. Yes. All selling general administration costs were asked to be kept at the business level, and the units, the manufacturing units were asked only to keep track of those costs that they controlled.

Q. Did that have – was that just for Northwest Hardwoods?

A. No, that was the entire company. And it was for standardization, so that when businesses were being compared against, everyone was using the same accounting principles.

MR. SIMON: Your Honor, we ask that a copy of the juror notebook be given to this witness.

THE COURT: He has it, I think.

* * *

[Tr. 33] business, meaning why should you be in business. And the second part included strategy and rationale, which is, what can do you and how attractive of an industry are you in. Then you look at the execution of that strategy and the outcome.

All of which each business went through in order for the Weyerhaeuser senior management team to understand what businesses should be a part of the company, what businesses need to improve to be industry leaders, because the goal is to be an industry leader, and then what businesses need to be just held or divested.

Q. Some of those documents contain some statements about what some other hardwood mills in the Pacific Northwest were doing or experiencing or facing. First of all, where did that information come from?

A. It was all estimates. In the western U.S., there isn't any place to find data regarding even production of lumber, so everything is just looking at our best guess estimate, using whatever resources we had available to us. It's very difficult to come up with actual numbers. It was strictly an estimate for the western United States.

Q. Now, what's the point or purpose of making these estimates about what some of the competitors' situations might be?

A. Well, for us, what we were more concerned with was what [Tr. 34] our business units were doing and how to im-

prove those. Because, again, our goal was to be number one or two in our industry, in the hardwood industry, and that was our objective, to display how we were performing.

Q. Now, we've been talking about the investment direction setting and the company level. Was there also something called an annual planning process within Northwest Hardwoods?

A. Well, it wasn't just Northwest Hardwoods. It was the entire company.

Q. Would you just explain what that is and how it differs from IDS?

A. The IDS was done in springtime to provide the Weyerhaeuser senior management team information by mid-year, so they could begin to set their goals. The annual planning process occurred in October, and that was for each business to plan for the following year.

The company would do that so they could roll all the businesses up and then go to Wall Street, you know, to indicate how performance and forecast looked. There was a lot of pressure to predict what future earnings were going to be.

Q. Now, who participated at Northwest Hardwoods in this annual planning process? Not the Weyerhaeuser company-level IDS, but who were some of the participants in the annual [Tr. 35] planning process?

A. As far as the annual planning process, it was really done at the mill levels, and then it was rolled up to Northwest Hardwoods' leadership team.

Q. And that would include you?

A. Yeah.

MR. SIMON: Thank you. I have nothing further.

THE COURT: Cross-examination.

MR. HAGLUND: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HAGLUND:

Q. Mr. Taylor, would you agree that if the alder resource in the Pacific Northwest were to be off limits or to disappear, that the existing hardwood industry here would also disappear?

A. Well, you know, the mills that we have today, are constructed with equipment to handle the alder and maple resource. I – I know we've run a few tests on softwoods, such as hemlock, but because we have never had a need to run other softwood species –

THE COURT: His question related to hardwoods. The hardwoods industry would disappear?

BY MR. HAGLUND:

Q. Was the answer yes?

A. If there were no other hardwoods to run, yes. Then

* * *

[Tr. 39] Q. And Weyerhaeuser maintains detailed aerial and other inventories of the entire forest resource in the Pacific Northwest, correct?

A. They keep track of inventories, that's correct.

Q. Quite closely, correct?

A. They usually do that every three to five years, yes.

Q. And you were involved in reviewing these materials before they were actually shared with senior management that was above you, correct?

A. That's correct.

Q. So you had input into what is Exhibit 400, correct?

A. That's correct.

Q. Okay. Let's move to Exhibit 405. Are you familiar with this document? It is also in your book, and I'll blow it up more in a moment. This is 405.

A. Yes.

Q. Is Del Fisher in the upper right-hand corner?

A. That's correct.

Q. And was this – this shows – oh, I don't see a date. Was this also prepared for this strategy session you've described?

A. Yes. This is – it appears, based on the comments, this is 1999.

Q. Well, wouldn't it have been 2000 if your third bullet

* * *

[Tr. 43] Q. I'll restate the question. Isn't it true that your senior management team of Northwest Hardwoods gave two $1,000 recognition awards at the end of 2000, and one of those was to Gene Novak?

A. I – I would have to check that. I can't remember three years ago what that recognition was.

Q. Well, do you remember that you did give one to Gene Novak?

A. I do not recall that, no.

MR. HAGLUND: Okay. May I approach the witness?

THE COURT: You may.

THE WITNESS: Okay. Yes, I do remember this.

BY MR. HAGLUND:

Q. Would you read what's stated in your – is that your handwriting in the lower left-hand corner?

A. That's correct.

Q. Could you read what you wrote to Mr. Novak.

A. "Recognition award of $1,000 will appear on the 12-29 pay period. Thanks for your support and assistance." And this was to the Project Grizzly team.

Q. And Mr. Novak was part of that team?

A. That's correct.

Q. And he got a thousand dollar bonus at year end as a result?

A. That's correct. According to this, yes.

* * *

[Tr. 50] weren't added until after you bought Coast Mountain?

A. That's not correct.

Q. Isn't it true, Mr. Taylor, that the forest licenses were not a significant factor in Weyerhaeuser's valuation of the purchase – in Weyerhaeuser's valuation of Coast Mountain?

A. That's correct.

MR. HAGLUND: Now, if the witness could be handed Exhibit 482.

(The clerk complies.)

BY MR. HAGLUND:

Q. Now, Mr. Taylor, I want to ask you some questions about the procedures for establishing transfer pricing for alder saw logs supplied to the Northwest Hardwoods mills from company lands.

Is it a fair statement that it's your understanding that those transfer prices are to be set

quarterly at fair market value as reflected by sales to – purchases from third parties?

MR. SIMON: Your Honor, I object. It's beyond the scope of direct on this line.

THE COURT: The objection will be overruled.

THE WITNESS: It's my understanding that prices are set based on the market.

BY MR. HAGLUND:

[Tr. 51] Q. Transfer prices are set based on market, is your understanding?

A. That's correct.

Q. Okay. I'd like to – you've got 482. It's a 66-page exhibit. I am only going to be dealing with a few pages, but I need to tell you what the numbers are. If you could first turn to Page 13.

First, Mr. Taylor, let me tell you that Exhibit 482 consists of the year-end profit and loss statements for each of your hardwood – your alder sawmills in Oregon, Washington and British Columbia for the period of 1997 through 2001. Each one is a two-page document and all of them are contained in this exhibit.

I assume you're quite familiar with these, and the format. Is that a fair statement?

A. That's correct.

Q. And the first one I want to show you is for the first year that you owned Coast Mountain. And you call it your Delta, BC, sawmill, correct?

A. Ah, Delta, BC, correct.

Q. And here, if we blow this up a little bit, I want to go to the middle where the logs are. We can see two major

categories of logs, is that correct, third party and Weyco or Weyerhaeuser.

A. That's correct.

[Tr. 52] Q. Now, the third party logs would be those that your company is buying from outside suppliers; is that right?

A. I – I am not familiar with the exact category. I'm assuming that that's correct. There is a difference between Weyerhaeuser and then third party.

Q. And the Weyerhaeuser category would be those coming from either private hands like those you acquired from MacMillan-Blodel or the forest licenses you acquired from Coast Mountain?

A. That's correct.

Q. Okay. And if we move across here to the far column, which shows the year-end data, wouldn't you agree?

A. Correct.

Q. If you look on the screen, what we see in 2001 is that you bought 22.4 million board feet from third parties; is that right?

A. That's correct.

Q. And the average price that you paid for per thousand board feet is $282 per thousand board feet, correct?

A. Right.

Q. And the second category, which is the private company wood or the forest license logs, you bought 9.8 million, or you supplied 9.8 million board feet of those logs to your Delta sawmill in 2001?

A. Correct. That's what this says, yes.

[Tr. 53] Q. And the transfer price that you recorded in your year-end financial statement was $282; is that right?

A. That's what this says, yes.

Q. So at least in British Columbia in 2001, there was no differential between the transfer price and the third party price on a year-end all average basis, correct?

A. Other than the handling costs.

Q. Okay. Other than a very small difference between handling costs?

A. Uh-huh.

Q. Okay. Now, I'd like to have you turn to Eugene, which is Page 45 in this document. Some of the page numbers are sideways because of constraints in the copy.

Now, would you agree with me, Mr. Taylor, that this is the Eugene mill year-end Page 2 statement for the financial performance of the Eugene sawmill?

A. That's actually Page 1.

Q. Okay. That's Page 1. You're right. Page 1 of the two-page year-end financial statement?

A. Correct.

Q. Now, if we go down to the same section of logs, do we have these same two categories, purchased third party, purchased Weyerhaeuser or fee timber?

A. Yes.

Q. And I've marked those with a highlighter on the screen; [Tr. 54] is that right?

A. That's correct.

Q. Now, if we move across, do we see here, Mr. Taylor, that the third party volume that you bought from third parties for the Eugene mill in 2001 was 32.1 million board feet?

A. Correct.

Q. And you paid an average price of $449 a thousand for that?

A. For the 12 months, yes.

Q. Okay. And then when we look at what was delivered to the Eugene mill from your company lands, it was 3.6 million board feet, correct?

A. For the 12 months, yes.

Q. And the average price is $436?

A. Correct.

Q. And that's a differential of just $13?

A. For the year average.

Q. For the year average.

A. Right, but not for each individual purchase.

Q. I agree. Just the year-end average $13 per thousand differential year-end.

Okay. Now, let's turn to Longview 2001, which is Page 10 of this document, Exhibit 482. Would you agree that Page 10 of this exhibit is the Longview mill, Page 1 of the [Tr. 55] year-end financial statement for 2001?

A. Correct.

Q. We go down to the same area in the first column. Do we see the same two categories of third party open market logs and company logs?

A. All logs, right.

Q. Well, we see two different categories, right? The same two we saw before.

A. We don't separate saw logs from pulp logs, so it's all logs.

Q. I understand. Then if we go across for Longview in 2001, it is correct that you bought 23.2 million logs on the open market for the year? You need to answer out loud.

A. Yes.

Q. And the average cost was $537, correct?

A. That's correct.

Q. And then you supplied from company lands 11.1 million board feet, correct?

A. Correct.

Q. And the average price for the year was $362?

A. For all logs, yes.

Q. And let me represent to you that's a $175 differential?

A. There is a difference in price between saw logs and pulp logs.

* * *

[Tr. 66] Q. All right. And then you also made a statement in response to Mr. Haglund, you didn't see a relationship between the alder lumber market and the alder log market?

A. That's correct.

Q. Let's take those through and I'd like you to explain what you meant. First, why did you disagree with him when he asked, "Can Northwest Hardwoods control the price of logs?"

A. Well, I view the lumber market and the log market different. So in the logs, it's driven by the softwood harvest, and there are a lot of decisions that take place by a landowner because of the softwood volumes on there. The hardwoods come along after. So the volume in value is determined on what that softwood harvest is.

**[Vol. 6-B (Apr. 15, 2003)] [Testimony of Vicki McInnally]**

* * *

[Vol. 68] Eugene Novak. I take it you know who Mr. Novak is.

A. Yes.

Q. Did you work with Mr. Novak, and in what capacity? Tell us a little bit about that relationship just generally.

A. Gene Novak was on our financial lead team. He was a business analyst for Northwest Hardwoods. He did report to me for the duration of my stay there, which was three-and-a-half years.

Q. Which time period?

A. From November 1998 through August of 2001.

Q. And directing your attention to the time period of early 2001 – or, frankly, let me broaden it. From any time that Mr. Novak reported to you during that time period when you were controller of Northwest Hardwoods, did you ever make any statements at all to Mr. Novak that it was Northwest Hardwoods' business strategy or objective to have or maintain high log prices?

A. I never made a statement like that, absolutely not.

Q. As a matter of fact, is it Northwest Hardwoods – or was it ever Northwest Hardwoods' strategy to maintain high log prices during your tenure there?

A. Never. Our strategy is to manage our log costs. The very first I heard about that supposed conversation was in Gene Novak's deposition several months after he left the company.

* * *

[Tr. 77] Q. I understand that. And when he came to town, was it unusual for him to meet with you in your office?

A. Occasionally we would meet. Typically we would meet in Portland because I was traveling there more often.

Q. Let me put it this way: Did Mr. Novak ever meet with you in Federal Way in your office?

A. Yes.

Q. And was it just the two of you in that office?

A. There may have been several times when it was just the two of us.

Q. Does that separate Mr. Novak from any employee that reports to you?

A. No.

Q. Many times they would come into your office and have a discussion?

A. Very, very often, yes.

Q. And in 1998-1999 time period, do you ever remember Mr. Novak at one of these meetings explaining to you about this disconnect between what he considered was happening to the alder lumber prices and alder log prices?

A. In the '98 to '99 time frame?

Q. Yes.

A. We had several discussions. In '99, I asked Gene to help put together a model on the western log resource activity. And for several months in '99, the latter part of [Tr. 78] '99, he was working on a model that showed all of the logistics flows from the resources, the standing timber to each of the logs –

Q. He was trying to check out –

A. – each of the plants.

Q. I'm sorry. He was trying to figure out the problem, right?

A. Yes. This is a model that's very familiar that we use in other geographies, and I asked Gene to help put one together for the west. Because he worked on a similar model in our northeast and our southeast operations. I said, "We needed to get – because it's such a complex set of mills and sourcing areas, that would help if we had a model put together."

So Gene and I did have conversations about that model. As a matter of fact, we took it for a trial run. It would have been in the very end of '99 – or actually the end of 2000.

Q. My question simply was: Mr. Novak was familiar with this model then, obviously?

A. He was putting it together.

Q. And he was familiar with it from prior assignments, correct?

A. Yes.

Q. Now in this time frame that we have been discussing, [Tr. 79] in 1998 and 1999, did Mr. Novak ever come in to you and ask, "Why are log prices so high when we control so much of the market?"

A. I don't remember any of those specific conversations.

Q. In general, was that the topic of any of the questions he had for you?

A. It would have been more in the latter – as we were investigating our strategy for 2001 is when we had more conversations.

Q. How about 2000? In 2000, would he have had a question similar to what I just asked?

A. The end of 2000 and early 2001 is when we were putting all the information together and we were having a lot of conversations about how to manage our log costs down.

Q. In that time frame, Ms. McInnally, do you recall Mr. Novak coming in to you and saying, "Why are log costs so high when we control so much of the alder log market?"

A. No, I do not remember him asking that.

Q. And you never said, "We have a strategy in connection to alder logs"?

A. I've never said anything to that effect. I would never say anything to that effect. That was fictional.

Q. Is it your opinion that Mr. Novak, after he had some personal problems with his divorce, that he never did any good work for Weyerhaeuser again after that?

* * *

[Tr. 83] THE COURT: All right. Any further questions of this witness?

BY MR. KELLEY:

Q. Ms. McInnally, in 2000 and after, did sales expenses go away in terms of allocation for Northwest Hardwoods mills?

A. We had several changes in how we allocated overhead costs each year. In 2001, they entirely were held at the business level. In 2000, which you're referring to, we retained the IT costs and the business management costs at the business level, because it was difficult to allocate those costs based on units of production.

Q. But the expenses still existed, right?

A. That's true. They were declining, but they still existed. We were asked to keep our accounting processes as simple as possible, and by the time we put together the plan for 2001, all of the costs were held at the business level.

Q. And now Weyerhaeuser as a parent corporation carries significant debt, does it not?

MR. SIMON: Objection, beyond the scope of the direct.

THE COURT: She testified, as I recall, about the allocation and the savings of the money necessary for the corporation, Weyerhaeuser.

MR. KELLEY: Relates to allocation, Your Honor.

THE COURT: I will permit it.

* * *

[Tr. 89] THE COURT: You may continue your cross-examination of this witness.

MR. KELLEY: Thank you, Your Honor.

Your Honor, may I approach? I have some blowups of some exhibits.

THE COURT: You may.

BY MR. KELLEY:

Q. Ms. McInnally, I am going to ask you some questions about 400 and 405. Maybe it is easier than me trying to put them on the screen if you could look over here, please. Can you see that?

A. Yes.

Q. Are you familiar with Exhibit 400, Ms. McInnally?

A. Yes, I put that together in the spring of 1999.

Q. You put that together?

A. Yes.

Q. Yes. And on the primary contributors with you on this exhibit, were they not David Weyerhaeuser?

A. David Weyerhaeuser.

Q. Rob Taylor?

A. Rob Taylor.

Q. Del Fisher?

A. Jerry Martin, Del Fisher.

[Tr. 90] Q. And this was to be used, as I understand it, in 1999, which is called the IDS seminar or meeting?

A. Yes.

Q. And that's a report where Northwest Hardwoods is and where it's going into the future, correct?

A. Correct.

Q. Now, have you seen the original of this document without the redactions lately?

A. Not lately. Not for a couple years.

Q. Well, you put it together. Let me ask you, do you recall specifically what has been redacted by your lawyers from this document?

A. I can tell that the outlook is missing, future years, and typically we put key bullets at the top.

Q. Do you recall specifically what the verbiage was in these key bullets?

A. There's a second exhibit that has one of the bullets on it, next page. Industry consolidation has occurred in the west. Northwest Hardwoods is a consolidator.

Q. Anything else you recall about the bullets on Exhibit 400?

A. I don't recall what they said.

Q. Do you recall on the outlook where the graph went and what Northwest Hardwoods' share was projected to be in the 2003 to 2007 time frame?

[Tr. 91] A. The intent of this chart was to show the supply outlook, so this is a chart that is intended to give a forecast of where the harvest levels are going.

Q. And my question only was: Do you recall in the 2003 and 2007 time frame, what share of the market is represented in Exhibit 400 for Northwest Hardwoods?

A. I don't recall the share after what's shown there. I can't recall what that says. It has been several years.

Q. Then if you take a look, please, at Exhibit 405, you also, did you not, prepared this document?

A. Yes. This is – this is the way that we show our competitiveness for our strategic review. This one is for Washington state.

Q. Did you put this Powerpoint presentation together?

A. Yes, I did, and the analysis, the numbers behind it.

Q. And I understand that you and the same individuals I mentioned, Mr. Weyerhaeuser, Mr. Taylor, Mr. Fisher, were the wordsmiths, if you would, of these bullet points?

A. What you're looking at, this is the note pages for the speakers, so when we're presenting this, typically what the senior team would have seen is just what is in the box, the slide up above. And so these were notes below for Dale to, as he was explaining the chart, there were notes that he could refer to.

Q. This was on the screen for the entire audience?

[Tr. 92] A. And in their notebooks.

Q. And these were Mr. Fisher's talking points?

A. Correct.

Q. Do you recall what's been redacted on this exhibit from No. 405?

A. We may have had some letters in there representing different competitors.

Q. Do you recall specifically that you did have, in fact?

A. I don't recall – I don't recall.

Q. Let me see if you can explain for me exactly what this shows. The zero to 100, that would show a profit margin, would it not?

A. On the left axis is the net margins, which is the profit margin. It's the earnings of that plant divided by the lumber that they sold. And so it goes from zero to 100. You could see Centralia was $100 margin, correct. That is the left axis.

Q. And the bottom axis, this is what?

A. On the bottom that shows the log supply for that time period that we're working with. In this case, it is roughly 250 million feet of log availability in that area servicing those mills.

Q. Were there any projections in terms of where the supply of the alder resource was going on Exhibit 405?

A. No, that's – that's more of a current view snapshot, [Tr. 93] where we're at today. The intent of that is to show a balance where you're at with your supply that's available versus the capacity that you have in the area. We do that with all of our businesses.

Q. You're looking at a snapshot of where you are now, not what the forecast is in the years to come?

A. Correct. This isn't long term.

Q. Ms. McInnally, would it be any assistance to you in recalling specifically what was redacted from these two documents if you saw the original of the document unredacted from your lawyers?

MR. SIMON: Your Honor, we have an objection to this that I would like to be heard outside –

THE COURT: All right. You can do that.

Any further questions?

MR. KELLEY: Yes, Your Honor. I would like to refresh her recollection.

THE COURT: All right. We will call her back in the morning if necessary.

MR. SIMON: Your Honor, this witness is from out of town and left two teenage children at home.

THE COURT: You may show me then the originals and I'll make a determination.

MR. SIMON: Well, I don't have them, he has them. I have a different issue that I want to raise with the Court [Tr. 94] about that and this procedure.

THE COURT: Ladies and gentlemen, we'll excuse you for a little extra recess for a few minutes. Sometimes these things do happen.

(Open court; jury not present:)

THE COURT: All right. What's the problem?

MR. SIMON: Your Honor, the problem is that when these documents were first delivered to Mr. Haglund by Mr. Novak, who took them from Weyerhaeuser, they contained competitively-sensitive information dealing with other competitors. At the time, Mr. Michael Haglund was a – and we're out of the presence of the jury, Your Honor – was a part owner and chairman and member of the Board of Directors of Washington Alder.

THE COURT: I recall that.

MR. SIMON: We objected to Mr. Haglund seeing this competitively-sensitive information.

THE COURT: I understand that.

MR. SIMON: There was no objection made at the time by Mr. Haglund on that point, no motion to compel at all. And, therefore, Your Honor, I think the jury will draw an er-

roneous inference when the jury hears there are names of other competitors on there of why we didn't provide it.

So I have two points: One is I think that that information should be provided and disclosed under seal and [Tr. 95] confidentially so our other competitors don't find out about that, but more significantly, Your Honor, I would like an instruction to the jury that the reason why it says, "redacted," and they're correct, my office redacted it.

THE COURT: I will find a way to tell them that, so you won't be tarred with that brush. And my recollection is that in some of the later arguments, you said that since Mr. Haglund was no longer involved, you didn't have any problem with it, so the real issue now is to make sure the jury doesn't draw any prejudice from the fact that it was redacted.

MR. SIMON: And the only way, Your Honor, the only way in my opinion, and I submit this to the Court quite sincerely, the only way for the jury to understand that and accept that is for the jury to understand that at the time they were redacted, from Mr. Haglund's view, it was because of his connection with an active ongoing competitor in Washington.

THE COURT: We're not going to do that. I can find a way to tell them it was redacted and the reasons it was redacted were valid at the time and they aren't any longer; and, therefore, they're being disclosed voluntarily by the defendant.

MR. SIMON: And the record reflects my disagreement with that and my objection. I appreciate the [Tr. 96] opportunity to put that on the record.

THE COURT: Very well. Let's see if there are any other arguments now while we're at it. You're going to show those original exhibits to her –

MR. KELLEY: Correct, Your Honor.

THE COURT: – to refresh her recollection. And I will tell the jury at the time you do that the reason they were redacted originally, that purpose is not in effect any longer, it should not be construed in any way against the defendant, the fact that they were redacted.

MR. KELLEY: Your Honor, these documents remained in this form after Mr. Haglund no longer had any interest in Washington Alder whatsoever.

THE COURT: I understand that. You didn't particularly ask for me to relieve the redaction or I might have done it. Anyway, let's get on with the testimony. The jury can come back in now.

You'll want these under seal, I assume, still?

MR. SIMON: Yes, Your Honor.

THE COURT: Okay.

(Open court, jury present at 3:30 p.m.)

THE COURT: Ladies and gentlemen, you've heard a little bit about some redaction on some exhibits. I want you to know the reason those were redacted by the defendant when they were disclosed originally is no longer in [Tr. 97] existence anymore. It shouldn't have anything to do with holding anything against the defendant that they have been redacted. I have now ordered that the redaction be lifted, but you should not hold against the defendant anything for redacting them originally, because that reason is now gone.

All right. You may proceed.

MR. KELLEY: Thank you, Your Honor.

THE COURT: And we'd better mark these "A" numbers, so we keep these straight.

MR. KELLEY: Your Honor, I have previously marked them as our next document, 485 and 486.

THE COURT: Let's give them "A" numbers because they're the same exhibits without the redaction. So 400 will be 400A; is that right?

MR. KELLEY: Correct, Your Honor, and 405A.

THE COURT: All right. Those are the only two?

MR. KELLEY: Yes, Your Honor.

THE COURT: All right.

MR. KELLEY: May I approach again, Your Honor?

THE COURT: You may.

And I assume, once again, other than as stated, there is no objection to 400A and 405A.

MR. SIMON: Yes, there is, Your Honor. With respect to 400A, we're going into post-2002 data, which is contrary to this Court's ruling.

[Tr. 98] THE COURT: All right. We'll have to get that out. We'll have to stay within – this case involves everything up to December 31st, 2001, so we'll have to find a way to get that information beyond that time out of the exhibit. Assuming that's done, I assume 400A and 405A can be received subject to your previous objection.

MR. SIMON: Subject, yes.

THE COURT: They'll be received.

(Plaintiffs' Exhibit Nos. 400A and 405A were received.)

BY MR. KELLEY:

Q. I'd like to hand you 400A. Would you take a look at that document, please.

A. Uh-huh.

Q. And before I ask you if that refreshes your recollection, let me just repeat, this is a document that you prepared for an IDS presentation in 1999 looking forward, correct?

A. Yes. I was new to Northwest Hardwoods, so I facilitated putting it together, the chart.

Q. In 1999?

A. Uh-huh.

Q. Now, does looking at 400A refresh your recollection, Ms. McInnally, in terms of what the projection was for the 2003 to 2007 time frame?

[Tr. 99] MR. SIMON: I object, Your Honor. If evidence is coming in post-2002, then I object to that, Your Honor. And I am not quite sure that the Court's ruling makes clear to this witness what is and is not permitted.

THE COURT: What's your position about why we're talking about 2007 now?

MR. KELLEY: Because it was a projection made, Your Honor, in 1999 going forward in terms of what the market was and what share they wanted of that market.

THE COURT: I will permit that, but you should understand the case is about acts that occurred only up to December 31st, 2001. This projection was made before that time and so I will permit it.

Go ahead.

MR. KELLEY: Thank you, Your Honor.

BY MR. KELLEY:

Q. Ms. McInnally, now, the next column. Does a review of Exhibit 400A refresh your recollection as to what the projected share for Northwest Hardwoods was during the next

five-year period?

A. Yes. What the next column shows, the main intent is that we have –

Q. I just want to know what the column says. I am sure Mr. Simon will ask you additional questions in followup.

What does this column reflect in terms of [Tr. 100] Northwest Hardwoods' market share, 2003 to 2007?

A. We're showing a supply share and it is different than market share. And the share is 85 percent. It is due to the log costs.

THE COURT: It is 85 percent of the supply of logs available or – you said supply, what –

THE WITNESS: What's happening is we were projecting declining availability primarily due to all the regulations that were unknown at the time.

THE COURT: Declining ability of logs?

MR. SIMON: Availability, Your Honor.

THE COURT: Availability, excuse me.

THE WITNESS: '99 was the time frame where all the salmon regulations were coming into play, and there was a huge amount of uncertainty. And so those of us who have capacity were concerned about what will the regulations do, and stream-side management.

At this time this chart was put together, we did not know, so you can see at the bottom, we took some projections about how much will be available at that time. And we were concerned because it was an unknown and we projected that there may be less available.

THE COURT: Let me get back to my question. That last column is talking about an estimated percent share of the logs, alder logs; is that right?

[Tr. 101] THE WITNESS: On the axis it's showing the logs that will be available, each harvest for each year. And then what we're interested in is, because our mills are becoming more efficient –

THE COURT: All I want to know is what that last column is. What does it say?

THE WITNESS: The total log supply availability, and of that, how much we project Northwest Hardwoods' will be.

THE COURT: Okay. Supply of log availability. That's what it means.

THE WITNESS: Yeah, it's supply.

THE COURT: All right. Go ahead. Excuse me, Mr. Kelley.

MR. KELLEY: No problem, Your Honor.

BY MR. KELLEY:

Q. In 1999, you projected that Weyerhaeuser would go over 85 percent of the supply share in this time frame, 2003 to 2007?

A. It was a function of having less available and our mills becoming more efficient.

Q. And having said that, the projection was 85 percent of the supply share?

A. That was our projection at the time, and we were very concerned about that.

[Tr. 102] Q. Let me hand you 405A, and ask you the same question, Ms. McInnally, if that refreshes your recollection in connection with certain information that was previously redacted.

A. I can't tell by looking at this chart what year it is.

Q. Okay. I think you testified earlier this was from an IDS in 1999?

A. 1999.

Q. Does that sound accurate?

A. Yes, but it doesn't have a date on it. We did very similar charts in '99 and 2000.

Q. A similar chart like this was available in both 1999 and 2000?

A. Yes, that's correct, but they were slightly different. We ended up putting Washington and Oregon together for simplicity in the following year, so this must be 1999.

Q. And 405A, does it refresh your recollection in connection with what these particular redactions were?

A. Yes, we had the –

Q. Let's start with this one.

A. Those days, specifically what it says? It says, "Other capacity."

Q. The next box, Ms. McInnally?

A. Washington Alder. These are the names of plants in the area.

[Tr. 103] Q. And the following box?

A. Ross.

Q. Based on your understanding, would that be Ross-Simmons?

A. Yes.

Q. The next box, ma'am?

A. Pacific.

Q. This right here is Pacific?

A. Right. I am not familiar with that business, Pacific.

Q. And there is a line right here. What does that indicate?

A. Well, it looks like what's happened is there's another line that you're missing.

Q. Does this line continue up, ma'am?

A. Yes, it does. And it says, "2012 supply."

Q. This line does?

A. Yes, uh-huh.

Q. Or does this line?

A. No.

Q. The line immediately next to Ross-Simmons –

A. No, go over. Let's see. Well, there are two lines on here that you need to draw out.

Q. If you identified this as Ross-Simmons, is there a line that has a supply indication that goes up immediately next to Ross-Simmons?

[Tr. 104] A. Yes, and that's called current supply.

Q. Current?

A. Which is intended to mean that there is roughly 200 million feet of saw logs, and all the rest of the capacity is pulp logs.

Q. And then is there one more projection in terms of the supply into the future?

A. That's the second line.

Q. Would that be here, ma'am?

A. Yes.

Q. And that goes to 2012?

A. Yes.

Q. So, now is your recollection refreshed that you did, in fact, in 1999 at this IDS, project forward in terms of what the supply would be?

A. Yes. This is similar to the other chart. Here we're putting where the supply is in the future.

Q. And one last question, this box here, who is that?

A. That's Cascade. Earlier I stated that this was a certain point in time, and I did not recall putting timelines in there –

Q. I understand.

A. – until I saw this.

Q. So in 1999, when this document was created, the current supply showed that there was not enough supply for all of [Tr. 105] the competition in the marketplace; is that correct?

A. Actually, that is not correct, because all those mills were running. There's also quite a few puip logs, so there is other volume that's out there that is maybe smaller in diameter which allowed the remaining capacity.

Q. That's a good point. Ross-Simmons now, you know, is no longer operating; is that correct?

A. That's what I understand.

Q. You know that, don't you? How about Pacific, do you know whether or not they're still operating?

A. I don't know.

MR. KELLEY: That's all I have, ma'am. Thank you.

THE COURT: Further questions?

MR. SIMON: Yes, Your Honor. May I inquire of the Court, though? I want to comply with the Court's rule, since Mr. Kelley just asked whether or not those companies are still operating, am I now free to go into what happened post-December 31, 2001?

THE COURT: No, except as to projections based upon data made available before December 31st, 2001.

MR. SIMON: Even though Mr. Kelley just asked about what's happening now with his last two questions?

THE COURT: Whether they are still in existence. I will let you – that's a good point. I will let you go into that to the extent it talks about what is available

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**[Vol. 6-B (Apr. 15, 2003)] [Testimony of David Kurtz]**

* * *

[Tr. 110] A. You mean the actual prices for the products?

Q. Yes.

A. Quarterly. It is usually quarterly. Every now and then, they might have gone to monthly, but generally quarterly price negotiations.

Q. And how much volume are we talking about, first with respect to Weyerhaeuser selling pulp logs to Georgia Pacific?

A. 40,000 green tons.

Q. And what about the volume that was being sold to Northwest Hardwoods from Georgia Pacific in Oregon?

A. It was 80 percent of the annual harvest, and that harvest would fluctuate, but it was probably three to five million feet.

Q. Why was it just 80 percent, do you recall?

A. We generally try not to sell 100 percent. Kind of like not putting all your eggs in one basket. We try to sell a percent and that way we have that remaining 20 or 30 percent to sell on the open market to make sure we are getting a correct price. It doesn't have to go there, if we think we're getting a good price, all 100 percent can go to the same home.

Q. Now, on a monthly basis or the quarterly basis, were those separate – were those separate selling arrangements?

A. Yes. What I had was a buyer in Washington that

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**[Vol. 6-B (Apr. 15, 2003)] [Testimony of Larry Bray]**

* * *

[Tr. 117] logs to the Ross-Simmons STEDCO Joint Venture?

A. No. We've had a history ever since I started or even before that that selling logs month to month, on a month-to-month basis, and that's always the way it had been there.

MR. JOHNSON: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HAGLUND:

Q. Isn't it true that after this lunch within a year you entered into – or your company entered into two successive one-year contracts to sell 80 percent of the volume from the Toledo tree farm to – the alder volume to Northwest Hardwoods?

MR. JOHNSON: Objection, Your Honor.

THE COURT: The objection will be overruled.

THE WITNESS: Our company entered into an agreement, a buy-sell agreement, whereas, the Bellingham paper mill would get pulp wood from a Weyerhaeuser operation in Washington state, and at the same time, Georgia Pacific would sell to Northwest Hardwoods a certain percentage of their Toledo-only harvest. I think that was a one or a two year – one-year agreements.

Q. And it was devoted, in terms of what GP was selling, exclusively to the hardwood component of that tree farm, [Tr. 118] correct?

A. Could you restate that?

Q. In terms of the contract with Northwest Hardwoods, what GP was willing, agreeing to sell was 80 percent of the

hardwood saw logs generated from the harvest on the Toledo tree farm?

A. That's correct.

Q. And this was a commitment that was a year-long contract in two successive years, correct?

A. That's correct.

Q. It wasn't a month-to-month situation, was it?

A. Well, the contract was in place for a one-year time frame. But in reality what we did is we had month-to-month negotiations, and pricing would be done each month based on current market conditions and based on negotiations between a representative of Northwest Hardwoods and myself. And that's the way we've done it for the last six years.

Q. Okay.

A. In selling alder off that tree farm.

MR. HAGLUND: Could the witness be handed Exhibit 430.

THE COURT: Is this the contract?

MR. HAGLUND: Yes.

THE COURT: Mr. Bray, we just heard a witness say that the price was negotiated quarterly instead of monthly. [Tr. 119] Would that be correct?

THE WITNESS: I believe that the contract states that it would be negotiated quarterly, and that's probably what's in the first contract. The second contract says monthly. We actually did it on a monthly basis.

BY MR. HAGLUND:

Q. Now – and the close relationship with Northwest Hardwoods has continued throughout the last several years, correct?

A. The last several years, we haven't owned the tree farm.

Q. Well, I'll withdraw that question then.

Now, did Mr. Gary Schimmel ever talk with you about the contract he had discussed with Mr. Nelson?

A. I can't recall that.

MR. HAGLUND: No further questions.

THE COURT: Any further questions?

MR. JOHNSON: One question, Your Honor.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. The 20 percent that was not sent to Northwest Hardwoods, what did you do with that 20 percent?

A. It was sold to H.R. Jones Veneer in Grand Ronde and Morton Alder, sold to other outside buyers of hardwood.

MR. JOHNSON: No further questions.

THE COURT: You may step down. Thank you, sir.

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**[Vol. 6-B (Apr. 15, 2003)] [Testimony of Raymond Poppe]**

* * *

[Tr. 122] regard to general inventory levels?

A. Yes, I did.

Q. And how did you go about managing the log inventories?

A. We – in larger producers of logs, more often than not, our purchase agreements are based – were done on a quarterly basis, and the smaller suppliers that weren't apt to be producing steadily on a quarterly basis, we would negotiate with them and write our purchase agreements with them as their product was – became available.

Q. As a resource manager, were you concerned about the potential for stain in logs?

A. Stain was a very significant issue with alder logs between April and October. So stain was another – or that part of the season was another concern when we were looking at controlling inventories and maintaining the supply, stain was a significant issue.

Q. From whom did you purchase logs in general?

A. From the large timberlands people, from independent loggers who bought timbers sales, from small landowners. Anyone who – who had hardwood logs to offer.

Q. We've heard some testimony in this case about negotiations with log suppliers, and the shopping that can go on between suppliers and log buyers. Are you aware of what I'm talking about?

A. I am not sure that I understand "shopping."

[Tr. 123] Q. Are there times when a supplier would come back to you and say, "Cascade had offered $5 more than you. Will you beat their bid?"

A. That was something that would occur occasionally. It was my practice not to engage in that whipsawing of prices because I'd already made an offer based on my best information and more often than not probably wouldn't produce any – any results anyway. If I understand your question, that's what I call whipsawing of the buyers, and I didn't engage in that.

Q. Mr. Poppe, did you purchase logs from Northwest Hardwoods – or did you purchase logs from Weyerhaeuser timberlands?

A. Yes, we did.

Q. And how were those prices negotiated?

A. Those were – excuse me, I came here with a cold.

We negotiated with Weyerhaeuser, Weyerhaeuser timber, at arm's length. And the market prices is what we dealt with the same with Weyerhaeuser, with Weyerhaeuser timberlands, as we would another large timberland operator.

Q. During that time frame, 1990 to 1993, relative to what you were buying from third parties, what types of logs was Northwest Hardwoods buying from Weyerhaeuser timberlands in Longview?

A. From '90, '91, we were buying a sawmill sort from [Tr. 124] Weyerhaeuser and Weyerhaeuser timberlands. Probably somewhere in '91 and probably because of the paper mill right there in Longview, we began buying the pulp logs as well. So in that frame – time frame, we bought again, beginning probably somewhere '91, we bought the camp run hardwoods or pulp logs as well as saw logs.

Q. Mr. Poppe, who did you report to as a resource manager at Northwest Hardwoods?

A. I reported to Heinz Hohendorf.

Q. Did Mr. Hohendorf ever instruct you that it was the business strategy of Northwest Hardwoods to buy more logs than it needed at Longview in order to keep logs away from competitors?

A. Never.

Q. Did Mr. Hohendorf ever tell you that you should buy logs at high prices, higher than the market, in order to raise the log prices to competitors?

A. Never.

MR. JOHNSON: No further questions.

THE COURT: Cross-examination.

MR. KELLEY: Briefly, Your Honor. Thank you.

CROSS-EXAMINATION

BY MR. KELLEY:

Q. Sir, if I understand your testimony, when you faced a situation in which a competitor might be raising what he

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**[Vol. 6-B (Apr. 15, 2003)] [Testimony of Bruce Sutten]**

* * *

[Tr. 128] standing timber that we utilize inside of our operating unit. I am also responsible for appraisal work and for the evaluation of any land adjustment, and land adjustment is simply where we buy land and timber and/or sell land and timber or reproduction. We are constantly either consolidating our properties or getting rid of properties that don't fit the core, so that's my responsibility.

Q. So you're a part of Western Timberlands?

A. Yes, I am, Western Timberlands.

Q. Now, as part of your duties, do you negotiate with Northwest Hardwoods' personnel on the transfer price for hardwood logs?

A. Yes, I do. In fact, I do all of the transfer prices for all the operations in the Twin Harbors area. That is one of my fundamental responsibilities. Northwest is only one of many units we have in our operation. We have western lumber business, which has three sawmills; the western veneer business, we have two veneer plants.

We have pulp, paper and packaging, a pulp mill that I negotiate transfer prices with, and Centralia Northwest Hardwoods. All of those are divisions of the corporation, Twin Harbors, Timberlands being the division that handles the land and timber, and then I have to sit down on a monthly basis and negotiate prices with all of the other individual operating divisions.

[Tr. 129] Q. So in terms of Northwest Hardwoods, with whom do you negotiate?

A. For Centralia, who I negotiate, Centralia mill which is the closest to our operation logistically, the shortest haul for our trucks, and our tree farm is actually right up against their operating boundaries, is the Centralia sawmill.

That doesn't preclude, though, if Centralia needs to move some inventory from Longview that I won't sit down and negotiate prices with Longview mill, but predominantly our production goes to Centralia. Centralia also has a pulp facility at DePaul. We split our hardwood into two essential sorts coming out of the woods. Our loggers make a definitive effort to make an eight inch plus grade log sort which goes directly to the sawmill, and then a fiber sort which goes directly to the fiber facility.

Q. Now, with regard to who you negotiate with at Centralia, during the 1990s, who was that person?

A. Bernie McCain.

Q. Now, with regard to the logs that you would transfer to the Longview sawmill, through the majority of the 1990s, who were you negotiating with?

A. 1990s would be Jerry Bain.

Q. Now, how would these negotiations work? How would they happen?

[Tr. 130] A. Oh, boy. Northwest Hardwoods, when it was first acquired by Weyerhaeuser Company, it was acquired as a wholly-owned subsidiary. Because of the legal sensitivities around that, at that point in time, and the time frame I do not recall. I simply do not remember when the time frame was, it was a hand's off negotiation.

Essentially what that means is it was arm's length where I sat and negotiated with Bernie at that point in time and Heinz Hohendorf, as open market logs. And so I was dealing with them as if it was another customer, any other customer in the business. After the company decided or made the decision in the legal sense to turn it from a wholly-owned subsidiary to a division, then the rules changed.

I have very, very definitive rules that tell me how I set my transfer prices and how I deal with my transfer prices,

and when it became a division of the company, I deal my transfer prices with it as a division of the company exactly like I would with western lumber business, which is one of the my softwood mills, or with the pulp and paper business, which is the pulp mill. And there is a corporate policy that I have to follow in order to establish those transfer prices.

Q. Now, the majority of logs that you deal in are conifers, in terms of the scope of your duties?

[Tr. 131] A. Yes, it is.

Q. So how do you know when you sit down with Mr. McCain or Mr. Bain that you are getting the market price?

A. Well, to step back to the wholly-owned subsidiary. At that point in time, our operating unit had excess hardwood above and beyond what Centralia and Longview needed out of my operating unit. And during that time frame, I actually sold logs to a company by the name of Hampton Hardwoods, which is owned by Hampton Tree Farms, which is – well, they had a large sawmill here in Oregon and some in Washington.

At that point in time, they had a hardwood mill located in our operating unit. I also sold logs to Cascade Hardwoods. So during that time frame, it was very easy to get it because I was selling logs on the open market and it was not hard for me to establish what market value was and how hard I had to push Jerry or Bernie.

When it became a division, what we fell back to at that point is the market evidence that I have to accumulate to do appraisals. I'm constantly out looking at timber, either when we're dealing with a land transaction that has merchantable timber on it, or if it's just a stand of merchantable timber.

And part of my responsibilities as senior appraiser is to know what the markets are, so I know what I have to pay for that, just as if you were appraising a house [Tr. 132] or an apartment building. You do comp sales, and that's the only

way you are going to know about where you have to be to pay for that patch of timber or that patch of land for timber.

Now, my largest responsibilities are the softwood part of it. Well, you don't get pure stands of Doug fir out in our neck of the woods. We have Doug fir, hemlock, spruce, maple, alder, cedar, all growing on the same piece of property.

So to do a credible appraisal for that piece of property, you have to have a good solid understanding of what those markets are for each of those species and for the quality associated with each of those species that exist on a piece of property to establish what your comp sale is going to be, so I can take it forward to my management team, and say, "Okay. This is what I am recommending that we actually spend for that piece of property."

Without credible information, quite frankly, I would get it thrown back in my face and I'd be doing something different.

Q. You mentioned that when you were sending logs to the Centralia mill, you will – Western Timberlands will sort pulp and saw logs. Is that what you said?

A. Yes.

Q. Now, with respect to the Longview tree farm, how does [Tr. 133] it work there?

A. That's a little different down there. The location – currently, the location that their hardwood goes to is one fault. The hardwood all goes to the Longview operation. And so for us at Twin Harbors, we specifically have two isolated disposal points, which mileage wise I would say they are 25 to 30 miles apart, physically the sawmill and physically the pulp mill.

To save money operationally, you make the decision off the landing or out of the woods to take the truck of gray to the sawmill, so that you don't have to end up putting it on

another truck and hauling it back down the highway to the sawmill, so we make that split in the woods.

In Longview, that's not the case. They're going to one location. They take it out of the woods, take it to that location. They get paid appropriately. They can get paid essentially what they show up with. On the average, back to the acre, I would assume it is pretty close.

Quite frankly, I've never sat down and made a comparison directly between the two of them. I know from my facts, you know, what we get back per acre.

MR. JOHNSON: No further questions.

* * *

[Tr. 134] CROSS-EXAMINATION

BY MR. HAGLUND:

Q. Mr. Sutten, you work out of the Grays Harbor area?

A. Yes. I work out of where our operating unit is in a small town called Cosmopolis.

Q. And is Weyerhaeuser the dominant log exporter of conifer logs out of Port of Grays Harbor?

A. Now we are. Yes, we are. The export market is extremely weak at this point. We're dominant, but very, very weak ourselves.

Q. Are you also the dominant exporter of chips out of the Port of Grays Harbor?

A. We don't export chips overseas out of the Port of Grays Harbor. We do transfer chips from our operations out of Grays Harbor to other operations in Longview.

Q. Now, is it a fair statement that the bulk of what your office does in Cosmopolis is source export logs to combine, on the open market to combine with export logs from your own tree farms?

A. No. The Twin Harbors tree farm, as we have transitioned, we transitioned the second growth management in about 1976. And when I'm saying second growth management, we were truly in second growth. We have the pride to say that we are the first industrial tree farm in the United States right there at Twin Harbors.

* * *

[Tr. 139] Q. And he would follow the same process that you follow when you negotiate transfer prices; is that correct?

A. We have a policy that we have to follow.

Q. Okay. And in looking at the detailed records, Mr. Sutten, it appears that the – that the vast bulk of your volume from the Twin Harbors tree farm goes to Centralia?

A. Oh, yes. Yes, it does.

Q. And you do your best to establish transfer prices that are at market value?

A. That's my job.

Q. And that's the policy?

A. That's the policy.

Q. And when one looks at the Longview record, sir, it's clear that that's what you do when you sell logs from Twin Harbors to Longview, correct?

A. Yes, it is.

Q. Because if one were to compare the prices for high, medium and low logs within the various diameter classes that you're selling in a given quarter, mostly to Centralia, but some to Longview, you'd have the same pricing, correct?

A. If I was selling from the Twin Harbors operation to the Centralia mill and to the Longview, I get paid the Cen-

tralia price, plus the additional trucking that it costs me to go there.

[Tr. 140] Q. And, in fact, if one would go through the detail as we have done, that's what it shows. You're getting the same price for –

MR. JOHNSON: Objection, Your Honor. Counsel is testifying.

THE COURT: It's cross-examination. I'll hear the question.

MR. HAGLUND: I will back up a second.

BY MR. HAGLUND:

Q. There are quarters, aren't there, Mr. Sutten, if I understand your testimony correctly, where you negotiate both with Mr. McCain on the vast bulk of your volume going to Centralia, as well as with Mr. Bain on the smaller amount of volume that goes to Longview?

A. Yes, I do.

Q. And the –

A. Or I have, I should say.

Q. You have. We're talking about a historic period, '96 through 2001, correct?

A. Yes.

Q. And you've been in this position that whole time frame?

A. Yes, I have.

Q. And if the records show that you're getting the same price whether you're sending those logs to Centralia or Longview, you are acting according to the policy as you know [Tr. 141] it?

A. That's right.

Q. Okay. Now – And when it comes to the prices that the Longview tree farm is paying for deliveries to Longview, you've never looked at that, you said?

A. I've never made an absolute comparison, no; but, again, I go back to the comment that I made earlier, we make a definitive grade definition break in the woods. And that definition break in the woods that we make for the Centralia mill also holds true for anything out of Twin Harbors operation that is transferred to the Longview operation, which is entirely different than what Longview does, because Longview takes camp run wood direct to their Longview operation.

So we're talking apples and oranges here, because Twin Harbors makes an extra exerted effort to draw value on a grade basis, because we have two different places. Longview doesn't. They don't make the extended effort to do the same kinds of things we do.

So when I ship logs to Longview, it's the same quality control out of the woods that we would have if I was going to Centralia. So I would have to assume without looking at the numbers specifically that, yes, my numbers would be higher because of the quality of our logs.

Q. But let me – what you've described is a situation [Tr. 142] where your tree farm does more sorting in the woods than the Longview tree farm does, as you understand it, correct?

A. Yes.

Q. But when you send a log truck into Centralia, the log truck is offloaded, is it not, and the logs are placed on the ground on what is called a roll-out scale, correct?

A. That's correct.

Q. And a Northwest Hardwoods' log scaler trained in the high, low, medium specs scale those logs, right?

A. Correct.

Q. And then your timberland division is paid according to the data that he inputs into his handheld, and goes into the computer system?

A. That's correct.

Q. And the same system is used in Longview, is it not?

A. Yes, it is.

Q. Now, isn't it true, Mr. Sutten, that in 1997 or 1998, you had a conversation with George Lukin, then of Pacific Hardwoods, in which you told him that your superiors had been told – or had told you to give Northwest Hardwoods some extra help in log procurement, and that you were to go into the market and tell log suppliers that you wouldn't buy their export conifer unless they also delivered their alder saw logs?

A. Oh, absolutely not.

[Tr. 143] MR. JOHNSON: Objection, Your Honor.

THE WITNESS: Absolutely not, no.

MR. JOHNSON: Outside the scope.

THE COURT: The objection will be overruled as to the scope. It is cross-examination and it is appropriate.

MR. HAGLUND: I didn't quite get –

THE COURT: And my memory is that was another witness, so it is proper impeachment.

You may proceed. The answer stands. He said it was absolutely not.

MR. HAGLUND: And I would –

THE WITNESS: I'd like to expound on that a little bit; and, quite frankly, the reason I would like to expound on it is we have – every year, we, in management at my level or ac-

tually a level below me and above, go through what we call antitrust training. And I do not – never do I attach a buy-sell agreement to each other.

I will buy and I will sell to the same customer, but there is no attachment ever that I have done in the 25 years I have been doing this. I do not do that.

BY MR. HAGLUND:

Q. So George Lukin testified to the contrary, that was false?

A. I have absolutely no idea what George said, but I do not do that and I would not have done that.

[Tr. 144] Q. And in your antitrust compliance program, there's an explicit reference to tying arrangements being improper, correct?

A. That was the guidance we've gotten from our attorneys and our antitrust training that we've had over the years that I've had it, yes. And I simply do not tie buy-sell agreement. I will buy and sell to the same customers, but they are entirely separate transactions, entirely separate contracts with entirely separate volumes attached to it.

Q. I understand there are separate contracts, but –

A. There's no tying.

Q. – isn't it true that you have told loggers that if –

A. Never.

Q. – they want to sell their export logs to you, they've also got to send their alder saw logs to Northwest Hardwoods?

A. I recommend that they do that, but I'm not – depending on the market, the majority of the time, they come back and tell me that Northwest isn't paying a high enough price, you should sell to Cascade Hardwoods or sell them to Ross-

Simmons. But really, quite frankly, I would never tie that, no.

If I bought the standing timber then it becomes mine in fee patent, then I can sell it internally to all of our facilities as a fee patent piece of timber and company asset. [Tr. 145] But for me to tie a purchase of export logs to Northwest Hardwoods division, or the pulp and paper division, I do not do that.

Q. How strongly do you recommend that your suppliers send their alder saw logs to Northwest Hardwoods?

A. I suggest because I don't really, quite frankly, on the hardwood side of the business, I don't have privy to the types of prices that Bernie is working with day to day to day.

I do have absolute control over our local sawmills in the softwood business, because I'm the one who sets the prices. So for our own sawmills, I will offer prices for all the volume on the piece of property that the logger owns that I can utilize. As far as Northwest Hardwoods is concerned, I recommend he calls Bernie or Steve Axel (ph), depending on where it's located. That's as far as it goes.

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**[Vol. 7-A (Apr. 16, 2003)] [Testimony of Gary Nelson]**

* * *

[Tr. 16] You may call your next witness.

MR. SIMON: Thank you, Your Honor.

Your Honor, the defendant calls Mr. Gary Nelson.

THE COURT: All right.

(The witness was duly sworn.)

THE WITNESS: Gary Gene Nelson, Junior. N-E-L-S-O-N.

DIRECT EXAMINATION

BY MR. SIMON:

Q. Good morning, Mr. Nelson. Michael Simon for Northwest Hardwoods and Weyerhaeuser. I want to begin by reading a brief statement about who you are. I will ask you if it is correct and then I have some questions for you.

I understand you are presently the executive director of the Port of Grays Harbor up in Washington, but previously you were the general manager of the plaintiff Ross-Simmons Hardwood Lumber Company; that you were employed by Ross-Simmons from February 1997 through approximately December of 1999. Am I correct, sir?

A. Yes.

Q. Will you briefly describe your job functions and histories and any changes that took place while you were at Ross-Simmons from February of 1997 through end of 1999. What were you doing?

A. I started as vice president of raw resources, which is [Tr. 17] essentially the log procurement manager and was in that capacity until the summer of '98. Then I took on the title of general manager, CEO – COO I think at that time.

Q. Essentially the chief operating officer, equivalent to like a president or general manager?

A. No. I think John Simmons was president and CEO at the time. I was in charge of operations.

Q. While you were doing raw resource material log procurement, was that for both the Joint Venture mill in Toledo, Oregon, and for the Ross-Simmons Longview mill or one or the other?

A. It was both.

Q. Would you take us through – would you describe for us how you went about – how Ross-Simmons went about procuring logs for the Toledo mill, and as part of the Joint Venture, what did they do and what were the experiences that you saw, starting with 1997?

A. When I came on board, we had a log buyer, full-time log buyer in Toledo at the mill by the name of Dave Frazier. It didn't work out too well. I think I let him go that summer and took over responsibility for procurement there.

It was a network of log suppliers – timberland owners and log suppliers. After 15 years in the business, you kind of know who is who and who to call. There is mailings you get on distribution lists, some of the larger [Tr. 18] companies, Georgia-Pacific, Willamette will have regular offerings, maybe quarterly offerings, and they will mail out a prospectus, if you will.

A lot it is just inquiries. We advertise in the newspaper, in the local papers, and we have people call in and then we would go out and look at their logs and bid or appraise the logs for them.

I would say – I can't say percentage-wise. I don't have the documents in front of me. You can look and see what was small private versus larger timberland owner.

Q. Were you able to get – why don't you describe what you were able to get generally in terms of the timber resource or alder log supply at the Toledo Joint Venture mill in terms of quality and price.

A. In '97, we actually had a pretty good log – actually had too many logs. In late 1997, we actually had to back-haul some logs up to Longview to get them processed before they stained on us.

Going into '98, again, the market started weakening in late '97 as did log prices go down. And then you have people who just don't log. Every time you have a drop in prices, the marginal supplier says, I'm not willing to sell at that price. Availability drops off.

The overall age class in that kind of working circle was, we felt, much younger than what we had in the

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[Tr. 21] Siletz, I think in the deck, and then we picked up the cost of transportation. So we paid the actual cost there and then picked up the transportation. We ended up with a delivered log in Longview comparable to what the market was in Longview.

Q. Let's talk about the market in Longview. In the 1997 time period, what was Ross-Simmons' experience in terms of buying logs for its Longview mill in terms of could it find adequate supply at appropriate market prices or appropriate prices?

A. Yeah. I think we had a good supply of logs. We also were buying in Port Angeles at that time. I think Bill Nelson had started or instigated a program with Crown Pacific in Port Angeles for regular supply. That relationship deteriorated, I think, in the fall of '97. I'm not sure why to this day, but that fell apart. But we did continue to procure logs in Port Angeles. That was a small increment of our logs for Longview.

In Longview, Longview Fiber was, I'm sure, the largest supplier of the whole spectrum, from small diameter pulp logs up to large diameter sawlogs. There was a fair amount of activity until late '97 was about the time that everybody called the Asian flu. The export market slowed down and, therefore, logging slowed down, so there were less logs available.

[Tr. 22] Q. I want to spend some time on that. I want to close this part of the story and make sure I understand at least, in your experience, through the end of 1997, you were saying that there was an adequate supply of logs at appropriate prices for both the Toledo Joint Venture mill and Ross-Simmons' Longview operation. Do I have that right?

A. Yes.

Q. Then what happened the later part of 1997 that affected the Ross-Simmons business and the Toledo Joint Venture operations?

A. I would say in probably the fourth quarter of '97 we started seeing demand decrease.

Q. Demand for what?

A. Demand for our lumber.

Q. Okay.

A. So we weren't moving as much lumber. Usually when that happens, you are not getting the price that you thought you were going to get. So you got not only a little deterioration of volume but also the average sales price started to deteriorate. And then you start making adjustments. You start running the mill at 80 percent capacity or something like that.

You try to slow things down. Slow production down to meet the sales. That's kind of where we were at in '97, at the end of '97, first part of '98, and it just continued [Tr. 23] to deteriorate. That was in Longview. The issues with

STEDCO down in Toledo were pretty much the same except we were still battling some quality problems with the lumber coming out.

Q. Let's talk about quality issues out of Toledo. What did you observe?

A. What the lumber sales staff told me was they had a hard time moving the same grade of STEDCO lumber versus Ross-Simmons lumber. I'm not really sure why. I don't know if it was because it was a new product out there in the market or if there was truly something less desirable about the product. That was more finished grade product. The other issues we had were getting, I guess, true boards, if you will.

Q. What does that mean?

A. The head rig – one of the head rig rails was off kelter, so we end up, as the saw went through the log, it tended to dive at the inner snipe. You ended up losing extra fiber on the end. The head rig – excuse me – the gang saw – we had a combination gang/edger. We continually had problems getting cants stuck. I think we finally got that figured out, how to lubricate it and keep the spaces of the saws from getting hot so we didn't end up with uneven lumber. That was the issue. You end up with poorly manufactured lumber.

[Tr. 24] Q. We heard terms like "snipe" or "uneven lumber." What is snipe?

A. It is at the end of the board. It gets real narrow. The saw dives in and it ends up like this.

Q. You are making a point like an upside down V?

A. Yes.

Q. I take it customers don't want that?

A. No – that eventually gets trimmed off. It is lost fiber.

Q. By fiber you mean wood?

A. Yeah.

Q. Did you say thin? Thick?

A. In the gang setup there at SEDCO you end up with – I can't remember – six or seven boards, maybe eight, but you end up with one board that is an inch-and-a-half and the rest are 2 inch, for example, when they all should be the same. That had to do with the saws not tracking through the cant evenly. So when you run that through the kiln and dry it and plane it, you come up with skips.

Q. What's that?

A. A skip is when it goes through the planer, and the planer puts a nice, smooth surface on it. If it is not uniform thickness, the planer tends to jump over spots. You will have a rough spot or a frayed spot in between.

Q. Now, you mentioned that the market was having problems, [Tr. 25] the lumber market was having problems at the end of 1997. Did that continue into 1998?

A. Yeah. There were a few bright spots, but in general I think the trend was probably down in terms of demand and prices. There are several markets. Any time you cut a saw-log or an alder log, you are going to have chips on the low end. You are going to have prime or select on the top end and everything in between.

Usually you have a buyer for select. You have a different buyer that buys the chips. You have a different buyer that buys the median or lower grades. It is not all the same market. The trick in sales is try to get everything to kind of move proportionately so you don't end up with your warehouse out of balance.

Q. How are the sales done for Ross-Simmons?

A. We had a sales staff –

Q. Who was it?

A. Sonny and John.

Q. Sonny Powell?

A. Sonny Powell. And Sonny took care of our S2S or our dried lumber primary. John took care of the pallet and shook, the green lumber sales.

Q. When you say that Mr. Sonny Powell took care of the S2S or dried lumber, that's the more valuable higher grade product. Am I correct?

[Tr. 26] A. Yes.

Q. Did Mr. Powell – to whom did Mr. Powell sell? What types of customers did he sell?

A. When I came in '97, we were selling primarily to wholesalers. I think the philosophy at the time was let's turn our money. Let's get our money back. Let them figure out how to merchandise that or market it. Is it going to Europe or Asia or staying in the United States?

Q. Would you spell that a little bit more. What was the business philosophy of Ross-Simmons during this time period with respect to what its priorities were?

A. The priority was to sell as much lumber as we could. It seemed to be that the – and, again, I didn't have, other than to witness which direction lumber was flowing, it seemed that there was North Pacific, I think, was a big brokerage that we used. We would sell to brokers, and they would market the lumber to whoever. A lot of times we never knew who the end user would be.

Q. I understand the financial records are in here. I won't ask any details about that. Is it generally your understanding that 1997 was one of the biggest sales and profit years for Ross-Simmons?

A. I don't think so. I thought that '96 or '95 was better. I don't know.

Q. We will look at the financials later. I won't go into

* * *

[Tr. 31] Did you mean anything besides what it says?

A. No.

Q. The next sentence, what did you mean by that? "Unfortunately, we could only push log prices down to a certain point as our competition kept a floor on log prices." What did you mean by that?

A. It is a tactic that all log buyers use. If you screw up and you buy too many logs at a high price and you can't take any more logs, then obviously you don't want the competition to get logs at a lower price. You try to do everything you can to keep that – even if you are not buying – a standard one was if I was buying, I would pay X, but I'm not taking logs. It was just really a strategy I think we all used to protect ourselves on the downside.

Q. Do you have any knowledge at all specifically that Northwest Hardwoods did that?

A. No.

Q. Do you have any knowledge at all of any anticompetitive activity by Northwest Hardwoods or any activity at all designed to push log prices up or keep logs away from competition?

A. Not by Northwest Hardwoods, no.

Q. That next sentence on paragraph 3, "Also softwood log markets were poor so the overall logging activity was down resulting in a supply of alder logs that was lower than [Tr. 32] normal." What did you mean?

A. Anybody that has been in the woods in the Northwest know that alder and cedar are not a predominant species. Hemlock and fir are. Most companies, when they go to log, they are logging Douglas fir or hemlock or a combination.

Along with that they will harvest alder. There is very few 90 or 100 percent stands of alder. It is usually a come-along species. It comes along with everything else that they harvest.

So if the demand, either domestically or in export market for Douglas fir is down, the supply of alder logs on the market is going to diminish.

Q. Is that what you experienced in '97 and '98?

A. Yes.

Q. Look at paragraph 5, Mr. Nelson. It says, "Production costs were higher than anticipated due to not being able to produce at the projected level of four 8-hour shifts per week." You told us you curtailed back to four 8-hour shifts.

A. Uh-huh.

Q. What did you mean by that statement?

A. I guess that means that we didn't produce at four 8-hour shifts per week. I don't recall.

Q. Okay. Fair enough. May I ask that you be shown Exhibit 1020. This is a letter dated August 12, 1998. It

* * *

[Tr. 46] Q. You believe that decision to sit and hold, though, caused the market to become stagnant, though, didn't you?

A. I couldn't say. Log market or lumber market?

Q. Lumber market.

A. I don't know if that contributed or not.

Q. You don't specifically recall telling anyone that or writing that?

A. No.

Q. Now, if I understood correctly, you testified that in your entire tenure at Ross-Simmons, you didn't see any unfair activity on behalf of Weyerhaeuser in terms of log pricing or trying to keep logs away from competitors. Is that right?

A. Right.

Q. Do you remember, sir, in 1999 Weyerhaeuser seeking an exemption from – seeking an exemption so they could export logs and at the same time still purchase alder from state properties in Oregon?

A. In Oregon, yes.

Q. Do you recall that?

A. Yes, I do.

Q. Do you recall that you – do you recall what your opinion was of that at the time?

A. Yeah.

Q. What was it?

[Tr. 47] A. I didn't think they should be able to. It was one niche that we had available to us. I didn't think they should be able to do both.

Q. Did you, in fact, think that it violated the intent of the federal substitution rules?

A. It had nothing to do with the federal. I thought it was the state. It was state land we were talking about, not federal.

Q. In May of 1999, sir, do you believe it was your opinion that this effort by Weyerhaeuser to both export log and purchase alder sawlogs from Oregon property violated both the federal substitution rules and the Oregon substitution rules?

A. I think the Oregon substitution rules.

Q. Do you recall that it was your opinion at the time that Weyerhaeuser was attempting to use a loophole so that it could do both?

A. I've got to remember what the rules were. I think it was you could not – if you exported – if you exported out of the state of Oregon, you couldn't buy Oregon state timber or logs, and they were trying to get an exemption so that they could buy Oregon state timber or logs. And I didn't think that was fair.

Q. Mr. Nelson, would it refresh your recollection about what your exact position was in May of 1999 about this issue [Tr. 48] if I showed you a letter that you wrote at the time?

A. That would be great.

MR. KELLEY: May I approach, Your Honor?

THE COURT: You may.

THE COURT: Has this been marked?

MR. KELLEY: It has not, Your Honor.

BY MR. KELLEY:

Q. Have you had a chance to review your May 14 letter?

A. Yes.

Q. Does that refresh your recollection of Weyerhaeuser's efforts to both export logs and purchase alder from state lands violated both federal substitution rules and Oregon substitution rules?

A. Yes, because I think what was driving this, sir, was they made a decision, I think, in early '99 to start exporting conifer logs out of Coos Bay. That was the change that kind of – I think up until that time Weyerhaeuser could buy ODF timber. It was when they made – in fact, this goes back to the early '90s. Weyerhaeuser took a position that they

wouldn't export logs out of the state of Oregon. Then in '99, I think, is about the time they reversed that, so that changed.

So the Oregon timber was something that Northwest Hardwoods, as Weyerhaeuser, had been able to access. And when they changed their mind and decided to export conifer [Tr. 49] logs, I thought that was a violation.

Q. In fact, you thought that they found some kind of a loophole, did you not?

A. Yeah.

Q. At the time, in May of 1999, did you believe that Weyerhaeuser controlled about 50 percent of the export market and 70 percent of the hardwood lumber manufacturing facilities?

A. That's what I said, yeah.

Q. Did you believe they had the motive – their motives were suspect?

A. I think that's what it says here.

Q. In fact, you describe it as an 800-pound gorilla, do you not?

A. Yes, I do.

Q. All you were asking for was a level playing field to compete against a mega-corporation like Weyerhaeuser?

A. Yes.

MR. KELLEY: No further questions.

THE COURT: Further questions of this witness?

MR. SIMON: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SIMON:

Q. Mr. Nelson, did Ross-Simmons, when you were there, buy a significant amount of timber from these Oregon state [Tr. 50] timber sales, the ODF timber sales?

A. Probably not. A lot of the ODF timber came out of the Tillamook forest which was kind of a tributary to Garibaldi, but we did pick up some in northwest Oregon, occasionally a little bit down on the central coast, but it wasn't a lot.

Q. Thank you. Now, when Mr. Kelley was asking you questions, I think I heard you say that with respect to driving log prices, you said sometimes Cascade Hardwood would drive log prices; sometimes Washington Alder would drive log prices. Then you said sometimes us, Ross-Simmons, would drive log prices. What do you mean by that?

A. There are several instances when that occurs. Usually the most common is when a new player emerges. I think I would – I'm sure STEDCO had a similar experience when they first started up. You have to, I say, buy your way into the market. You have to get credibility with the local suppliers. And the way you do that is through a price premium.

Washington Alder, when they started up, whenever that was. It was in the spring of whatever, in Port Angeles, we noticed an immediate jump in prices up there. Again, it is buying your way into the market; buying credibility with the suppliers.

The other time that this happens is, let's say a sawmill has a run or sells a bunch of their inventory, so

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**[Vol. 7-A (Apr. 16, 2003)] [Testimony of Jerry Bain]**

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[Tr. 53] Q. Who were the suppliers during the 1990s that you purchased from?

A. Oh, in a given year we would have 250 to sometimes 300 suppliers, small suppliers from one to two – load suppliers all the way up to the larger suppliers.

Q. Who are some of the larger suppliers?

A. Cavenham (phonetic), Weyerhaeuser, Hampton. Those were probably our major larger suppliers.

Q. How about Rayonier?

A. Rayonier, we got logs from them.

Q. Simpson?

A. We never got anything from Simpson in Longview.

Q. I am going to ask the witness be shown Exhibit 14 and Exhibit 482.

Mr. Bain, Exhibit 14 is a plaintiffs' exhibit. Do you see the area where Longview is?

A. Yes.

Q. What is that red area right next to Longview?

A. That is the Weyerhaeuser timberlands.

Q. Now, the blue area in this map are the state timberlands both in Oregon and Washington. During the 1990s, how did Northwest Hardwoods go about purchasing logs on state lands?

A. On state lands we weren't able to bid the timber sales, but we could buy the logs off the timber sales from whoever

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[Tr. 56] price and negotiate a separate agreement for pulp logs at market price.

Q. What was the market price based on?

A. Based on – at the time whatever the market was. Their sales rep. pretty well knew what the log market was in the region, and I might have a price that I wanted to pay, he would have a price he wanted, and we negotiated a price from that.

Q. Do you have Exhibit 482 in front of you?

A. Okay.

Q. This is an exhibit of the plaintiffs. If you look at the first page, it shows the average price for the year for third-party logs in Longview and the average price for Weyco logs in Longview. Do you see that?

A. Yes.

Q. It has it for different years from 1997 to 2001?

A. Yes.

Q. If you turn the page to page 2, if you look about two-thirds of the way down, do you see where those numbers came from, the purchase logs, third-party, and purchase logs Weyco?

A. Yes.

Q. Now the average for the end of the year, the average purchase price for Weyerhaeuser was different from the average price to third parties –

[Tr. 57] A. Correct.

Q. – at Longview? Please explain that.

A. The average price on the third party is primarily saw-logs, which is always at a higher rate. The average price for Weyerhaeuser is a weighted average of the pulp logs and the

sawlogs that were purchased and melded together for the end of the year.

Q. So for Weyerhaeuser, you are buying both pulp logs and sawlogs?

A. Correct.

Q. In general for third parties you are buying what?

A. Primarily sawlogs. We bought very little – we did buy some pulp logs from third parties but not very much. Most of the pulp logs we got from Weyerhaeuser was enough to meet our needs. We did buy a little bit. We would have some supplier that would say: Hey, I want to sell my pulp to you also. Okay. We will buy your pulp, and this is the market and buy their pulp log.

Q. Let's talk a little bit about pulp logs then. First of all, how did those trucks come into the mill?

A. They came in from all of our suppliers, sorted the sawlogs on one load and sorted pulp logs on another load.

Q. From Weyerhaeuser, why didn't you have them send all the loads altogether?

A. Actually they wanted to do that. The main reason is

* * *

[Tr. 59] needed one. At that time they went out on the market, paid extremely high prices, offered extremely high prices for logs. Extremely higher than what we could pay. We just backed away from the market and stayed where we were at.

Q. Do you know why they were paying high prices?

A. I don't know. They were – like I say, they were short of logs at one time and –

Q. Throughout the 1990s who did you report to?

A. What year? Excuse me.

Q. From 1993 to 2000, who did you report to as resource manager?

A. I don't know when Heinz left. Heinz Hohendorf part of the time and Jay Mehta (phonetic) was in there a short time and Del Fisher until I retired.

Q. Now, did any of those individuals ever express to you that it was a strategy of Northwest Hardwoods to raise the level of log costs in order to hurt competition?

A. Oh, absolutely not.

Q. Did any of those individuals ever tell you to buy more logs than Longview needed in order to keep logs away from Ross-Simmons or other competitors?

A. Absolutely not.

MR. JOHNSON: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

[Tr. 60] BY MR. HAGLUND:

Q. Now, Mr. Bain, you were the resource manager in Longview from '93 to 2000 until you retired, correct?

A. Yes.

Q. You would have been the top log buyer at the Longview mill resourcing for that mill during that time frame, correct?

A. Yes, that's correct.

Q. You reported to the three individuals you mentioned, Mr. Hohendorf, Mr. Mehta and then Mr. Fisher from approximately '97 through 2000?

A. Yes.

Q. From the time frame – you started at Longview in '86, right?

A. '87.

Q. And from '87 until some point in '93 when you became the resource manager, you were reporting to a resource manager named David Wood. Is that correct?

A. David Wood for part of the time and then he retired. Then Ray Poppe.

Q. Now, is it your testimony, sir, that in '89 and, again, in 1993 that the Longview mill had no significant stain problems?

A. We periodically, throughout the whole time, would have stain problems.

[Tr. 61] Q. Did you have a significant stain problem in 1989 and, again, in 1993?

A. I can't answer to 1989, but in '93 is when we purchased a large amount of pulp for the chipping operation, and we had – a lot of the pulp logs were stored on land and a lot of those did get stained and did affect the chip quality.

Q. Do you ever remember a significant stain problem in the sawlog inventory in '89 or '93?

A. No. Like I say, I can't say for '89, but '93 I was there.

Q. Weren't you there in '89?

A. I was there. I was a log buyer. Resource manager was responsible.

Q. You can't remember?

A. I don't recall.

Q. Okay. Okay. So there might have been a significant stain problem. You just can't remember at this point in '89?

A. I don't recall.

Q. Okay. Now, is it true, sir, that throughout your entire career as a log buyer for Northwest Hardwoods that you have made it a personal practice never to increase your original bid above your first bid in the face of a competing bid?

A. On a bid basis, no, I never did change the bid on a [Tr. 62] bid.

Q. You would never change the bid?

A. Not on a bid.

Q. When you say "bid," what do you mean?

A. If somebody has a stand of timber or a group of logs on a bid basis and normally you have a one-shot chance to bid those logs, you send the bid in and that's it.

Q. Let's not use the situation where you are following a formal written bid procedure. You have been – let's take the situation where you have got a call from a logger or landowner. They say: I got a patch of timber. It is going to be harvested in two months. I would like to find out what the market is doing and get a quote from you guys. You would go out and look at it, right?

A. Correct.

Q. Then you make a phone call and give them the quote?

A. That's correct.

Q. The occasion occurred, did it not, where that logger or landowner would call you back up and say: Ross-Simmons is $3 a ton higher. If you want the wood, you need to beat them. That happened?

A. Oh, it did happen.

Q. Was it your personal practice never to increase –

A. It was my personal practice to avoid that. If there was somebody that I really knew, that I trusted, I might [Tr. 63] meet the price. But to go over that, absolutely not. It was

very rarely that that did happen, but occasionally there was a situation, somebody that I really knew – because some of these people that you are referring to at times would – they would come to me or whoever was there and say: Well, Ross-Simmons offered this price. And would they go over to Ross-Simmons and say: Northwest Hardwoods offered this price, back and forth. They jerk you around like a yo-yo. It is a practice you try to avoid.

Q. I want to make sure we understand your testimony. You never would beat the bid?

A. I never did beat the bid. I would match it.

Q. You only did that once or twice to the best of your recollection?

A. You know, I don't know exactly how many but not very many.

Q. Less than 10?

A. Yes.

Q. In 15 years?

A. You know, you are getting specific.

Q. That's what the case is all about, sir, getting specific.

A. But I can't say exactly over 15 years. But I know it was a very small amount.

Q. Now, from time to time do you, as a log buyer or [Tr. 64] resource manager for Northwest Hardwoods, receive antitrust training at corporate headquarters?

A. I had been to, I think, two different meetings over the years.

Q. And is it made clear in that antitrust training that an employee will be fired if they violate the company's – Weyerhaeuser's antitrust policies?

A. Yes.

Q. So there are major consequences of failing to live up to those guidelines and policies, correct?

A. Yes.

Q. Now, is it your understanding that tie-in situations were covered in your training?

A. What was that question, please.

Q. As part of your training did you ever have explained to you in these Weyerhaeuser antitrust sessions that tie-in sales were not legal?

A. Tie-in – I don't understand the question.

MR. JOHNSON: Objection, this is beyond the scope of the direct.

THE COURT: The objection will be overruled.

Explain what you mean by tie-in.

BY MR. HAGLUND:

Q. A tie-in situation is where a particular company has a particular product that a buyer or supplier wants –

[Tr. 65] MR. JOHNSON: Your Honor, I do object –

THE COURT: Objection, overruled.

MR. JOHNSON: – to his characterization of what tie-in is.

THE COURT: I will hear the question first.

BY MR. HAGLUND:

Q. I will try to explain it as simply as I can. It is a situation where a company has a product that some other party wants and as a condition of selling that product to that party, the seller says: You also have to buy something else or sell something to me?

A. I was never involved in that.

MR. JOHNSON: Objection.

THE COURT: Objection overruled. He can state his premise, and we will argue about the law later.

BY MR. HAGLUND:

Q. You are not familiar with that concept at all?

A. I ne[illegible]vas involved in any of it whatsoever. I know what you [illegible]alking about now, but, no, we never got into that situation.

Q. Did you ever develop relationships with any of your suppliers, Mr. Bain, where you had an agreement with that supplier that you would get a last look at buying their timber?

A. A last look? No. No.

[Tr. 66] Q. You never ever had a relationship with a supplier where they knew that they could go into the market, get the Ross-Simmons price, come to you and you would meet it?

A. No. No.

Q. Never?

A. No.

Q. Okay. Would that violate your training to engage in that kind of activity?

A. I don't know. I'm not sure of that.

Q. You are not sure?

A. Yeah. That's just –

Q. You never did it, but you can't recall whether it would violate your training?

A. I don't recall if it would violate training. I just never did it.

Q. Okay. Let me ask some questions about the log grading and sorting procedures at Longview. There has been testimony previously about the sorting system in place within the alder mills. Is it a fair statement that when logs come into Longview, just like in Centralia or Eugene, that they will be taken off the truck, rolled out on the ground and scaled?

A. Correct.

Q. And that happens whether it is wood bought from a third party or from Weyerhaeuser tree farms?

* * *

[Tr. 71] Q. Now, the pulp logs are going to fetch a lower value, correct?

A. Correct.

Q. Now, when you would negotiate with – let me ask this first. You have testified earlier that when you are buying sawlogs, whether it was from a third party or from the Weyerhaeuser tree farm, that they come into the yard, they would be scaled and the data put into the computer system?

A. Yes.

Q. Now, you also bought some camp run from what I understand?

A. From who?

Q. From third parties.

A. I just said that after 1991 we changed, went away from buying camp run, and we got sawlog sorted and pulp sorted.

Q. But let's be clear. You still continued to buy some camp-run wood from third parties?

A. You know, if we did, it was a very minimal amount. I don't recall exactly. I can't go back and say specifically. But if it was, it was a minimum amount because we made a

big effort to get away from buying camp run because camp run is very risky when you are buying camp run from any supplier.

Q. Now, it is not your testimony that you did not buy any camp-run log truckloads in the year '95 to 2001, is it not?

MR. JOHNSON: Your Honor, I think it has been

* * *

[Tr. 73] and Centralia would negotiate with Bruce. Now, we'd wait for the other to get done with the other. We would do it simultaneously.

Q. Let's make sure we got our names and positions straight. Mr. Sutton, he is the marketing manager for the Twin Harbors tree farm that is closest to the Centralia sawmill?

A. That's correct.

Q. He would negotiate with Mr. Bernie McCain?

A. That's correct.

Q. And Chuck Lappe is the marketing manager for the Longview tree farm, the closest to your operation?

A. That's correct.

Q. On a quarterly basis you would negotiate with him for the prices for sawlogs?

A. Yes. For the Longview region, yes.

Q. You were familiar, weren't you, from time to time with the prices that Mr. Sutton and Mr. McCain were negotiating, correct?

A. Oh, yes.

Q. Is it a fair statement that the sawlog prices for the volume received from the Weyerhaeuser Longview tree farm would be comparable to the market prices you were paying

for the same grade and diameter class of sawlogs from third parties?

[Tr. 74] A. Yes.

Q. Okay. And that's what the computer data should show?

A. That's correct.

MR. HAGLUND: Nothing further, Your Honor.

THE COURT: Further questions of this witness?

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Has any supplier ever expressed this dissatisfaction to you about Northwest Hardwoods' scaling?

A. At times, yeah.

Q. And did you work with that supplier to see if they could better understand the scaling system?

A. I tried to at times.

Q. Have any suppliers ever chosen to sell to Ross-Simmons or Cascade or someone else because of Northwest Hardwoods' scaling system?

A. It has happened, yes.

MR. JOHNSON: No further questions.

MR. HAGLUND: Nothing further.

THE COURT: You may step down.

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**[Vol. 7-A (Apr. 16, 2003)] [Testimony of Bernie McCain]**

* * *

[Tr. 75] DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Mr. McCain, you graduated from high school in 1965, served in the Navy for 18 months and then got a forestry degree from Centralia College in 1973. In 1973, you then went to work at Northwest Hardwoods as a log buyer at the Centralia mill. You were named resource manager for Northwest Hardwoods' Centralia mill in the early 1980s. And that is your current position?

A. That's correct.

Q. Mr. McCain, could you tell this Court and the jury about your general approach to buying logs at Northwest Hardwoods.

A. Well, I try to keep it rather simple. I try to buy the highest quality log I can at the lowest price.

Q. Now, when you are going out and offering a price for logs, what factors are you considering?

A. You factor a lot of things, but mainly you factor the quality of the wood, the size of the wood, the availability, timing, when it is going to come in, the supplier. But mainly you extract the price, look at the wood and the quality of the wood.

Q. Now, Mr. McCain, we have heard testimony about log staining in this trial. How do you go about managing your log inventories to minimize the potential for stain?

[Tr. 76] A. At the log yards at Centralia, we can hold about almost 3 million feet of logs in our yards at Centralia. Our monthly cut there is on the average around four, four and a half million feet of logs.

We advocate stump-to-dump three weeks. That's a pretty good average for logs to stay fresh from landing to the yard. Then we can rotate our inventory in probably two to three weeks in the yard so we are in real good shape.

We have had bigger inventories at times. At that point we direct logs to go into the water. They go in the water. They stay fresh in the water there for that moment before we use them. With our small yard it keeps us keen on keeping our log inventory fresh just by the size of our yard.

Q. Mr. McCain, during the 1990s, who did you consider your competition for logs to be?

A. In the '90s, kind of go around in my mind geographically there, Edmond Company bought hardwood in Tacoma. Sheers bought logs in Sheldon. Steve Pullen bought hardwood in Sheldon. Willis Enterprises bought logs in the Hoquiam area. Olympic Fiber bought hardwood in Aberdeen. Dahlstrom's in Aberdeen bought logs. WTD in South Bend at that time bought logs. Alexander in Onalaska bought logs, hardwood. Northwest Fiber in Morton bought logs. Cascade Hardwoods in Chehalis. I might have left somebody out.

[Tr. 77] Q. Do you know who Mr. Bill Nelson is?

A. Yes.

Q. Mr. Bill Nelson testified earlier in this trial that during the early 1980s when he was at Cascade Hardwoods, there was what he called a log war between you and him. Do you recall anything about that?

A. No. I don't recall any log wars, no.

Q. During the 1990s, who did you report to?

A. 1990s I reported to Mr. Heinz Hohendorf.

Q. From 1997 on through 2000?

A. I reported to Jay Mehta and Mr. Fisher at that time.

Q. What types of conversations would you have with the person that you reported to?

A. The types of conversations throughout the time period there, we would – I would contact all the superiors in what I thought the market was doing, where log flows were going to be during the season. Alder is real susceptible, like any log, in wintertime it slows down. It is susceptible to other markets, especially hemlock.

If that market slows down and the logging slows down, why alder is kind of a come-along species. I wanted to keep them abreast where the market – where the log flows are going to be and keep abreast where inventory was and things like that in general so they were informed and had an idea of what the future looked like. It is very hard to [Tr. 78] call sometimes, but you do the best you can.

Q. During the 1990s, what was the strategy of Northwest Hardwoods in terms of log prices?

A. Well, basically it is – you asked me before, we try to buy the best quality log at the best price or lowest price we can. That's generally what the market is doing in your area. We try to do it that way.

Q. Did either Mr. Hohendorf or Mr. Mehta or Mr. Fisher ever express to you that it was the strategy of Northwest Hardwoods to maintain high log prices to hurt competition?

A. No, I never heard that message.

Q. Did any of those individuals ever express to you that you should buy more logs than you needed in order to keep logs away from your competitors?

A. No, never.

MR. JOHNSON: No further questions.

THE COURT: Further questions of this witness?

MR. KELLEY: Briefly, Your Honor.

CROSS-EXAMINATION

BY MR. KELLEY:

Q. Good morning, Mr. McCain. During your time at Northwest Hardwoods or Weyerhaeuser, did you receive some training, sir, in connection with antitrust?

A. Yeah. We annually have that meeting.

Q. In the sessions that you attended, do they address [Tr. 79] issues related to log buying?

A. Yes.

Q. And do you have an opinion of whether or not issues related to a last look at logs is addressed in that – in those sessions?

MR. JOHNSON: Objection to the form of the questions.

THE COURT: Overruled.

THE WITNESS: I don't understand "last look." Could you explain that more?

BY MR. KELLEY:

Q. Your witness statement says that you never had a last look, an arrangement where you had a last look at a log. Let me make sure you and I are communicating. I interpret that to mean that you never had a situation with a supplier of any kind where you told them to go around. Go ahead and look. Shop it around. See what bids you get. But give me the last look at your logs before you sell them.

A. No. I have had people call me. When people call you, you have got a range of customers that are – that's their business. They log. And you have got people that has got a few loads in the backyard, and they really need help. I give them prices. They ask me if there is anybody else buying hardwood in the area. I say: Yeah, you can check other places, and I gave them names. As far as saying, you [Tr.

80] know, if you get another price, give me a call back. I give them a price at that time and it is over with.

Q. You give the best price. If they want it, yeah, great. If they don't, sell to somebody else?

A. Right. The only other situation is if somebody else calls you and you get the prices and say, well, would you like to take a look at it? What do you think? Is it worth more? It could be. No promises. If the quality is there, the stand texture looks good for the mill and everything, I say: I would appreciate it if I could come out and take a look.

Q. Fair enough. In your whole time, though, have you ever had an arraignment that I described, this last look, where you told the supplier: Go ahead and shop it. Let me have the last look at the log?

A. I don't recall.

Q. You don't recall ever having such a situation?

A. No.

Q. Were last looks like that covered in your antitrust training?

A. I don't know if they said last looks in our antitrust.

Q. Fair enough. Mr. Johnson just asked you some questions about Bill Nelson in the early 1980s. You were at Centralia at the time, correct?

A. Correct.

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[Tr. 82] three grades?

A. Correct.

Q. When the scalers are going through at the mill looking at the logs, they input all that information in a little handheld?

A. Correct.

Q. That information goes to a central location in Portland?

A. I believe so, yes, our log system.

Q. Is it your understanding, sir, that all purchases from Weyerhaeuser timberlands, transfer of purchases, are at the same as market prices?

A. That's correct.

MR. KELLEY: Thank you.

THE COURT: Any further questions?

MR. JOHNSON: No further questions.

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**[Vol. 7-A (Apr. 16, 2003)] [Testimony of Philip Tedder]**

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[Tr. 87] was marked as demonstrative Exhibit No. 18, which is this map of the United States?

A. Yes.

Q. I won't ask you to describe it as it has been fully described previously, but were you the person who pulled together the data that went into the standing hardwood inventory information as well as the hardwood lumber production information that is displayed in the purple and red circles?

A. Yes, I was.

Q. For the record, Dr. Tedder, the data that you developed this map from was from what year?

A. Well, it is from several years. The production date of the – the hardwood production lumber data is from the census of manufacturing from 2001. I think that's indicated down there on the bottom. The hardwood inventory is from different years. Most of them are 2000 and earlier.

The Forest Service does recurring inventory of each state over a ten-year rolling average. They update it every five years. So to give an average date on that inventory that was portrayed, I would say the average date of it is about five years old.

Q. Okay. Thank you. Dr. Tedder, there is some evidence in this case to the effect that Weyerhaeuser actually owns approximately 7 percent of the standing alder inventory in [Tr. 88] Oregon and Washington. There are other – there is other evidence showing that Weyerhaeuser in the late '90s was purchasing approximately 64 percent of the alder sawlog harvest in Oregon and Washington. If you would, sir, please assume that both those sets of facts are true.

Do you have an opinion about whether Weyerhaeuser, given those facts, has the power to control the price for alder sawlogs in Oregon and Washington?

A. Yes.

Q. And what is that opinion?

A. I think that anybody that has a 65 percent ability to – that purchases 65 percent of the volume that is harvested each year, they have a very strong control over what price they want to pay for it.

Q. Now, Dr. Tedder, did you also look at the question of whether there is an economically distinct market for finished alder lumber?

A. Yes.

Q. Is there a distinct market, economically distinct market, for alder lumber?

A. I think there is a fairly distinct market for alder of lumber. It is used for cabinet facing, furniture, that sort of thing locally. I think there is some that is peeled. I'm not sure it is used as facing. I think it is used as core veneer. I would say it is distinct.

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[Tr. 90] largest sawmills in the Eugene of area?

A. Seneca sawmill today, I think, is either first or second in lumber production in a single spot.

Q. In Oregon?

A. In the United States.

Q. Now, in your experience running those mills, as well as your experience as a forest economist looking at log and lumber supply and market performance, could you describe your own views on the relationship between log and lumber markets?

A. Yes.

Q. Please do so.

A. Log prices have to follow lumber prices because if they don't, you eventually are not going to make any money.

So in the softwood market you will find that there is usually a lagged value of softwood logs to the softwood lumber price. Now, the lag of that is caused by the fact that you just don't buy logs on a daily basis. You go and look at a stand to appraise the stand. It may take a couple of months once you look at it to harvest it to get it to your log decks.

So you are bidding on logs based upon the lumber price that is going on right now and you think might happen later. But a lot of times that doesn't turn out right. So there is always a little bit of a lag of the log price. If [Tr. 91] the lumber price falls, log prices will fall.

If lumber prices go up – it is kind of funny – log prices go up a little faster on that side of the coin. But they always have to follow because there always has to be that log-to-lumber ratio that affords a producer, a manufacturer, to make some money.

They get out of whack. Every once in a while, every couple of months, they pull apart, but they pull back together. And they kind of oscillate in an area that generally allows some of the lower end producers to break even or make a little bit of money. So that's the relationship.

Q. So you have observed that – both in your work over the last 30 years, you have observed that both in the hardwood log and lumber markets as well as the softwood log and lumber markets. Is that correct?

A. That's correct.

Q. Now, did you also examine the expert witness disclosure statement of William Nelson?

A. Yes.

Q. Specifically did you have an opportunity to examine the methodology that Mark Rasmussen used to develop a number of his scenarios designed to show how much the log market for alder sawlogs was increased by Northwest Hardwoods based upon certain assumptions during the period of '97 through

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[Tr. 93] objective in the markets they are in?

A. Their objective, and it is clearly stated that they want to be the No. 1 producer in the individual wood product sectors.

Q. As a forest economist, what's the advantage of that to the company that gets to that position?

A. Well, the more volume that you have at your availability, the more you can affect what price you sell it at.

Q. And what's important about being able to set the price at which you sell the product?

A. The more you have, the stronger you are in negotiating the selling price.

Q. And the higher your profits then?

A. Usually it is the way it works out.

Q. Now, Dr. Tedder, I want you to assume for the moment and for purposes of this question that Weyerhaeuser has a 75 percent market share of the market for finished alder lumber in the United States.

Are you aware, sir, of any other wood products market segment or wood products market where any company enjoys a share that is as high as 75 percent?

A. No. I think the next closest thing is Louisiana Pacific's OSB production, about 50 percent U.S. production, but nothing close to that.

[Tr. 94] Q. And you are talking about all market segments in the wood products industry in the whole of the United States?

A. Yes.

Q. Now, there has been some mention in this case of alder being a come-along species. Are you familiar with that term?

A. Yes.

Q. Do you agree that alder is a come-along species?

A. Yes.

Q. Harvested generally along with the dominant species in the Northwest, like conifer?

A. That's correct.

Q. Now, from a forest economic standpoint where alder is a come-along species, is it more or less sensitive to the forces of supply and demand?

A. I think it would be really less sensitive.

Q. Why do you say that?

A. Well, it is either there or it isn't there. You have a certain amount available to you that is harvested when you harvest the softwood stands. The person or the owner of these companies – of the logs has to get rid of it. It is there whether you want it or not.

Q. So from the standpoint of a landowner with a patch of timber that they wish to harvest, the driver is going to be when they decide to put conifer logs into the market. Is [Tr. 95] that your understanding?

A. That's right. And then you don't – you can't store the alder because you have to replant under the State Forest Practices Act the stand that you took off of.

Q. Now, I would like to display on the on the screen Exhibit 99. Are you familiar with Exhibit 99, Dr. Tedder?

A. Yes.

Q. Does this show the log inventories at Northwest Hardwoods' Longview mill from '89 through 2000?

A. That's what I understand it to be.

Q. Now, in your opinion if we look at 1989 and 1993, are you aware of any business reason to run up log inventories of alder logs to those levels?

A. No.

Q. Why do you say that?

A. Well, for two reasons. One, you know, that's in the winter, so you want to have a few logs built up. I think some of those come because people accelerate their harvest or manufacturers tend to come up a little bit in preparation for the winter years.

But you really don't want to hold that much volume. One, of course, it will stain. The logs will degrade, even if it is raining on them. Some of the logs get crushed, broken, that sort of thing. But another business reason, you know, from the standpoint of running a [Tr. 96] company.

You look at that number there, that's 18 million feet. So 18 million feet at $400 a thousand, $500 a thousand, that's 8- or $9 million. If you can get by with half of it, it is not really a good business decision to be spending money on a very large log deck because you have to borrow against that log deck as well. It just reduced your crediting from an individual mill's perspective.

Q. I would like to display now Exhibit 82. You understand this to be a depiction of Weyerhaeuser's – Northwest Hardwoods' division lumber inventories from '88 to 2000?

A. Yes.

Q. Now, there has been reference to a statement in Weyerhaeuser's 1998 annual report referring to 1998 as a year in which there were market downturns. And "Mr. Rogel says we took downtime to balance inventory levels with market conditions."

Looking at this data displayed on Exhibit 82, does it appear that Northwest Hardwoods followed the advisor statement of Mr. Rogel that I just quoted?

A. Well, when you look at that, after you have added all the mills in there, it looks like to me it goes up instead of down. It goes up quite a bit from '98 – it looks like a mill in '99 came down and back up and fell off some. It is

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[Tr. 103] what caused that to know what really happened?

A. I don't understand your question.

Q. Yes, sir.

A. I thought that pulp mill was a different business than the hardwood sawmill business.

Q. So what did Northwest Hardwoods' Longview mill do with those pulp logs?

A. They probably whole log chipped them and sold them the to a pulp mill.

Q. Which pulp mill?

A. Weyerhaeuser's pulp mill, but it is a different business.

Q. Thank you, sir. Now, Mr. Haglund asked you whether or not log prices have to follow lumber prices. Do you recall that?

A. Yes.

Q. And you gave a long answer about that. You were mostly talking about softwoods, weren't you?

A. Yes.

Q. Thank you. Would you agree or disagree with the following statement: If you harvest less softwoods in the Pacific Northwest, you have less alder coming along with those softwood harvests?

A. I would say that that's generally a correct statement.

Q. Would you agree or disagree with the next statement:

* * *

[Tr. 113] expresses frustration and concern over how high alder sawlog prices have gotten.

MR. HAGLUND: Is this a speech or question?

THE COURT: It is a speech. We will let it go on for a little while longer.

THE WITNESS: Frustration and concern over the alder sawlog high prices.

BY MR. SIMON:

Q. Assume that there is agreement with that frustration and concern.

A. By whom?

Q. By a number of folks with him. A guy named Jerry Martin, John Martin and mill managers. End of assumption.

A. That's a good assumption on that one.

Q. Is that set of facts consistent or inconsistent with your conclusion that as of early 2001 Northwest Hardwoods could control the price of alder sawlogs?

A. Well, based upon the fact that Rob Taylor runs it, and you said that he said that he was upset with the high price of alder sawlogs and all his management at Weyerhaeuser agreed with him, then it is inconsistent.

MR. SIMON: Thank you, sir. I appreciate your time.

THE COURT: Further questions?

MR. HAGLUND: Yes.

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**[Vol. 7-A (Apr. 16, 2003)] [Testimony of Delroy Fisher]**

* * *

[Tr. 118] Q. Did you have supervisory responsibilities?

A. Yes. I had four resource managers in Washington and Oregon. Below those folks there was another eight log buyers. Then in 2000 I also had another resource manager at our Delta mill in British Columbia, and we had three additional log buyers working.

Q. During this entire time period who did you report to?

A. Rob Taylor, vice president of business.

Q. Now, during that period, say 1997 through 2000, what were the factors affecting the price of alder sawlogs as you saw it is as the western raw materials manager for Northwest Hardwoods?

A. During that period, I would generally characterize the '97 through 2000 period as one of declining resource for a number of reasons and also increasing sawmill capacity. Some of the reasons for the decline, I think it was well mentioned here through this case so far, is that there were new sets of regulations being adopted in both Oregon and Washington. We were also feeling the impact of the 1994 Northwest Forest Plan from the federal government. Those chiefly were the two big reasons.

Then also during that period there was a very low chip market. Chip markets were declining. Domestic – or the conifer markets were also declining, both domestically and export. Consequently you have this increase in [Tr. 119] capacity, lowering supply, which tends to drive prices higher on the hardwood.

I would also say that – I'm sure you all know about the come-along aspect of alder. I would just exemplify that a little bit, if I could. If you took any acre of ground out there, with a mixture of softwood and hardwood, the typical com-

mercial forest would have about ten loads per acre on it. Eight to nine of those loads is going to be conifer. One to two loads are going to be hardwood.

You can tell the supply of hardwood is very much related to the marketability of that softwood component. That becomes an artificial constraint on supply as the softwood markets go down.

Q. Mr. Fisher, what is the Forest and Fish Report?

A. The Forest and Fish Report was one of those examples of regulations that were applied in the late '90s. It was actually implemented in the year 2000, early 2000, as an emergency rule. I believe it was in March of 2000. Then it became a permanent rule later that year. Essentially what it did was it added protection around fish-bearing streams.

We have been operating under a Forest Practices Code – I am speaking of Washington here – it is very similar for Oregon as well. This particular Forest and Fish Report was from Washington. We had been operating under a set of laws that were adopted in the '70s. They were [Tr. 120] updated in the '90s. But really they hadn't changed significantly in that period of time.

It became a point where the federal government started understanding more about the salmon populations and their habitats. It became clear, as I think you all know, the salmon became listed as an endangered species. This developed into a process called the Timber, Fish and Wildlife which was a group of people representing basically all the stakeholders in the community: The forest industry, the regulatory people, consumers, general public, and the federal agencies as well.

The attempt was, in Washington state, was to get all stakeholders – and I forgot to mention the Native American Tribes as well were involved. We tried to get all the stakeholders in a room and agreeing what would be an effective way to protect the salmon habitat in the state of Washington.

That was an arduous process, adversarial. We did have environmental groups involved in that as well.

Eventually that did culminate in 2000 with a rule that essentially expanded those buffer zones, those zones that are very close to the streams from approximately 25 to 50 feet under the old rules to as much as 180 feet under these new rules.

There was opportunity with the new rule to do some partial extraction. But the cost of this is a very [Tr. 121] complicated and complex rule to understand just how much you could remove from this riparian zone. It took a lot of money, a lot of landowners, especially small ones and even large ones, even Weyerhaeuser to some extent, did not want to invest that money to understand how much they could actually extract. So in a lot of cases that full buffer became unable to be logged.

50 foot of that was automatically no touch. Nothing could happen on either side of the stream for 50 feet. That remainder, roughly 100 to 130 feet, there was some partial logging that you could do. But the cost was very difficult because you actually had to measure every tree that was in this buffer zone.

Then you would have to develop – put that into a model to understand just how many trees you could remove which was stated in the regulation. Then based on that you would have to get an approved application through the Department of Natural Resources to do that extraction.

The whole concept – and I think it is a good one actually – but that entire concept was to help improve the streams by providing more adjacent woody material on either side of the stream that would eventually over time fall into the stream and create a better habitat for the fish.

Now alder, unfortunately, that is some of the best places where alder grows. So we took a disproportionate hit [Tr.

122] compared to the conifer logs or conifer timber in the forest because most of the alder is in those riparian zones or very close to them.

There was one study that actually found that over 50 percent of the area tied up in this new area was indeed hardwood. So there was a significant impact due to these new regulations. There were similar laws, although they are not actually included yet in the state of Oregon –

MR. HAGLUND: Objection, Your Honor. Incomplete laws.

THE COURT: Yes. Ask another question.

BY MR. JOHNSON:

Q. Mr. Fisher, I want to show you – first off, would you submit monthly reports to Mr. Taylor about what your observations were about what was going on in terms of the raw material flow?

A. Yes. I was required, like all of the managers that reported to Mr. Taylor, to provide him with a monthly report on what was going on in your segment of the business.

That particular report from me tried to summarize in a general way what was happening to our inventories, or log prices, our purchasing ability and what might be impacted in that purchasing ability as well as some other specialty projects I was working on.

Q. I would like to show you a couple passages from things

* * *

[Tr. 125] month, September of 1998.

Could we pull that up, Mr. Moody.

You write: "Competitor activity increased throughout the month: Lost bids from Hampton, Simpson, Port Blakely and

Merrill Ring, evidence indicating as high as $50 over our offers. With low inventories at all competitors, due mostly to low logging activity from fire weather, price acceleration is likely until inventories recover. Washington Alder and Westwood began purchasing."

First, who are Hampton, Simpson, Port Blakely Merrill Ring?

A. Those are major timber suppliers in Washington state and Oregon. All of these names mentioned here, they put their volume up basically on a quarter basis. They will send you a prospectus of how much wood they have for sale. They will ask all the competitors, softwood and hardwood, to submit bids for that quarter. You have got one bid, one shot. And as I indicated here, we were not successful on any of those.

Q. How would you hear that you were $50 below the competitor's offers at that point?

A. Once the bids are finally accepted and they find out who basically got the bid, they will tell you if you were close. Whether this is an accurate number, who knows? They like to tell you that you were way off. They happen to

* * *

[Tr. 132] chipping operation that sits right next to the mill. So that was the supply for export chipping as well as our domestic needs. The domestic needs there are to third-party customers that we sell to.

In this particular time we were buying a little bit more pulp logs. But, again, the pulp logs were for chipping after we did some extraction. The remainder of that was for chip supply.

Q. Thank you, Mr. Moody.

Mr. Fisher, I now want to turn to something a little bit different. There has been testimony and discussion in this

case about a process called IDS. What is IDS and what was your involvement generally in that process?

A. IDS stands for investment, direction and setting. That was a Weyerhaeuser way of looking at each one of our businesses. I think Mr. Taylor actually described that fairly well yesterday. But it is a process that the senior management people at Weyerhaeuser – it is a tool actually to assess how each one of the multiple businesses of Weyerhaeuser are doing. Like any other competitive situation, each one of the businesses inside of Weyerhaeuser are competing for capital dollars.

This was one tool to help assess and allocate those capital dollars. It was a snapshot that we did – I think we did it maybe three times I think, as I recall. It [Tr. 133] was a snapshot view of your business at one point in time taking a look at what you are presently doing and seeing where you think you might be going in the future.

Q. So you reported this IDS process up to senior management at Weyerhaeuser?

A. That's right.

Q. Was the IDS – what was put together in the IDS, was that distributed to your resource managers or other people within Northwest Hardwoods?

A. No. That was a fairly confidential document. It was just for the senior leaders of the businesses. I think we shared some excerpts of it to an expanded lead team of managers. But basically that was a very confidential document that was for review internally.

Q. Right. Do you have the witness notebook there?

A. I do.

Q. Going up to Exhibit 400, Plaintiffs' Exhibit 400.

A. All right.

Q. First off, I will represent to you that the highly confidential sealed exhibits were put on by the attorneys in this case. I see it says: Northwest Hardwoods' projected supply share. At the bottom, do you see where it says: The source, Dick Wakely, Del Fisher, 3-99." Did you have any involvement in putting together this document?

A. Yes. I did the raw material section in this document [Tr. 134] trying to assess from our strategic planning group, which is where Mr. Wakely came from. He did the forecasting, what he thought the available wood might be.

That's a key message here. It is not what really will happen. It was what we think might be available to happen. So it is a projection and an estimate at this particular point in time.

I supplied, in looking at the fiber – one of the real difficult parts in doing an exercise like this is trying to understand what is sawable fiber. As you recall, there is a large inventory out there of hardwood that includes pulp logs as well as sawlogs, and the definition of sawlogs is constantly moving.

Q. Wait. What do you mean by that? Why is the definition of pulp logs and sawlogs constantly moving?

A. Really it aligns to several factors: One, what your customer base is looking for on the lumber side and your mill capability to extract lumber from smaller and smaller diameter logs.

Northwest Hardwoods, we knew the resource was shrinking. Now, that's a general term. It is declining. We may have years that it still does very well, but then years it falls off maybe harder than it should. But all of those are factors based around the other factors that I talked about earlier, which is the softwood markets, the

* * *

[Tr. 138] estimate of where we thought people were. I mean, we all basically understand what cost and raw material is. We all basically understand what it takes to run a sawmill. We have a general idea of what the lumber markets are. So you can get to some understanding of margins. We obviously knew our own. The rest was an assessment.

What we did conclude out of this and what you will see perhaps in a later chart was that there was, in fact, overcapacity for the supply as we saw it coming. That was going to have to be reckoned with in some way with our own facilities as well as the market in general. So we are showing here on this chart that there is probably not enough wood to serve all of these operators.

Q. Now, in terms of the discussions on the IDS what was the strategy then of Northwest Hardwoods in terms of this view that you had that the supply may be constrained in the future?

A. We needed to be the best we could be. That's really what we always – that is what we always try to be. We know our markets. We don't really try to focus on others. We look at our markets, what our growth potential is. We try to buy raw material that best fits our facilities, and we try to keep growing our business, quite frankly.

Q. There has been discussion in this case, and you have been talking about supply of hardwood sawlogs or hardwood [Tr. 139] logs in the late 1990s into 2000. How did this reduction of supply and these new entrants affect the price of hardwood logs in the Pacific Northwest?

A. I think before I answer that directly, because it is related to where we are, we are in Washington and Oregon and one mill in British Columbia, but each one of our mill locations is in a log market area.

I have heard a lot of comments here that we are lumping all of the Northwest's hardwoods together and comparing it

to the rest of the industry and so forth. In reality, we work within a log market area. That means the way we can buy logs in that local area is where you are going to be most competitive.

Most of our logs are bought within a 50- to 75-mile radius of our mills. We actually have five different – our mills are located in five marketing areas, log sourcing areas. There are log sourcing areas where we do not have mills.

But in those areas it has its own dynamics of supply and demand, different quality of wood. Some competitors are more aggressive than others. There may be more competitors in any one particular market. You have to really understand the effect of price. It is really how it is occurring in each one of the marketing areas that we exist in. With the exception of the Sedro Woolley mill and [Tr. 140] Arlington mill, we only have one mill in each of those supply areas. Sedro Woolley and Arlington, I would say, are in both the same supply area.

Q. Mr. Fisher, during this time frame, say '97 to 2000, what was the strategy of Northwest Hardwoods in terms of raw material costs to the mills?

A. Our strategy was always to buy the best log we could get for our conversion facilities at the best possible price which means the lowest possible price and at the same time treating our suppliers fairly.

In other words, we liked to establish long relationships with our suppliers, but we never forced them to deal with us. We just always tell them what we think we can afford to pay for logs. We manage then an inventory for each one of those mills to be sure we don't go too far over our inventory targets or too far under. Both have big impacts on the financials of each one of the mills.

You should also understand that each one of these mills have their own P & L, their own profit and loss. We do sum them up on the statement at the end of the month and quarter,

but each one of those mills is an independent profit center. Those mill managers are responsible for their log costs and their profitability.

So there is an interaction that goes on between our resource people and the mill manager. Ultimately it is [Tr. 141] the mill manager that is going to answer for his profit and loss statement.

Q. Mr. Fisher, was it ever the strategy of Northwest Hardwoods to raise the cost of logs to hurt competitors?

A. Absolutely not.

Q. Was it ever the strategy of Northwest Hardwoods to buy more logs than you needed in order to keep logs away from competitors?

A. Absolutely not. That would be a defeative attitude. But, again, if we buy too many logs than we need, they would just spoil. One of the things that we practice and preach to our suppliers is that we want fresh logs. In saying that, it is very difficult. We are constantly improving to do a better job on that.

In the summer months, as you have heard, logs do degrade very fast once they come off the stump. As soon as it is off the stump, it is susceptible to stain and it usually doesn't happen – it probably takes about four weeks in really warm weather for that to occur. In winter months it is not nearly as bad, but we focus all the time with our suppliers to give us fresh logs.

MR. JOHNSON: No further questions.

THE COURT: Cross-examination.

MR. HAGLUND: Thank you, Your Honor.

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[Tr. 143] MR. HAGLUND: I'm sorry, Mr. Fisher.

BY MR. HAGLUND:

Q. Do you have 1257 there?

A. Yes.

Q. Turn to page 3 of that document.

A. I don't see page numbers.

Q. At the bottom it has got your Weyerhaeuser Bates stamp of 055524.

A. Okay.

Q. Do you see that?

A. Yes.

Q. Now, actually, I apologize. Go to the page before that, 23. If you look – I will highlight it. Is this your January 1998 set of notes?

A. I believe so.

Q. Do you in your notes here, "Note the misalignment or disconnect between the log and lumber markets"?

A. Yes. What I'm referring to there is, again, I take a look at lumber markets as part of my job as well. But that's not my responsibility. But logs, like I just said, an example I just gave you, you can have logs running higher or lower than what lumber markets are doing. That's probably what I was commenting on here.

Q. Now, are you looking at Exhibit 1275 now?

A. Yes.

* * *

[Tr. 146] Q. Now, negotiation training, I want to ask you some questions about that. Isn't it true, Mr. Fisher, that Weyerhaeuser, Northwest Hardwoods, trains buyers to develop last look relationships with its major suppliers?

A. No, it is not.

Q. And that's your testimony here under oath?

A. Yes.

Q. Okay. Let's turn to page – if you could look at the page in the exhibit that ends with the number 24.

A. On 478 or 1275?

Q. Either one. It was just this one page missing that we have now talked about.

A. What's the number again?

Q. Ending in 24. This is your February 1998 report. You found it?

A. Yes.

Q. I would like to highlight a sentence. It reads: "Relations with major suppliers continues to improve; Crown Pacific, Rayonier, PLS, Willamette, G-P and Roseburg are generally in first refusal positions."

A. That's correct.

Q. Sir, isn't a first refusal position exactly the same as having a situation where you have got the last look at that parties' volume?

A. Absolutely not.

[Tr. 147] Q. Isn't it a situation, sir, where with these large industrial landowners, like Roseburg Forest Products, Willamette Industries, Georgia-Pacific, you develop a relationship with that supplier where they know if they go into the market to get a price from a competitor knowing they will come back to you and you have a right of first refusal to match the competitor bid and get that wood?

A. No, that's not correct at all.

What we do with these particular suppliers, we do have relationships with all of them, and we do sit down and we do try to negotiate price. Sometimes they say they are willing to; sometimes they say they want to put bids up. There is never anything that is always continuous, but we are always working with all of our suppliers, whether small or large, to get the logs that we are looking for.

Q. Mr. Fisher, is it your testimony, sir, that first refusal has no meaning in this sentence?

A. I didn't say that at all. First refusal means we can sit down with them; that they will listen to our log bids or our log prices that we would offer. They have no obligation to stay with us at all. They can go to someone else if they so desire.

Q. Mr. Fisher, if you – are you all right?

A. Yes, sir.

Q. You have signed some contracts that are in evidence in [Tr. 148] this case that have the term "right of first refusal" right in there, haven't you?

A. In the contract?

Q. Right.

A. Are you referring to the G-P contract?

Q. Yes.

A. Yes. That was a contract that we negotiated with those folks for a buy/sell relationship which was selling some softwood logs out of our northern Washington region and being able to buy some logs with alder logs down in Toledo off of their tree farm. Again, first refusal just means that we have the opportunity to sit down and discuss our price with them. They do not have to accept it.

Q. That's not right at all, is it?

MR. JOHNSON: Objection.

THE COURT: You can argue that. Move ahead.

BY MR. HAGLUND:

Q. Could the witness be shown Exhibits 430 and 431.

A. Are we done with these?

Q. No, not yet.

A. I have them.

Q. Mr. Fisher, do you have Exhibit 430 in front of you?

A. I do.

Q. Now, this is the 1998 contract under which Georgia-Pacific agreed to sell 80 percent of their hardwood [Tr. 149] volume sawlogs from the Toledo tree farm to your company, right?

A. That's correct.

Q. If one looks at paragraph 3 in the purchase price section, did we see the term "right of first refusal" in the second to last sentence?

A. Yes.

Q. And that sentence reads: "It is understood that both companies will always have the first right of refusal on the base volumes. If the buyer is unwilling to pay the sales price, then the volume commitment is assumed to have been met by seller for that quarter."

Now, when you have a right of first refusal in a contract, isn't it your understanding, as you have managed these contracts over the years, that it means that if the seller of some alder log volume comes to you and says – or they have got a legal obligation if they get a quote from a competitor to bring you that quote and give you the right to meet it, correct?

A. That would be a process that could define first right of refusal. That's not the way these contracts were actually administered.

Q. But as you understand the contract documentation, Weyerhaeuser, when it has a right of first refusal in the contract, has a right to require the seller to sell the logs [Tr. 150] to Weyerhaeuser provided you will match the competitor's price, correct?

A. In this particular contract, yes.

Q. And isn't it true, sir, that when you have an oral right of first refusal understanding with a major supplier, it is the very same thing, just not reduced to a written contract?

A. That's not the context in which we did business with those suppliers. I may, in fact, have used the wrong word in that report. But that's not the way we actually conducted business.

Q. But if that's the understanding, it should be no different than what you described relative to when that term is included in a contract, correct?

MR. JOHNSON: Objection.

THE COURT: Objection will be sustained.

BY MR. HAGLUND:

Q. Now, Mr. Fisher, I would like you to turn to the page ending 33.

A. Which exhibit?

Q. Either one.

THE COURT: Give him the number.

MR. HAGLUND: Sorry, Your Honor. 478. That's the complete one.

THE WITNESS: What was the number?

* * *

[Tr. 153] circled on this exhibit, correct?

MR. JOHNSON: Objection. I want to clarify. I don't think the pink area is the state forest.

MR. HAGLUND: Oh, you are very right, Mr. Johnson. I'm sorry.

BY MR. HAGLUND:

Q. It is the blue, the much larger zone, correct?

A. Yeah, I think that's right. It is blue.

Q. The pink is Willamette Industries that at this point in time was not yet, November of '98, a hostile takeover target of your company which was announced two years later, correct?

A. I believe that is the Willamette ownership.

Q. Okay. But to restate my question, and I appreciate the correction on the state lands, the Tillamook and Clatsop state forests are shown in blue in the area that I'm outlining on the screen, correct?

A. I believe that's right.

Q. And depending upon which forest and where it was located, that volume could have very well gone to Longview, correct?

A. I don't know the location of that sale.

Q. I just asked you: Depending on where it was located, if it was far enough north, it could have likely gone to Longview, correct?

* * *

[Vol. 7-B Tr. 5] had closed, correct?

A. When was that date?

Q. August of '98.

A. Well, it says here, "They began." I don't know if that necessarily was right in September, but you could be right.

Q. Okay. And if you look also on this page, there's a reference to, "Oregon land and timber prepared for bid sales. One unit sold this month. Sales will be sold with hardwoods reserved." See that?

A. Yes.

Q. Now, is it a fair statement that this refers to the fact that when Weyerhaeuser sold land it acquired from Diamond Wood in the late 1990s, that for much of that land, you included a deed restriction requiring the buyer to commit to sending the alder saw logs – any alder saw logs harvested in the next three years to Northwest Hardwoods at prices designated in the deed restriction?

A. We established a guaranteed price for the alder saw logs at the time these prospectuses were sent out. Essentially what it did, it guaranteed a delivery and guaranteed a price, not unlike the Oregon Department of Forestry would do with their sales where they would peg a price for the minor species and then bid the major species, such as Douglas fir. This is a very similar process, except this included the land as well.

[Tr. 6] Q. Isn't it a fair statement, Mr. Fisher, that the landowner was required under the terms of those deed restrictions to deliver any alder they harvested from the land they bought from your company in the next three years to a Northwest Hardwoods mill?

A. If they chose to harvest, that's correct.

Q. They did not have the freedom to sell it to anybody else, correct?

A. Not for the first three years, that's correct.

Q. Okay. Now, you're familiar with the contracts that were entered into with Crown Pacific; is that right?

A. Yes.

Q. And is it a fair statement that those were a unique form of contract in that Weyerhaeuser agreed to prepay 25 percent of the estimated value up front?

A. These contracts – first of all, Crown Pacific came to us with this recommendation. They were trying to sell timber and put it into a calendar year for their tax purposes and earnings purposes, mostly for their earnings purposes, so they approached us on hardwood. They also approached other folks on their softwood to advance them money, so they could book these sales as lump sum timber sales in that calendar year.

Q. Okay. So if I understand it, this allowed by – you accommodated what amounts to a kind of an accounting gimmick

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[Tr. 23] would be over time in terms of a percent of the alder saw log market, correct?

A. As a percent of the available saw logs. Not necessarily what was harvested.

Q. And isn't it also true that you projected an ability to push log prices down over time?

A. We always bought log against – our logs against the current market. That is a very dynamic situation that has a lot of factors I think have been thoroughly explained to everyone. And we base – for that particular point in time where were did this report, we were using the best knowledge that we had at that time.

Q. Mr. Fisher, on April 24, 2001, do you remember participating in one of these IDS strategy setting sessions?

A. I think I may have. I think that was the last – the last one I participated in.

Q. Do you remember projecting an ability to push log costs down in the future?

A. No, I do not. That's bad terminology. Again, we buy our logs based on the market conditions at the time, and this was, again, a snapshot view of what we thought we'd be able to do to predict log prices out into the future.

Q. Do you recall what you projected out into the future?

A. No, not at this time.

Q. Would it refresh your recollection if you could see an [Tr. 24] original of the document that you used at that meeting?

A. It might.

MR. HAGLUND: Your Honor, I'd ask that the witness be handed impeachment Exhibit 495.

(The clerk complies.)

BY MR. HAGLUND:

Q. Have you had a chance to examine Exhibit 495, Mr. Fisher?

A. Yes.

Q. Does it refresh your recollection regarding what you projected was going to happen to log costs into the future, 2001, 2002, 2003?

A. I think, as you can see here, if you go back to 1999, looking at Centralia, for example, that I discussed a little earlier the dynamics that were occurring in the year 2000. Domestic or conifer prices were under a lot of pressure, poor markets, new regulations that have set in, and there was a real concern about maintaining inventories in front of the mill, which caused this price run in 2001 and 2000.

Markets got better after that. Our thought was that this period of time would start looking more like the previous years when things might be in a bit better balance and not running irrationally, where log prices were running very irrational to the – to the normal market that we were more experienced with back in the '97, '98, '99 period.

[Tr. 25] Q. Mr. Fisher, yesterday I think one of your executives referred to discussions in the first quarter of '01, and used words to the effect that, "We were very focused on managing our raw material costs down." Do you remember that type of testimony yesterday?

A. He was always focused on trying to get the best log price for the best quality log, which meant lower log prices whenever we could get them.

Q. But I guess my question is, sir, with your recollection refreshed now, here's a meeting April 24, 2001, two weeks before Ross-Simmons was closing its doors, and isn't it true, sir, that you were projecting your log costs to go down across the division in 2002 and 2003, correct?

A. These are outlook projections. I am not saying these things happened, but, again, the irrational pricing that was occurring in 2000 we didn't think would continue.

THE COURT: It would simplify if you would just answer the question yes or no if you can and then explain it.

Restate the question. Let's get to the question.

BY MR. HAGLUND:

Q. Isn't it true, Mr. Fisher, with your recollection refreshed from Exhibit 495, that at this meeting on April 24, '01, that you projected your log costs to go down in 2002 and 2003?

[Tr. 26] A. That's what this – yes, that's what this chart says.

Q. Thank you. My last question, sir, is: Didn't you also calculate the impact on the bottom line of the division of every $10 reduction in divisional log costs?

A. Yes, it appears that that's on this page.

Q. And isn't it true that every $10 reduction in your log costs as a division was projected to add $2 million to the bottom line of the Northwest Hardwoods?

A. That was an estimate. Again, whether that actually happened or not, but any – any reduction in log costs would certainly go to the bottom line.

Q. My question was very simple. All it takes is yes or no.

A. I thought I answered it.

Q. At that meeting in April '01, did you project that every reduction in the log costs that you could achieve in the future would net two million bucks to the bottom line?

A. I think that was the hypothetical situation for $10, that's correct.

MR. HAGLUND: Thank you. No further questions.

THE COURT: Cross-examination – redirect, Mr. Johnson.

* * *

[Tr. 29] with the Department of Revenue. Roll out one in ten and do a full scale on those. That data then gets rolled up as a sample and extended across those loads that have not been sampled.

Q. So if those logs – the pulp load are then scaled, they would come in at a lower than average price; is that correct?

A. Yes.

Q. Now, other mills within the Northwest Hardwood system, for instance, Arlington, buys pulp logs, right?

A. That's correct.

Q. And is the same thing done there in terms of trying to extract saw logs when they can be found?

A. Yes, same system.

Q. And is that the same thing that's done in Eugene?

A. Yes.

Q. And is that the same thing that's done at the other mills?

A. Yes.

Q. Is Weyerhaeuser then treated any differently than other third parties in terms of the pulp loads that come into the yards at the Northwest Hardwoods mills?

A. Absolutely not. In fact, I think what was testified yesterday, we have to be sure that we treat our internal customers the same as we do our external customers.

* * *

[Tr. 31] A. Okay.

Q. Do you see 55539? Do you see that page?

A. Okay.

Q. Midway down the page, Mr. Haglund put this up earlier, it said, "Aerial recon of competitor logs in Washington indicated low to moderate inventories." What do you recall of what this was about?

A. This is a practice that we normally don't do, but what memory I do have of this, Jerry Martin and myself, we rented a helicopter one day to go out and look at those alder plantations I mentioned earlier, and I think in doing that, we flew over several competitors on the way to doing that. That's the only recollection I ever have of doing any aerial reconnaissance.

Q. And on Page 24 of that exhibit –

A. Okay.

Q. – there was the passage that Mr. Haglund spent some time on that says, "Crown Pacific, Rainier, PLS, Willamette, GP and Roseburg are generally in first refusal positions." When you wrote this, what did you mean by that term?

A. What I meant by that is we had a negotiating position that we were able to sit down with these suppliers and discuss log prices. And we tried to buy their logs.

Q. And I just want to make sure that we're clear on this issue from before. Why does Northwest Hardwoods try to

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**[Vol. 7-B (Apr. 16, 2003)]**
**[Testimony of Randall Pozdena]**

* * *

[Tr. 42] Q. Let's take it down to some examples. Say, for example, the automobile industry or the car, is a Toyota Camry a relevant market? And, if not, why not?

A. No, clearly not. The reason is that a Toyota Camry competes with – meets in the marketplace, if you will, many other vehicles that are very close substitutes for it, may not be perfect substitutes but they're substitutes in the following sense. If the price of a Toyota Camry gets cheap enough even people who drive Mercedes may choose to buy a Toyota.

Conversely, if a Toyota becomes pricy enough, as it did in recent years when the yen exchange rate moved against the product in the United States, people will switch away from Toyotas to American vehicles. So it's clear that a brand or even perhaps a style of vehicle or a size of vehicle does not constitute in and of itself by itself a relevant market.

Q. Dr. Pozdena, are you aware that in this lawsuit the plaintiffs allege two different relevant markets. First, they allege a relevant market for finished alder lumber and they also allege a relevant market for alder logs. Are you aware of that?

A. I am, sir.

Q. Let's take those separately. Let's first talk about plaintiffs' allegation that the relevant market is finished [Tr. 43] alder lumber. Do you agree or disagree with that?

A. Strongly disagree that alder, finished alder lumber, constitutes a relevant market.

Q. Would you take us through generally your reasons and then I think we've got some exhibits to display that will help give a more drilled-down analysis.

A. First, let's do the common sense notion. One of the reasons that alder has come into prominence is, in fact, because of its substitutability for other species of wood in the marketplace. It has a benign grain pattern, is easily machined and managed. It can be stained in a variety of ways, and that's the reason, in fact, why alder has suddenly become a popular hardwood, because people recognize that it's a good substitute for the increasingly scarce eastern hardwoods, mainly eastern hardwoods, cherry, maple, ash, and so forth.

So that's sort of a homely sort of explanation. But more quantitatively, one can examine the price movements in alder finish, alder lumber, over time, compare them with the price movements in eastern hardwood lumber over time, and we find that they track each other uncannily well, extremely well, and we can measure that quantitatively, using certain statistical techniques.

Q. Dr. Pozdena, do you have before you Exhibits 1309 and 1308A?

[Tr. 44] A. I'm not quite sure.

Q. I think the clerk may have just handed it to you.

A. Oh, I'm sorry.

Q. 1309 and 1308A.

A. Yes, I have them in front of me now.

Q. Am I correct in thinking it would be easier to start with 1309?

A. I think so.

MR. SIMON: Your Honor, with the Court's

permission, may I put up a blowup of 1309?

THE COURT: You may.

MR. SIMON: Your Honor, may I ask Dr. Pozdena to come down here because some of the print is a little bit fine?

THE COURT: You may.

MR. SIMON: Dr. Pozdena.

(The witness complies.)

BY MR. SIMON:

Q. I have 1309 here. And I think you also might be able to see it on the screens as well. Would you take us through 1309 and tell us what it shows.

A. Yes. The red line is an index of the prices of all hardwood lumber. That's inclusive of the eastern hardwood lumber, maple, cherry, ash, and so forth that grow primarily on the East Coast.

[Tr. 45] The black line is the price index for Pacific Northwest alder lumber obtained from the Northwest Hardwoods actual western products sales regional database. So it's the actual transaction prices of alder lumber that was sold out in the region here.

Q. Now, is this chart by itself sufficient to yield any meaningful conclusions in your profession?

A. Well, I think it's – I think it's very illustrative of just how uncannily these price trends move together. There are small departures and wiggles and wobbles in the curves; but, in general, these price indices move very, very closely together.

Q. Are there techniques, though, that you can use that will help us really understand more precisely how well alder lumber relates by price to other hardwood lumbers?

A. Yes. The authorities in this area recommend two statistical techniques. They're kind of simple statistical techniques, and I'll try to make them unjargony if I can. One is to simply take the simple correlation of the prices themselves over time.

And as you can see from this picture, I'll argue that these prices are highly correlated. Their movements are highly correlated. There's a lump there, there's a lump there. There's a large dip there and a rise and correspondingly for both types – for both types of [Tr. 46] hardwoods.

So that's one way to do it, just take a simple correlation. We did that actually in my first expert report. We just took that simple correlation. The correlation is very, very high. We did it species by species. This is an index of all hardwood lumber, but we did it species by species and demonstrated those high correlations.

Q. Let's put that up next, and ask that you comment on 1308A which I'd also ask be put on the monitor.

Now, it will be easier to read on the monitor, but if you can just orient us to this chart and explain to us what you did and how you did it.

A. Yes. This is actually the second correlation calculation that we did, which is to address – if I might back up just a moment –

Q. Sure.

A. – Mr. Simon, and address an issue and put this chart back up there. I am not sure the jury can see this unless I put it up there.

Q. I've got it.

A. One argument – these correlations are very high. One argument might be, well, there is something – some other common factor that's causing them all to move together, and has nothing to do with the substitutability of these [Tr. 47] products.

The old notion of a rising tide floats all boats, so it could be something like general inflation. It could be something like the pattern of housing starts, something like that. So the simple calculation doesn't address that issue, but we did get a

very high correlation doing that simple calculation. To address this – the issue that maybe there is some general rising tide floating all boats, we adjusted this for housing starts and inflation; that is, we controlled for it. We still got the high correlations.

We still got the high correlations in the price movement which suggests that it wasn't some general – what we call macro-economic factor causing these prices to move together, but rather the true substitutability of these products in so many uses.

I don't know what kind of hardwood is under the padded arms of my sofa. I don't know what kind of hardwood makes up the sub-straight of my dining room table top, what's under that mahogany veneer, what's under that dark mahogany stain.

These species are incredibly substitutable, and if you go into Ethan Allen, the salespeople probably don't even know what species of hardwood is in their products, in their furniture products. So as long as we're talking about wood [Tr. 48] that is hard and wood that can be stained and made to look a certain way, these are obviously very highly substitutable.

And we have calculated correlation indicators of just how highly substitutable they are. And the most substitutable pairs of products are, I think, the sort of yellowish or yellow-greenish box surrounding them. This doesn't mean that these others aren't, by the way, correlated, but perhaps there just wasn't enough sales of something like that in order for that data to show through.

But the main impact of this, of course, is to show that northwest alder is highly correlated with many other species.

Q. Why don't you get on the stand. And when we get to other charts, I'll invite you to come back, with the Court's permission.

A. (The witness complies.)

Q. Now, what I'd like to do for the next few minutes, though, is to respond to a criticism that was leveled against your analysis here early in this trial by Mark Rasmussen primarily.

Were you present when Mr. Rasmussen was critiquing and commenting on your price correlation analysis?

A. Yes.

Q. And you heard his criticism or comments that it didn't take into account first differences or things like that?

[Tr. 49] A. Yes.

Q. I think it will be more precise if it comes from you. Would you relate to us, please, what it was that Mr. Rasmussen was criticizing about your analysis and then tell us whether he was right or wrong and why not – and why?

A. Yes. Do you mind being a picture stand again?

Q. No. What should I hold up?

A. Hold up the chart or the graphic.

THE WITNESS: Your Honor, may I step down again?

THE COURT: You may?

THE WITNESS: Not that one. I want the picture.

BY MR. SIMON:

Q. This one?

A. Yes.

Q. Okay. And we're putting up 1309. So maybe it will be helpful to project that on the screens as well.

A. Mr. Rasmussen introduced the notion of not taking correlations between simple levels of these prices as they

move like this, but rather first differences. And that's kind of a jargony term, but what it means is the change in the price.

I'm highlighting with my laser beam here, one such first difference would be, it can be the change of this price from there to there (indicating). I'm not going to [Tr. 50] call it first differences. Let me just call it a wiggle. That's the way it shows up on this chart.

What Mr. Rasmussen said was when he measured these wiggles and correlated the wiggles in the black line with the wiggles in the other hardwood prices, he didn't find much correlation, and you wouldn't. The reason, as you can see, is that the other hardwoods' line is very smooth, looks sort of like a slow, meandering Mississippi River or something like that with none of the sharp wiggles that you see in the alder data.

Now why is that? The reason is that the alder data uniquely comes from an actual database of actual sales, with the price weighted by the quantity of sales that's going on, and it captures every little jiggle, bounce and bump in that marketplace.

In contrast, the source of the data for eastern hardwood prices as noted here is the Hardwood Market Report. And the Hardwood Market Report collects the data in a manner that I can best describe as, "We go out and ask some folks." That is the database collection methodology.

They go out and they ask people, "What sort of range have you been seeing cherry trading at these days?" And when they get that information in, they round it off. And they may not go out everyday and they may not talk to everyone, and they certainly do not talk to everyone who [Tr. 51] traded cherry or hard rock maple or ash or whatever that same day.

THE COURT: Are you through with that chart now, Doctor?

THE WITNESS: Well, I just want to make one other point, Your Honor.

So as a consequence, you end up with this very smooth relationship. The data collection technique itself doesn't permit collecting the wiggles.

THE COURT: What I meant was, if you're through with the chart, you can put it back up.

THE WITNESS: Okay. Yes, Your Honor.

BY MR. SIMON:

Q. Now, another comment that Mr. Rasmussen made had something to do with his analogy of, for example, of tomatoes and airplanes and commenting that things like inflationary trends can account for similarities.

MR. HAGLUND: I am going to object. It was Dr. Zerbe who explained that, not –

THE COURT: The objection will be sustained. You can ask this witness questions about it.

BY MR. SIMON:

Q. Dr. Pozdena, with reference to 1308A, would you explain for us, please, what did you do to make sure that the results of your analysis was not being influenced by [Tr. 52] inflation or other general trends?

A. We used a statistical procedure called regression analysis to incorporate the inflation and housing start trends. And that procedure prompts you to purge that influence from the other things that might be influencing trends.

It's a widely accepted, widely-used statistical procedure for doing exactly such things. And, in fact, it's the procedure recommended by the authority that the plaintiffs rely on in their unfortunately mistargeted critique of my analysis.

Q. Dr. Pozdena, that ends my questions about the issue about an alder versus hardwood lumber market. I guess maybe just to get to the bottom line, what is your opinion in terms of what the relevant market is for purposes of this case?

A. I think it's very obvious that the relevant market is the hard – finished hardwood lumber market, not the alder lumber market, but the finished hardwood lumber market.

Q. If you could explain simply now, why?

A. Because we noticed that – first of all, there is just sort of the homily sort of things that I offered to the Court today about the obvious substitutability of this product. It's what's made this product popular and what made it from being a – turned it from being a weed into [Tr. 53] being a product that was worth selling to the marketplace – its substitutability for all these other products. But also and more quantitatively, that its price moves just like it is one of those other products.

Q. Now, based then upon your statement that the relevant market is the market for finished hardwood lumber, do you have an opinion on whether or not the defendant in this case, Northwest Hardwoods/Weyerhaeuser has market power or monopoly power in that market?

A. It does not. It has 2.5, if I am recalling correctly, only 2.5 percent market share in the hardwood lumber market.

Q. Now, I'd like you to assume that there's been some evidence in this case that would show that of the alder – of all of the alder that's sold, Northwest Hardwoods or Weyerhaeuser may have anywhere from 60 to 65, 70 or even 75 percent of all the alder sold. Does that give it market power?

A. It doesn't matter. If they attempt to raise the price too high, and that's what they would have to do, by the way, if they're ever going to recoup the losses from their alleged predatory behavior, is to raise the price of alder lumber in the marketplace.

If they attempt to raise that price, people will simply substitute, back away from alder to whatever they were using before they were using alder. And it will be [Tr. 54] some other probably East Coast hardwood or an imported hardwood lumber product.

Q. And along those lines, just so we have a complete record on this, would you tell us the antitrust economic definition of market power or monopoly power that you're using in that answer.

A. It means that the entity has power over price. That Weyerhaeuser has power over price. It can peg a price and the market kind of has to take it.

Q. Now, we've been talking about lumber. Now I would like to switch over to another topic, and that is the other alleged market, that plaintiffs claim is a relevant market and that's logs. The plaintiffs claim that alder logs are a relevant market.

First of all, what is your reaction – what is your response to that allegation? What's your opinion?

A. Well, if a relevant product of an industry is hardwood lumber, then the relevant input market is hardwood logs. I didn't use the term "alder," I used the term "hardwood logs."

So my response is that for the analysis of the input market to be consistent with the analysis of the output market, the relevant market for inputs has to be hardwood logs of all species.

Q. Do you have any opinion on whether or not Northwest [Tr. 55] Hardwoods or Weyerhaeuser had monopoly power or market power in the market for hardwood logs?

A. It certainly does not. And I would go further and say that even if I accepted just to be friendly that somehow alder logs were relevant, they don't have market power there either.

Q. All right. Let's explore that for a little bit then. Why?

A. Well, they own – the number seven percent has been bandied about, that Weyerhaeuser owns or controls these short term, these temporary agreements with other growers of the stumpage, seven percent. I think the actual number is more like five percent for both public and private lands. But whatever it is, it's a small number.

That's the relevant number to think about when you're thinking about market power in a storable commodity, like a log.

Q. Would you take us through that because I would like you to assume that there is some evidence in this trial that perhaps of all the alder logs or alder saw logs purchased – it can be saw logs or pulp logs right now – maybe Northwest Hardwoods or Weyerhaeuser might buy 60 or 65 percent or so or more of those logs that are actually bought and sold in a given year. Why isn't that the relevant measure?

A. Let me just use, again, sort of a simple example. My [Tr. 56] sons are now teenagers, but they wouldn't let me do this now. Let's say I took my son to the beach with a beach pail, and my son dipped it into the ocean and there were no other kids on the beach at the time and brought the pail up to me and said, "Dad, I'm only the one here with a pail. I'm harvesting 100 percent of the water that's being harvested out of the ocean today. You owe me a million dollars for this pail of water."

Obviously, my son has no market power. The ocean sits out there as something akin to the total amount of standing alder timber. For someone else to come along with a pail and compete with my son simply by entering and buying the – collecting the supply of water and competing with my son.

To put it – bring it back to the alder logs context, 97 percent – well, 93 to 95 percent of the standing alder timber is

up for grabs, so how can they possibly control prices? If they move it too much, if they tried to control the price, there would be an influx of other competitors into that market to grab onto that supply.

Q. Now, the evidence in this – the context in this case is that Northwest Hardwoods sells lumber, they buy logs. Does antitrust economics recognize the distinction in terminology between, let's say, market power on the selling end and market power on the buying end?

* * *

[Tr. 58] someone in their position from lowering log costs and achieving monopsony power? What are the restraining influences?

A. There are a couple of them. I refer to the storability of this commodity. What I mean by that is that if I – let me be Weyerhaeuser as alleged in this matter and I go into the woods and I offer the owners of standing timber stumpage too low a price, a price that they find offensively low.

They have the choice. They need not sell it to me. As a matter of fact, if they don't sell it to me, and this is something that is important in this particular marketplace, the tree continues to grow and actually gets more valuable, so the response will be for them to withhold supply from me.

And I am going to be very frustrated now. I can't buy supply at this low price. I'm going to have to bid – go back to that person and say, "How about if I offer you this? How about I offer you this?" And finally the price will get up to the reasonable level, because the seller has the ability to store that commodity and thwart my attempt to rip that person off for what that log is truly worth, for what those logs are truly worth.

The other is if you think about it this way, the logic of the plaintiffs' case is that during the early part of the predatory phase they are paying too much for logs

* * *

[Tr. 72] evidence perhaps that there is predation going on. And there is a formal test in the economics literature called the Areeda Turner test, and it's based on exactly this notion.

Q. Now, did I ask you to take a look at the Northwest Hardwoods financials to see if you saw any evidence of that?

A. Yes, you did.

Q. What did you find?

A. I found absolutely no evidence of that. It's in my report, I think, not in the exhibits I have in front of me; but in every mill in the time period at issue in this case, they were making positive profits on log purchases.

Q. Now, one of the of the issues that plaintiffs were talking about, as a matter of fact, they talked about it this afternoon. Were you in the courtroom when Mr. Fisher was asked questions about these internal transfer prices from Weyerhaeuser-owned timberlands to Northwest Hardwoods?

A. Yes, I was.

Q. Did I ask you to perform a detailed study of that?

A. Yes, sir, you did.

Q. Would you describe for us, first, what did I ask you to do? What did you do and then I'll ask you what did you find?

A. The ugliest thing that you asked us to do was to take 30 banker's boxes of data and turn it into a computer [Tr. 73] database, which we did with the assistance of an outside vendor.

What we then did with that data, which was called the log purchase database, we were able to examine comprehensively, not with cherry-picked examples as you've seen ear-

lier today in this courtroom, comprehensively whether there was any tendency for Weyerhaeuser to charge its own mills less for its own logs, logs coming off of its own land than it charged those mills for logs that were acquired off of third party land.

And we performed an extensive statistical analysis that is in my report. It's carefully tabulated in my report. And found that once you controlled for the sort quality of the logs, and that's actually the only variable that is needed to do this. We included log diameters and other things, too. Once you controlled for the sort quality of the logs, there was no difference.

It raised the question, why are we seeing differences in the examples that Mr. Haglund put on earlier today? And the reason is that in that database is a blend of saw logs and pulp log purchase data. And if you cherry pick them carefully enough, you can find differences because they do price differently, but not if you examine them comprehensively.

THE COURT: Excuse me just a minute. I am just a [Tr. 74] little bit concerned about this. I want to understand it.

THE WITNESS: Yes.

THE COURT: 501 to 505 are the exhibits that you put up.

THE WITNESS: Yes.

THE COURT: Aren't – isn't the same format used throughout those boxes?

THE WITNESS: Yes, it is.

THE COURT: What other information did you use that is not shown on those pages?

THE WITNESS: None.

THE COURT: How did you arrive at sorting, because those – we went through those pages and the format of them,

and I'm not sure I understand how you can come to a conclusion that the payments were equal.

THE WITNESS: I don't remember, sir, exactly how many – how many of those sheets there are in 30 banker's boxes, but we did the analysis on all of them. We didn't simply pick –

THE COURT: You're saying they all – just using the same figures that the plaintiffs used for 501 to 505, they all just came out about even?

THE WITNESS: That's correct, that's correct.

THE COURT: So you didn't use any different data, you just simply tabulated everything that is in those boxes?

[Tr. 75] THE WITNESS: That is correct.

BY MR. SIMON:

Q. Approximately how much time was spent doing that, not just by you, but by you, your assistants, the computer vending firm that did it all? Do you know approximately how many hours was spent doing that?

A. Well, I know just getting the data entered cost nearly $100,000. And our analysis inputting that data, which then came from the data, Scan One, the data vendor, in a relatively raw form into a database, I don't know – I don't know how many hours that would be, but lots of hours and lots of money.

Q. Now, I know I've asked you this question before, but I am going to ask you right now in this courtroom: Is there any cheaper, less expensive, less time-consuming way to get that type of accuracy without the results that you've just – without the efforts that you've just described?

A. No, sir, there's not. You run the risk of precisely what was demonstrated earlier today, that someone goes in

and picks out a couple of pages of that that supports their argument and ignore the rest of the boxes.

THE COURT: Let me ask you another question. Where are the figures? How did it come out? If you did all this, what are the figures? They didn't come out exactly even, I'm sure.

[Tr. 76] THE WITNESS: They did not come out exactly even, but they came out statistically exactly even. That is to say –

THE COURT: Well, where is some evidence of that? I am concerned about this.

MR. SIMON: Your Honor, those have been submitted in our expert witness reports and disclosures that have been filed with the Court and opposing counsel.

THE COURT: All right. That's what I wanted to know.

MR. SIMON: They are all set forth –

THE COURT: Which exhibits to your expert report?

THE WITNESS: Let's see, this would be to Supplementary Report 3, I believe.

MR. SIMON: Do you want me to bring it up to you and you can identify it?

THE WITNESS: Yes. I have a different copy with me.

THE COURT: The third supplemental report?

THE WITNESS: I believe so, but let me just check, Your Honor.

MR. SIMON: Let me bring you the amended second and third supplemental, and I can also bring you the original if you want.

MR. HAGLUND: Do you have another copy, counsel?

[Tr. 77] MR. SIMON: No, I have already given it to you.

THE COURT: You should have one of them, shouldn't you?

MR. HAGLUND: Yes, I do, Your Honor, but –

THE COURT: I know there are a lot of papers. You can use mine if you want to.

Give him this one.

MR. HAGLUND: Thank you, Your Honor.

THE COURT: Excuse me. Go ahead.

THE WITNESS: Yes. Your Honor, in the text beginning at Paragraph 20 on Page 12 of my third supplemental declaration is a lay description of what was done. In Exhibit C is the exact statistical analysis that was performed. And there are a series of tables, C2 and C3, one which was done for the Longview mill only, where I understand this allegation of supposedly cross-subsidizing or sum subsidizing that mill through this mechanism is most cogent – is most strongly made in this case. But then in Exhibit C3, it was done also for all Weyerhaeuser mills.

And what this analysis demonstrates, as the text explains I think better than I will probably do right here, is that most statistically important factor explaining the difference –

THE COURT: I am just concerned with figures. Do you come up with total figures for each of the columns on [Tr. 78] those sheets that we looked at?

THE WITNESS: No, sir. It's not done that way. It's done – what we use is information on the differences in sort quality between the private – I'm sorry, third party purchase logs in a given month and the sort quality of the – off the Weyerhaeuser land's logs in a given month.

THE COURT: Why wouldn't you just add up the columns, as the exhibits we saw? Why don't you just add up

the figures and see what it comes to? I don't understand the theory, in other words.

THE WITNESS: Well, because we don't know exactly how much the market value sort quality –

THE COURT: That's what I'm getting at. Did you use something else that's not in those boxes?

THE WITNESS: No, sir, I did not. I used just –

THE COURT: The sort quality doesn't show in there except as to the width of the lumber, medium, low or high grades. That's all there is.

THE WITNESS: And the diameter.

THE COURT: And the diameter.

THE WITNESS: And the volume of the sale in any given month.

THE COURT: So why not just add those up?

MR. SIMON: Your Honor, can I help a little bit for the Court?

[Tr. 79] THE COURT: Yes. I wish you would.

MR. SIMON: The documents that Mr. Haglund pulled out are not representative of all the other documents. The types of documents that he presented to you is those exhibits is not representative of what's in the sixteen or something or other boxes that we provided to them. There are other documents in there with a lot more detail.

THE COURT: This is exactly what I want to know.

MR. HAGLUND: I vigorously object to that characterization.

THE COURT: We're going to find out about this because this is what I want to know. I understood that 500 and 501 through 505 are exact duplicates of everything that's in

those boxes, only they take – a few of the items taken out. The rest of them are in the same format exactly.

THE WITNESS: Approximately the same format. Over the different years, they are printed out in a slightly different form.

THE COURT: Now, I understand from counsel that he's saying there is something else in those boxes besides those forms that we saw in 501 through 505. And if there is, that's what I want to know.

MR. SIMON: And, frankly, let me concede that Mr. Johnson knows what's in those boxes far better than I do, so I'll defer to him.

[Tr. 80] THE COURT: I want a straight answer. I saw 500 through 505. I saw the forms. Granted, those are selected out of those boxes. But are there any different forms than those that are in those boxes?

MR. JOHNSON: I am not sure what you mean by "forms," Your Honor.

THE COURT: Well, let's just start over. Let's look at 500, first page of 500. You can see the form there across the top. We reviewed it. In fact, I reviewed it specifically to make sure I understood with Mr. Fisher the columns, both left and across the top. Now, what I want to know: Is there something else in those boxes that's in a different format than that?

MR. JOHNSON: Yes, Your Honor. There are four different types of reports in those boxes. There are the purchase by contract reports, which are 500. There are inventory reports. There are vendor listing reports, and I can't remember what the other report is.

MR. HAGLUND: But, Your Honor, the only reports that show all the detail, high, medium, low, volume, price and diameter are the ones that we – are the monthly ones that we

have pulled, some October months for the Centralia and Longview mills.

MR. JOHNSON: And that's exactly the point, Your Honor. By taking just selected months, that's exactly [Tr. 81] the point that Dr. Pozdena is making. But if you look in the aggregate –

THE COURT: Just a minute, Mr. Johnson. The other thing I want to know is, though, are the other months in the same format as this?

THE WITNESS: Yes, Your Honor, they are.

MR. JOHNSON: For the report, yes.

THE COURT: All right. So my question, again, is why not take all of these reports that are in there and instead of going through some formula that I'm having difficulty understanding, why not just total up the items under six-inch, eight-inch, nine-inch, 10 to 11, 12 and 14, under high grades, add them up and see how they come out for both Weyerhaeuser purchases and third-party purchases?

THE WITNESS: A couple of reasons, Your Honor.

First of all, the – across the various reports, the diameter buckets, if I can call them that, the diameter classifications are not always constant, so that in some –

THE COURT: Wait a minute. Tell me about that. I want you to look at 500. Let's get 500. Put it up on the screen.

MR. SIMON: Can you see that, Dr. Pozdena, or can we get him a hard copy?

THE WITNESS: Not particularly well.

MR. SIMON: Can we get him a hard copy, [Tr. 82] Your Honor, please?

THE WITNESS: It's okay. It's okay.

THE COURT: Blow it up a little bit.

THE WITNESS: It's okay.

THE COURT: You can blow it up a little bit. There you are.

THE WITNESS: It's okay. Your Honor, if you look under the column that says "Diams," you'll see 6 to 7 inches, 8, 9, 10 to 11, 12 to 14. On some of the reports, those size – those diameter buckets six to seven, might be in some of them six to nine. In some of them, it might be eight to ten. In other words, there is not – over the years, the report format has changed somewhat.

It always has the diameter information, but it doesn't always have it in the same format. So I can't do the simple addition that you want to do. I have to control for the diameter measurements. You know, unfortunately a more complicated but more accurate fashion statistically. I can produce, however, a very simple picture that illustrates this graphically. And I did in an ill-fated attempt to submit the fourth supplementary report.

MR. SIMON: That's what we submitted, Your Honor, just before trial began, which the Court discussed before trial.

THE COURT: Well, you can see why I did, because [Tr. 83] it cost $100,000 to produce it at the last minute. It is going to be hard to analyze it. That's what I'm –

MR. SIMON: We have been responding to changing plaintiffs' allegations, Your Honor.

THE COURT: I won't argue that with you now. We'll take that up at the recess.

But I still want to ask you, Doctor, even though some of the other years' reports, is that what you're saying, have different sizes under "H," here?

THE WITNESS: Sizes under "diams."

THE COURT: Under diams along side of H?

THE WITNESS: Yes.

THE COURT: Even though they're different, you could have easily added up everything that was in the Hs and everything that was in the Ls to come up with the total figure. Did you do that?

THE WITNESS: I did not do that, sir, because – remember I have – I have this for every month for, I believe it's about six years. And to add them up would not allow me to respect the fact that prices are changing over time along with these other factors that are changing here, you know, the size and the sorting grade. So I have to do it – unfortunately, it is a multi-factorial kind of problem, and I have to treat it as such.

THE COURT: So if I understand correctly, now, [Tr. 84] Mr. Johnson, you're the expert on this, the only difference between any of the forms in the boxes is that some of them, for example, have different diameters than are set forth than those that are in 500?

MR. JOHNSON: The form is always the same, but for each entry for each separate vendor or log supplier, the form is different because different vendors or different suppliers submit their wood in different forms. Even Weyerhaeuser submits their logs in different forms. That's why it is harder to just do a simple calculation.

MR. HAGLUND: I completely disagree.

THE COURT: All right. I'll let you examine him. And we may have to analyze all of those boxes. We'll see. Let's go ahead with the examination by the lawyers.

Anything further for this witness?

BY MR. SIMON:

Q. I don't know. Dr. Pozdena, is there anything that I have left out – that I have not asked you that you can think of that supports your opinion?

MR. HAGLUND: Objection.

THE COURT: The objection will be overruled. I think he has covered most everything.

THE WITNESS: I am a little discombobulated. Let me think for a moment if there is something else I would like to speak to. I can't think of it right now, Mr. Simon.

* * *

[Tr. 104] Q. All of the consumers are the sawmills in the region, correct?

A. All of the users of that as an input are – they are not consumers. They are industries that use it as an input.

Q. They're buying the product called alder saw logs?

A. That is correct.

Q. And you'd agree from a geographic standpoint, there are no substitutes for those in this region, are there?

A. There are some Oregon maple, Oregon walnut.

Q. No substitutes that could replace it if it were lost, correct? You conceded that already.

A. I have conceded that, yes, sir.

Q. So isn't it true, Dr. Pozdena, that as to the saw log market this is a no-brainer, that is a relevant market, isn't it?

A. No, sir, it is not. Because if the market for the end product, the finish market, is national or perhaps even international in scope, where is the consumer harm from the loss of – and I don't know, is this a blight or something that's causing the loss of the alder?

I don't know the hypothetical that you're setting up here in great detail, but there will be virtually no injury to the consumer of finished hardwood lumber products, which is the relevant output market, and the one that injures – that has the potential to affect the consumer if [Tr. 105] alder saw logs go away. Yes, there will be some mill operators who will lose their jobs. There will be –

Q. I think you're going beyond my question.

A. I am just trying to make it clear that you're trying to get me to make a statement that is economically inconsistent with the underlying economics of my statements.

Q. Dr. Pozdena, you've referenced the purpose of the antitrust law a couple of times and you constantly refer to avoiding consumer harm. Isn't it another fundamental purpose of the antitrust laws to protect businesses' ability to compete?

A. To protect efficient –

Q. Protect competition?

A. To protect competition, yes.

Q. And isn't it true, as you understand the antitrust laws, Dr. Pozdena, that it would be illegal for a firm to deliberately take steps to drive another firm out of business?

A. I believe that if you can prove predation that that would be illegal, yes.

Q. Now, let's turn to your lumber analysis. I'm looking for that – here it is. Now, if I – I'm going to display Exhibit 1309. This is your exhibit, right?

A. Yes, it is.

Q. And if I remember your testimony correctly, you

* * *

[Tr. 107] Q. You don't find it in gymnasium floors or bowling alleys, do you?

A. I believe that's typically hard rock maple.

Q. Now, the graph that I just displayed, you took the 17 eastern hardwoods that you looked at and you averaged them all together to get one line, right?

A. I didn't average – I indexed them all. I added them all together as an index.

Q. And you found individually on another graph that you prepared very high correlations for each of the 17, correct, with alder?

A. That's correct. I wouldn't say each of the 17. I think most of the 17 had high correlations.

Q. And you found a high correlation for hard maple, right?

A. Yes.

Q. As well as cherry, correct?

A. Yes.

Q. And you've seen these materials, Exhibits 86 and 88, that Mr. Rasmussen prepared?

A. Yes.

Q. Now, and it's your testimony, sir, that the first differences or price change correlation analysis that Dr. Zerby and Mr. Rasmussen performed was completely the wrong thing to do, correct?

A. Cannot be done on this data and is not the [Tr. 108] recommendation of the authority that they themselves reference.

Q. Well, you referenced the Stigler and Sherwin article in your own original submission, didn't you?

A. Yes, I did. It is the authority in this area.

Q. And let me make sure I understand why you criticize the data. And this – you performed your own correlation using the very same data, correct?

A. Yes, I did.

Q. The top grade superior from Northwest Hardwoods for 11 years, and compared it to the top two grades together, FAS first and seconds for these 17 other eastern hardwoods, right?

A. Yes, that's correct.

Q. So the same data. And you criticized their use of the price change correlation because the Weyerhaeuser data is a monthly average of – well, let's back up a second, so we can get it out clearly. The Weyerhaeuser data is a monthly average of the actual division-wide price for that month for the superior lumber sold into the market, correct?

A. Yes. Weighted – each sale is weighted in the calculation of the average.

Q. And the data from the Hardwood Market Review is an average price determined by the leading publication tracking eastern hardwood lumber in the United States, right?

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**[Vol. 8-A] (Apr. 17, 2003)]**
**[Argument on Defendant's Motions and Jury Instructions]**

* * *

[Tr. 121] MR. SIMON: One moment, please.

THE COURT: Yes.

On 1, 1A was not received. But one No. 1, the full edition, was received without objection.

THE CLERK: Is 1A withdrawn then?

THE COURT: 1A is withdrawn, I guess.

MR. HAGLUND: That's fine, Your Honor.

THE COURT: All right.

MR. SIMON: With the Court's permission, may I ask Ms. Julia Markley to take the primary lead in the discussion of our motions now at the close of the evidence?

THE COURT: I don't want discussion. I want your record complete as to what motions you are making without argument.

MR. SIMON: Very well.

THE COURT: I am not going to allow them at this time. I may reconsider them at the end of the case, depending on the verdict. All I want, without argument, is the motions that she wants to make.

MR. SIMON: We understand. May I ask permission to have Ms. Markley do it, subject to me adding something if I hear something left out at the end?

THE COURT: No, I won't allow that. I think one or the other ought to do it. That's the rule of the Court.

MR. SIMON: I know. That's why I made the [Tr. 122] request. I ask for relief from that rule.

THE COURT: I will consider it, depending on what happens. I think she is capable of doing it or else you can do it. It is not that complex.

MS. MARKLEY: Julia Markley for the defendant. We have a written motion for judgment as a matter of law that I'd like to submit to the Court and counsel.

THE COURT: All right. If that's so, we'll put those in the record and there's nothing further you need to do.

MS. MARKLEY: If I may briefly summarize for the Court orally.

THE COURT: You may.

MS. MARKLEY: Defendant moves for a judgment as a matter of law on liability grounds and on damages. On the liability grounds, defendant submits that plaintiffs' evidence shows nothing more than defendant raised its rivals' costs, which is a theory that has not been accepted by any Court, particularly in the circumstances –

THE COURT: It is not necessary to argue. Just give me the motions.

MS. MARKLEY: Second, the defendant moves as a matter of law that its contracts with Georgia Pacific and Crown Pacific are per se legal under the antitrust laws. The deed restrictions that Weyerhaeuser had in its land [Tr. 123] around Eugene that it sold after – that it acquired in the Diamond transaction are legal as a matter of law.

There is insufficient evidence of intentional false statements to the State of Washington Office of the Governor, and State of Oregon Forester, and plaintiffs' Section II claims cannot be based on those allegations.

There is insufficient evidence of attempted monopolization here because of the essential element of the dangerous probability of acquiring monopoly power. Every witness has testified that Weyerhaeuser actually –

THE COURT: It is not necessary to argue.

MS. MARKLEY: On the damages, plaintiffs have insufficient evidence of damages because all their damages evidence is speculative. The $20 million-dollar figure that –

THE COURT: It's not necessary to argue it.

MS. MARKLEY: The plaintiffs' damages models fail to control for causal factors other than Weyerhaeuser's conduct, like the Asian economic crisis. The plaintiffs' damages models fails to aggregate among the several allegedly predatory acts of the defendant.

THE COURT: All right. You want to add anything, Mr. Simon?

MR. SIMON: And we'd ask simply that those issues be taken away from the jury. In addition that, for all the [Tr. 124] specific issues that she's identified, that the jury should be so instructed that those are not proper claims in this case. The only thing I want to add to that motion, Your Honor –

THE COURT: Let's deal with this.

I'm going to deny the motions. I don't think it's necessary that actions of the defendant be illegal to be a factor in determining whether the plaintiff has proved a monopoly or not. So whether the actions with Crown Zellerbach and State of Washington and Oregon are legal or not, I don't think it is at issue, so I will not take those away from the jury. In fact, the defendant's instructions included comments on those specific things.

All right. Anything further?

MR. SIMON: Yes, Your Honor. It came up yesterday at least maybe even a day or two before that, a couple things. Mr. Haglund's questions to the witness, the Weyerhaeuser witnesses, asked about tying. And in light of that, I thought it important and necessary to have the jury instructed that –

what tying is, and that there is no evidence of tying in this case.

So we have prepared a Supplemental Jury Instruction No. 25 that we'd submit to the Court that basically takes tying out of this case. In addition, there has been a lot of testimony, especially yesterday with the [Tr. 125] cross-examination of Dr. Randall Pozdena regarding the defendant's internal transfer pricing issues.

And, again, we would ask that the jury be instructed. I have a written instruction here to submit to the Court, Instruction 26, that there is no law that requires a business to charge itself any particular internal price or to use any particular internal pricing method for resources that it owns and desires to use as a part of the manufacturing process.

If I may approach, I'll give a copy to the Court.

THE COURT: That's fine. They're noted. My recollection is, and I'll hear from the plaintiff, that there is no contention of legal tying in this case; is that correct?

MR. HAGLUND: Yes, Your Honor.

THE COURT: Tying, as such, involves a number of factors that haven't been delved into in this case, and I think the only testimony about tying was with relation to the testimony to control the price of logs, but I'll look at the instruction that was submitted, 25, and consider it.

I'm handing out to you now a set of instructions, a draft which is marked April 17th of 2003. Okay. And also a proposed verdict form. I want you to study those carefully, and as I indicated, we will, before argument starts this afternoon, at 12:30, an hour from now, we will [Tr. 126] take up any exceptions that you have to these written instructions.

In connection with that, I will ask you each to point out to me any of your instructions you feel are not covered that you want to make sure you have an exception to. Point that out

to me. I will not give you an automatic exception to submitted instructions unless you do.

The reason for that is, for example, on the plaintiffs', I have a set of 60 pages of proposed instructions that I can't believe the plaintiff really wants me to give, because they are so extensive and massive that no jury would possibly understand them when they were finished.

The defendant's are a little more concise, and I tried to consider the law and all the instructions submitted and combine them. What I believe both the Court and the lawyers have a duty to do is make instructions as simple as possible, recognizing that no matter how simple we make them in this case, they won't be simple, but at least we can reduce them as best as we possibly can.

So study those for the next hour, and at 12:30, we will take exceptions. The same to the verdict form, and I'll hear your suggestions. This is only a draft; however, as I indicated, this draft will be put in the Court records so the record will reveal what we're talking about when we [Tr. 127] take exceptions. Any question about that?

MR. HAGLUND: Not from the plaintiffs, Your Honor.

THE COURT: Mr. Simon?

MR. SIMON: No, Your Honor.

THE COURT: Okay. I will see you at 12:30.

We'll be in recess.

(Court adjourned, Volume 8-A, 11:45 a.m.)

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**[Vol. 8-B (Apr. 17, 2003)]**
**[Argument on Jury Instructions Cont'd]**

* * *

[Tr. 3] THE COURT: All right. Let's start with the draft instructions I delivered to you April 17th at 8:31 a.m. We will take that first. Then we will go to the defendant's supplemental requested instructions. It is not necessary for the defendant to repeat the arguments that were made in the motions for a judgment that have been handed to me and filed on the record and stated on the record. So you don't have to repeat those.

Let's start with the plaintiff. Do you have any exceptions to the draft of instructions that I gave you? If so, give me the page and paragraph.

MR. HAGLUND: Yes, Your Honor. It is just one suggestion. On page 8, first paragraph, the last sentence of that paragraph where it says: A similar rule applies to monopsonist. The power to control price is the power. A monopsonist can either increase or decrease. So I think it would be accurate to change it to: The power to affect the price the monopsonist must pay.

THE COURT: Any objection to that change?

MS. MARKLEY: Yes, Your Honor. Monopsony is defined under the law as a power to reduce price. That will lead the defendant into several of the defendant's other [Tr. 4] objections to the jury instructions proposed.

THE COURT: All right. Let me say this to Mr. Haglund. Is there any evidence of anything other than reduction in the case?

MR. HAGLUND: Well, we have both, Your Honor. We have evidence that they raised the price to push out competition.

THE COURT: The price of what? Logs or lumbers?

MR. HAGLUND: Logs.

THE COURT: Logs. We also have evidence that they were planning to push the prices down in the future. We have both.

That would be a monopoly, wouldn't it?

MR. HAGLUND: As to logs, the input is monopsony.

THE COURT: Okay. Monopsony. As far as the logs go, your contention is that the defendant raised the price and reduced the possibility of your getting logs?

MR. HAGLUND: That's right. A monopsonist essentially just has power over price, to either raise them or reduce them.

THE COURT: I think that's right.

The difference between monopsony and monopoly is that monopsony relates to the acquisition, the ability to acquire the product rather than to sell it?

MR. HAGLUND: Correct.

[Tr. 5] THE COURT: Isn't that correct?

MS. MARKLEY: This is not a case that a competing sawmill can bring a Section 2 claim. This is not a proper case for monopsony. If plaintiffs are alleging that Weyerhaeuser raised the price of the inputs to the logs, this is the argument of the defendant that this is the raising rival's cost theory is what the plaintiffs are proceeding under. There is no legal supporting theory of monopolization or monopsonization.

THE COURT: All right. I understand your argument. That's part of your motion that you filed. But I think counsel is right, that in the case of a monopsony, it is the power to effect the price. I am going to change that so that you will both know. Instead of "reduce," it will be "effect."

Anything else that the plaintiff has?

MR. HAGLUND: That's all for the plaintiff.

THE COURT: All right. Exceptions by the defendant.

MS. MARKLEY: Defendant takes exception to page 10.

THE COURT: Which paragraph?

MS. MARKLEY: The paragraph at the bottom, the last full paragraph starting with "One of the plaintiffs' contentions."

[Tr. 6] THE COURT: All right.

MS. MARKLEY: Defendant takes exception because this is akin to a predatory pricing instruction. The U.S. Supreme Court test for predatory pricing as announced in the Brook Group case in 1993 is that plaintiffs must show below-cost pricing or that the defendant operated at a loss. This is a bright-line test announced in the Brook Group case. Defendant takes exception to that entire paragraph.

Again, this also implicates the raising rival's cost theory to which defendant objects that there be any instructions on that.

THE COURT: What's the plaintiffs' position on that paragraph?

MR. HAGLUND: Your Honor, it is our position that this is a fair summary of the Reid Brothers case. The Reid Brothers and Ninth Circuit case law, we believe, makes clear that if you can show below-cost operations by any measure, you are entitled to an instruction like this. We have in this case, Your Honor, in the exhibits evidence of below-cost operations of the Longview plant when one compares their profitability figures with the subsidy on Exhibit 482.

MS. MARKLEY: Your Honor, may I be heard?

THE COURT: I will call on you when I'm ready.

I don't see that that paragraph recites that you [Tr. 7] contend that the defendants had a loss. Let's look at that paragraph carefully.

MR. HAGLUND: I think you are right, Your Honor.

THE COURT: You agree that this is a predatory

pricing paragraph, as least that's what we have tried to put

in here. So it takes a raising of the price and a loss by

the defendant in the reasonable hope that they can recoup

it, doesn't it?

MR. HAGLUND: Yes. And we have recoupment

evidence as well.

THE COURT: I understand that. I'm talking about the language in this. So we need to make some additions to this paragraph, don't we?

MR. HAGLUND: Yes, Your Honor.

THE COURT: There has to be in that first sentence or following it some statement that the defendant sustained a loss. Let me get my expert involved in here.

That's why I ask if it was a predatory claim. I think that this is an accurate statement, but it is not an accurate statement as far as a predatory pricing goes. If you are not claiming this as predatory pricing paragraph, then we should take out the recoupment of losses.

MR. HAGLUND: I guess as it stands it is really not a predatory pricing paragraph.

THE COURT: If that's the case, is it even needed? [Tr. 8] We set forth what the plaintiffs' contentions are at another place. So if it is not a predatory paragraph, do we even need it in there? Let's find whatever we said the plaintiffs' contentions were. I don't see a general statement of the plain-

tiffs' contentions in here to the effect that the plaintiffs' claims, as I recall, and there was in one draft of the instructions the plaintiff contends that the defendant raised the price of logs and forced them out of business generally. So I'm going to do that.

I need to ask you now – this is a good time to ask you whether you do contend this is a predatory pricing case on behalf of the plaintiff? Do you think that there is evidence that would justify a predatory pricing instruction, keeping in mind that it would be up to the plaintiff to prove that the defendant raised the prices, sustained a loss as a result of raising those prices with the reasonable hope that they would recover that loss after the competition was gone. That's predation. The question is whether you contend you have evidence of that.

MR. HAGLUND: Your Honor, I think that based upon the strong evidence that we have in the record regarding the subsidy of the Longview mill we are entitled to the predatory pricing instruction.

THE COURT: Is there evidence that shows that without that predatory high pricing the mill would have [Tr. 9] sustained a loss?

MR. HAGLUND: If you just take their – I will make two points in closing. One, if you just look at 1998, for example, and what their actual pretax profit was, it is less than the $4.2 million subsidy that we show for that year.

In the year 2000, if you add back the selling and general and administrative expenses and account for a $2 million subsidy, they lost money in 2000.

THE COURT: Only in 2000?

MR. HAGLUND: Your Honor, I can't speak definitively.

THE COURT: It sounds looks like your other lawyer wants to speak.

MR. SCOTT: Your Honor, I'm Shay Scott, an attorney with Mr. Haglund.

THE COURT: I don't want you to argue, but you can talk to Mr. Haglund.

MR. HAGLUND: The other point we make, Your Honor, is that the Reid Brothers case makes it very clear that preclusive bidding is exclusionary conduct regardless of whether or not you can show recoupment.

THE COURT: I think it can be under certain circumstances and may be under this case. So that gets us back to the key question here, whether this particular [Tr. 10] paragraph should be left as separate from predatory pricing, in which case we leave out the reasonable expectation that subsequently the defendant could recoup its losses and if we're going to have a predatory pricing instruction, which should be separate. Or else this is the predatory pricing instruction, we need to put in here that the defendant did sustain some losses.

Do you agree with that?

MR. HAGLUND: Yes.

THE COURT: All right. Then, Ms. Markley, do you want to talk about that?

MS. MARKLEY: I'm sorry. Mr. Haglund wants the predatory pricing instruction?

THE COURT: Let's talk about this paragraph first. I assume you agree that based upon the Reid Brothers case I should submit unnecessary high bidding if it is exclusive of the plaintiff. You don't agree?

MS. MARKLEY: No. Brook Group, the Supreme Court test on predatory pricing –

THE COURT: Wait a minute. We are not talking about predatory pricing in that statement. In other words, high pricing to force a person out of a market or a plaintiff out of a market without predatory pricing can be an anticompetitive act, can't it?

MS. MARKLEY: No. We take exception to that [Tr. 11] instruction.

THE COURT: I understand then. I tell you what I'm going to do, I'm going to add into this and make it a predatory pricing paragraph by simply adding language that the defendant sustained a loss and leave the rest of the language alone. This will be a predatory pricing paragraph.

I will add another paragraph, for the purpose of your argument, which talks in terms of simply bidding to exclude a competitor can be an anticompetitive act.

MR. HAGLUND: Yes, Your Honor. I guess our suggestion there is that if you took the first four lines of that paragraph and put a period after "anticompetitive" without the recoupment expectation that would be consistent with Reid Brothers.

THE COURT: Wait a minute. Tell me that again.

MR. HAGLUND: Page 10.

THE COURT: Uh-huh.

MR. HAGLUND: If you put a period after the word "anticompetitive" at the end of the fourth line.

THE COURT: All right. Period after the word "act" in the fifth line.

MR. HAGLUND: Right.

THE COURT: Uh-huh. Leave out then, "If you also find that defendant had a reasonable expectation that it could consequently recoup any losses it sustained through [Tr. 12] this conduct," leave all the rest of that out.

MR. HAGLUND: Your Honor, we have rethought our situation. We do not request a predatory pricing instruction.

THE COURT: All right. I think that makes sense. I was considering taking that away and didn't put it in the instructions other than this. I think this correction will solve that problem and make it clear this is not a predatory pricing paragraph.

All right. Your next exception.

MS. MARKLEY: So the record is clear, defendant does take exception to that instruction –

THE COURT: Yes.

MS. MARKLEY: – as modified.

THE COURT: Next. Which page and which paragraph?

MS. MARKLEY: Page 4 of the Court's jury instructions where it talks about the purpose.

THE COURT: Just a minute. Page 4. Which paragraph?

MS. MARKLEY: The last full paragraph beginning, "The purpose of the Sherman Act."

THE COURT: Okay.

MS. MARKLEY: Defendant requests the Court to include defendant's proposed instruction No. 1.

THE COURT: Let me see that. Just a minute. I thought we had, but let's make sure.

* * *

**[Vol. 8-B (Apr. 17, 2003)] [Plaintiffs' Closing Argument]**

* * *

[Tr. 54] what they did.

Let's just briefly cover some of the key evidence. Weyerhaeuser claimed that plaintiffs are making serious charges, ladies and gentlemen, and by George, we are going to come in here and prove that they are wrong. Well, they fell awfully far short of coming even within a country mile of responding to these charges. Let me just give you a few of these examples.

You heard all but Weyerhaeuser witnesses say logs follow lumber. That happened as far back as we could get data from Weyerhaeuser. Logs following lumber. You saw it. You saw Dr. Tedder, Mr. Rasmussen, Mr. Ehinger. Every wood products industry expert in this case, Bill Nelson, all testified logs follow lumber. Maybe a month or two behind, but that's not what we see here.

We see a sustained upward drive of log costs while the supply remains steady while lumber is falling. That doesn't happen unless something strange is happening. That's exactly what happened here. Weyerhaeuser was deliberately pushing up the costs, and we saw Del Fisher acknowledge, when his recollection was refreshed by one of the unredacted exhibits, that, yes, we were projecting we would get log costs down in the future. Every ten bucks was $2 million to the bottom line.

What happened here, ladies and gentlemen? If you

* * *

[Tr. 56] the testimony, that it would be impossible to build and develop a mill of that size in B.C. because Weyerhaeuser has a dominant grip on the resource between the MacMillan-Blodel lands they acquired when they bought, not surprisingly the single largest forest product in all of Canada,

MacMillan-Blodel, and secured the only five alder licenses in the entire provinces when they bought Coast Mountain Hardwoods.

Now, Rob Taylor said the licenses really weren't much of a factor, and he tried to offer what didn't sound to me as a very persuasive explanation. They tried to buy Coast Mountain when it was weaker financially in '97 and '99. You heard Mr. Kidd say they offered $15 million and twice said, "We'll never offer a dime more than that."

But when Ross-Simmons enters the picture and tries to get involved in discussions to buy Coast Mountain while it is in intensive care in the year 2000, spring of 2000, on the ropes, looking for a way to solve its problems, be creative, turn-around professional Gordy Boyd, go to Vancouver, negotiate with Coast Mountain, Coast Mountain doesn't have the time, as Mr. Kidd explained, because the owner needed to sell the mill in a quicker fashion.

But what did Mr. Boyd say was proposed as the purchase price for Coast Mountain Hardwoods? $26 million. He thought the money could be raised within six months [Tr. 57] between equity and debt. Where would Ross-Simmons be today had they succeeded in buying Coast Mountain? I think they probably would still be here. Why? You saw yesterday, I think, in Exhibit 482 how much cheaper the resource is in British Columbia.

The average, ladies and gentlemen, if you remember, for all of 2001 for a 42 million board foot producing sawmill just south of Vancouver was $282 a thousand compared to the $400 to $500 per thousand board feet for all of Weyerhaeuser's alder mills in Oregon and Washington. That's a big gap. That's why as soon as Ross-Simmons was in the picture, Rob Taylor ran up and offered 26 million bucks and paid it fast and closed that transaction in 2000.

He says: Oh, the licenses weren't a very big deal. We really didn't factor that in. Well, look at Exhibit 307. The first page you have seen. And we went over it. The only alder specific licenses in entire British Columbia. 30 million board feet of volume is what Mr. Blaney testified this represented.

The second page really didn't get discussed. Let me just point something out. This was data in the forestry office about the value of these licenses over time. $78 million U.S. You need to make an adjustment out for some projected licenses that weren't secured and haven't [Tr. 58] been secured at this time frame. But still when you make the pro rata adjustment, the licenses themselves were over $50 million in value. Weyerhaeuser got the mill and these licenses for 26.

The log hoarding that we talked about, a lot of evidence about that. It is awfully hard to explain what you see in Exhibit 99 when you see the huge runups in inventory in '89 and '93. You heard testimony from people who don't have an ax to grind.

Why would Tom Collett, who gets a subpoena – he was deposed. He has been away from Weyerhaeuser for the last ten years. He works for that Javier Farms. He is still in the industry, but where he is working relates to forest land in the Dominican Republic. He was a personable person. He shows up. He talks for 15 minutes and relates a story.

He was in the sales office. Why do we have so much stained lumber? We are buying too many logs. Why are we buying too many logs? Because Arnold says there is only room for one alder sawmill in Longview. Here is a fellow – why in the world should his credibility be questioned? Mr. Simon was able to bring up absolutely nothing that should stick as to a fellow like Tom Collett.

Or let's take another example, George Lukin. George Lukin worked as a log buyer for the Tree Source or

* * *

[Tr. 68] what they show for Ross-Simmons/Toledo, which is the Joint Venture mill. They are showing that they're projecting them to use only 2 million board feet in 1998 and in 1999 they expect them to be gone: Zero, zero.

Combine that with what you see in your notebook. I don't even need to put them on the screen really. You have got them in your notebook. The graphs are definitive. They know that they are growing their share. Why are they tracking margins? Those weren't back of the envelope projections or estimates like they tried to say in this courthouse. They know what they are doing. It is a calculated move, and they are doing it in sync with the CEO.

Do you know who those Power Point presentations – my view is those were really for Steve Rogel, primarily for his consumption, and the team to rally around the goal line and the objective, which is to dominate alder, to show why we are going to be a significant segment in a $15 billion corporation and show how in sync we are with a CEO who is very candid about all his code words.

We want to consolidate the industry. There are too many players. Not enough market discipline. And who, when he can't get somebody to sit down and across the table agree to be bought out, like Arnold Curtis did with Diamond Wood and Goodyear Nelson, Steve Rogel, as you heard, announces a hostile takeover of a company like Willamette [Tr. 69] that was being pursued during this same critical time frame and I submit to you, ladies and gentlemen, affected the ability of Ross-Simmons, while it is intensive care, to survive.

Because you saw on the map that is displayed that Willamette owns a large amount of acreage in northwest Washington, right near the state forests that Weyerhaeuser also successfully gained an exemption to continue to be the controlling force with the false testimony that was presented.

Before I turn to damages, let me comment on one other instruction. You'll hear an instruction about witness false in part. That's an important instruction. As it says, if you distrust what a witness says in one part of their testimony, you should and can distrust the rest. I submit to you that happened regularly with multiple Weyerhaeuser witnesses because they just can't afford not to say things that are consistent with being in compliance with the antitrust laws because their jobs are on the line.

I feel sorry for the kind of pressure that they were put under, but in the force of all the questioning and when you contrast that with what they said with what the evidence really shows, there can't be much doubt that they weren't telling the truth in portions of their testimony. And the rest of it should be disbelieved as well.

* * *

**[Vol. 8-B (Apr. 17, 2003)] [Plaintiffs' Rebuttal Argument]**

* * *

[Tr. 123] at $82- or $92,000 a year until August of '01. Mr. Simon just flat out misstates the facts. He says: The $20 million scenario – it may have been 20 over three years. It might have gone back that far.

If you read the paragraph it says – I will go to the last sentence where he says: I understand we may be able to push our log costs down $20 million in '01.

Rhetorical question. Does that infer that we have given up some $40- to $60 million in the last three years? The three years is right there. That's $20 million a year over three years. That's the basis of the scenario. It is a perfectly legitimate basis out of their own documents.

Grant Wheeler. They had absolutely no answer to Grant Wheeler's plain, simple honest recitation of the threat he received from the great grandson of the founder of this company, who did not have the courtesy, the guts or the courage to show up here and face you.

Mr. Simon did not come close to living up to his commitment when they won't bring David Weyerhaeuser to look you in the eye and tell you that he did not threaten Grant Wheeler.

And Rod Buck comes and honestly says, plain and simple, he said: If you go into the sawmill business, Grant, we will cut you off. It couldn't have been plainer. They mention log buyers in the last couple of years of

* * *

# EXCERPTS OF RELEVANT TRIAL EXHIBITS (BLACK AND WHITE)

# [Exhibit 85a]

Correlation of KD Final Differences
After Sup 4/4 p... sdonia's KD FAS Eastern Hardwood Species
(Compare to ... Exhibit 7)

EXHIBIT
CV 00 1693 PA
85a

| After Sup 4/4 | After Sup 4/4 | APPALACHIAN 4/4 FAS HARD MAPLE - UNSEL - KD | APPALACHIAN 4/4 FAS BASWOOD - KD | NORTHERN 4/4 HARD MAPLE - UNSEL - KD | NORTHERN 4/4 FAS BASSWOOD - KD | SOUTHERN 4/4 FAS COTTONWOOD - KD | NORTHERN 4/4 FAS SOFT MAPLE - KD | APPALACHIAN 4/4 FAS SOFT MAPLE = KD | NORTHERN 4/4 FAS RED OAK - KD | APPALACHIAN 4/4 FAS CHERRY - KD | APPALACHIAN 4/4 FAS POPLAR - KD | SOUTHERN 4/4 FAS RED OAK - KD | APPALACHIAN 4/4 FAS RED OAK - KD | SOUTHERN 4/4 FAS WHITE OAK - KD | APPALACHIAN 4/4 FAS WHITE OAK - KD | NORTHERN 4/4 FAS ASH - KD | SOUTHERN 4/4 FAS ASH - KD | APPALACHIAN 4/4 FAS ASH - KD | NORTHERN 4/4 FAS WHITE OAK - KD | Average of Eastern Hardwoods |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| After Sup 4/4 | 1.00 | | | | | | | | | | | | | | | | | | | |
| APPALACHIAN 4/4 FAS HARD MAPLE - UNSEL - KD | 0.28 | 1.00 | | | | | | | | | | | | | | | | | | |
| APPALACHIAN 4/4 FAS BASWOOD - KD | 0.17 | 0.29 | 1.00 | | | | | | | | | | | | | | | | | |
| NORTHERN 4/4 HARD MAPLE - UNSEL - KD | 0.23 | 0.85 | 0.30 | 1.00 | | | | | | | | | | | | | | | | |
| NORTHERN 4/4 FAS BASSWOOD - KD | 0.16 | 0.29 | 0.44 | 0.33 | 1.00 | | | | | | | | | | | | | | | |
| SOUTHERN 4/4 FAS COTTONWOOD - KD | 0.17 | 0.10 | 0.25 | 0.01 | 0.23 | 1.00 | | | | | | | | | | | | | | |
| NORTHERN 4/4 FAS SOFT MAPLE - KD | 0.33 | 0.47 | 0.34 | 0.59 | 0.60 | 0.15 | 1.00 | | | | | | | | | | | | | |
| APPALACHIAN 4/4 FAS SOFT MAPLE = KD | 0.30 | 0.46 | 0.38 | 0.50 | 0.35 | 0.15 | 0.76 | 1.00 | | | | | | | | | | | | |
| NORTHERN 4/4 FAS RED OAK - KD | 0.22 | 0.40 | 0.54 | 0.42 | 0.42 | 0.39 | 0.38 | 0.33 | 1.00 | | | | | | | | | | | |
| APPALACHIAN 4/4 FAS CHERRY - KD | 0.06 | 0.22 | 0.34 | 0.29 | 0.19 | 0.16 | 0.36 | 0.46 | 0.41 | 1.00 | | | | | | | | | | |
| APPALACHIAN 4/4 FAS POPLAR - KD | 0.15 | 0.36 | 0.52 | 0.43 | 0.47 | 0.24 | 0.45 | 0.53 | 0.48 | 0.27 | 1.00 | | | | | | | | | |
| SOUTHERN 4/4 FAS RED OAK - KD | 0.21 | 0.39 | 0.48 | 0.41 | 0.31 | 0.31 | 0.36 | 0.39 | 0.77 | 0.46 | 0.57 | 1.00 | | | | | | | | |
| APPALACHIAN 4/4 FAS RED OAK - KD | 0.18 | 0.38 | 0.47 | 0.35 | 0.34 | 0.37 | 0.37 | 0.37 | 0.73 | 0.53 | 0.51 | 0.75 | 1.00 | | | | | | | |
| SOUTHERN 4/4 FAS WHITE OAK - KD | 0.13 | 0.23 | 0.29 | 0.17 | 0.10 | 0.06 | 0.03 | 0.10 | 0.36 | 0.21 | 0.13 | 0.18 | 0.35 | 1.00 | | | | | | |
| APPALACHIAN 4/4 FAS WHITE OAK - KD | 0.06 | 0.14 | 0.18 | 0.14 | 0.21 | -0.02 | 0.06 | 0.09 | 0.33 | 0.22 | 0.10 | 0.35 | 0.28 | 0.76 | 1.00 | | | | | |
| NORTHERN 4/4 FAS ASH - KD | 0.15 | 0.10 | 0.31 | 0.06 | 0.46 | 0.16 | 0.26 | 0.27 | 0.35 | 0.15 | 0.25 | 0.33 | 0.26 | 0.25 | 0.24 | 1.00 | | | | |
| SOUTHERN 4/4 FAS ASH - KD | 0.10 | 0.21 | 0.32 | 0.22 | 0.46 | 0.21 | 0.26 | 0.26 | 0.44 | 0.28 | 0.32 | 0.42 | 0.34 | 0.33 | 0.21 | 0.57 | 1.00 | | | |
| APPALACHIAN 4/4 FAS ASH - KD | 0.12 | 0.26 | 0.39 | 0.24 | 0.57 | 0.12 | 0.33 | 0.31 | 0.46 | 0.32 | 0.37 | 0.39 | 0.43 | 0.25 | 0.26 | 0.59 | 0.57 | 1.00 | | |
| NORTHERN 4/4 FAS WHITE OAK - KD | 0.14 | 0.18 | 0.14 | 0.12 | 0.10 | 0.01 | -0.02 | -0.02 | 0.33 | 0.01 | -0.07 | 0.24 | 0.17 | 0.65 | 0.71 | 0.29 | 0.18 | 0.25 | 1.00 | |
| Average of Eastern Hardwoods | 0.23 | 0.64 | 0.60 | 0.65 | 0.61 | 0.32 | 0.65 | 0.66 | 0.76 | 0.57 | 0.68 | 0.78 | 0.76 | 0.47 | 0.44 | 0.50 | 0.56 | 0.63 | 0.33 | 1.00 |

## [Exhibit 90a]

## Comparison of Alder Harvest from ODF to NWH Mill Consumption (Mbf, Log Scale)

| | Garbaldi Mill Consumption | Harvest from ODF Districts | | | | % of Garibaldi Consumotion |
|---|---|---|---|---|---|---|
| | | Astoria | Forest Grove | Tillamook | Total | |
| 1996 | 16,224 | 1.128 | 367 | 2,017 | 3,511 | 21.6% |
| 1997 | 18,721 | 6,408 | 31 | 1,889 | 8,328 | 44.5% |
| 1998 | 22,602 | 4,134 | 20 | 812 | 4,966 | 22.0% |
| 1999 | 24.338 | 2,443 | 40 | 5,697 | 8,180 | 33.6% |
| 2000 | 23,168 | 2,332 | 94 | 1,262 | 3,687 | 15.9% |
| 2001 | 18,529 | 5,782 | 204 | 1,232 | 7,218 | 39.0% |

| | Eugene Mill Consumption | Harvest from ODF Districts | | | | | % of Eugene |
|---|---|---|---|---|---|---|---|
| | | West OR | Clack-Marion | West Lane | Coos | Total | |
| 1996 | 34,723 | 840 | 447 | 4 | 839 | 2,130 | 6.1% |
| 1997 | 35,546 | 1,905 | 16 | - | 73 | 1,994 | 5.6% |
| 1998 | 36,673 | 406 | 267 | 7 | 537 | 1,216 | 3.3% |
| 1999 | 39,576 | 1,168 | 55 | 8 | 674 | 1,904 | 4.8% |
| 2000 | 42,025 | 713 | 0 | 0 | 862 | 1,575 | 3.7% |
| 2001 | 42,717 | 256 | 1 | 0 | 1,389 | 1,646 | 3.9% |

| | Garbaldi + Eugene Mill Consumption | All ODF Districts | % of NWH mills in OR |
|---|---|---|---|
| 1996 | 50,947 | 5,641 | 11.1% |
| 1997 | 54,267 | 10,322 | 19.0% |
| 1998 | 59,275 | 6,182 | 10.4% |
| 1999 | 63,914 | 10,084 | 15.8% |
| 2000 | 65,193 | 5,262 | 8.1% |
| 2001 | 61,246 | 8,865 | 14.5% |

Source: Timber Data Company; NWH financials, Novak

# [Exhibit 124]

# CLOSED HARDWOOD MILLS: 1980-2001

| Closed Hardwood Mills: Oregon | Location | Year Closed |
|---|---|---|
| Calkins Coast Hardwoods | Rose Lodge | early 1980 |
| Hendrix Lumber | Alsea | 1987 |
| Kohl, Inc. | Seaside | 1988 |
| K & M Wood Products | Coquille | early 1980's |
| P&M Cedar | Roseburg | 2000 |
| Precision Hardwoods of Oregon | Williamina | mid 1980's |
| Ross-Simmons/STEDCO Joint Venture | Toledo | 1998 |
| S&C Lumber | Grand Ronde | 1996 |
| Weatcoast Hardwood | Florence | 1984 |
| WTD Industries | Philomath | 1990 |
| WTD Industries | Tillamook | 1988 |
| Bauber Emerald Fir | St. Helens | late 1980's |
| Peter Max | Mollalla | early 1990 |
| Wilamette Hardwoods, Inc. | Jasper | 1992 |
| | | |
| Total: 14 | | |

| Closed Hardwood Mills: Washington | Location | Year Closed |
|---|---|---|
| Allworth Valley Mills | Battleground | 1999 |
| Bergeron Lumber & Hardwoods | Vancouver | 1991 |
| Grays Harbor Hardwoods | Hoaquiam | 1991 |
| Husby's Farm | Arlington | 1990 |
| Koenig & Sons | Sultan | early 1980's |
| North Star Lumber | Shelton | mid 1990's |
| Paxport Mills Inc. | Tacoma | 1995 |
| Port Angeles hardwoods | Port Angeles | early 1980's |
| Precision Wood Products | Vancouver | early 1990 |
| Ross-Simmons Hardwood Lumber Co. | Longview | 2001 |
| Schaeedbeck Inc. | Tacoma | early 1980's |
| Shuksan Lumber | Stanwood | 1991 |
| Smokey Point Hardwoods | Arlington | 1999 |
| Schmidt Mill | Mt. Vernon | late 1980's |
| TreeSource | South Bend | 2001 |
| Little Rock Manufacturing | Little Rock | early 1980 |
| Olympia Hardwood | Shelton | 1987 |
| | | |
| Total: 17 | | |

**[Exhibit 125]**

**OPEN HARDWOOD MILLS: 2001**

| Open Hardwood Mills: Oregon | Location |
|---|---|
| Hardwood Components | Mehama |
| Morton Alder | Willamina |
| Rose City Hardwoods | Myrtle Point |
| Westwood Industries | Reedsport |
| Northwest Hardwoods | Eugene |
| Northwest Hardwoods | Garibaldi |
| Monroe Oak | Sheridan |
| | |
| Total: 7 | |

| Open Hardwood Mills: Washington | Location |
|---|---|
| Alexander Lumber | Onalaska |
| Cascade hardwoods | Chehalis |
| Smith Street Mill | Everett |
| Washington Alder LLC | Mt. Vernon |
| Northwest Hardwoods | Arlington |
| Northwest Hardwoods | Centralia |
| Northwest Hardwoods | Longview |
| Northwest Hardwoods | Sedro-Woolley |
| | |
| Total: 8 | |

# [Exhibit 126]

## CALCULATION OF ROSS-SIMMONS LOST PROFITS (1997-2001)

| Scenario A | Volume (MBF) | $ / MBF | Lost Profit or Reduced Cost |
|---|---|---|---|
| 1997 | 42,342 | $-0- | $ -0- |
| 1998 | 35,151 | 89 | 3,128,439 |
| 1999 | 35,448 | 83 | 2,942,184 |
| 2000 | 30,315 | 84 | 2,546,460 |
| 2001 (Jan. 1-May 31) | 12,631 | 84 | 1,061,004 |
| | | | $9,678,087 |

| Scenario B | Volume (MBF) | $ / MBF | Lost Profit or Reduced Cost |
|---|---|---|---|
| 1997 | 42,342 | $17 | $719,814 |
| 1998 | 35,151 | 58 | 2,038,758 |
| 1999 | 35,448 | 98 | 3,473,904 |
| 2000 | 30,315 | 135 | 4,092,525 |
| 2001 (Jan. 1-May 31) | 12,631 | 135 | $12,030,186 |

| Scenario C | Volume (MBF) | $ / MBF | Lost Profit or Reduced Cost |
|---|---|---|---|
| 1997 | 42,343 | $ 23 | $ 973,889 |
| 1998 | 35,151 | 64 | 2,249,664 |
| 1999 | 35,448 | 98 | 3,473,904 |
| 2000 | 30,315 | 141 | 4,274,415 |
| 2001 (Jan. 1-May 31) | 12,631 | 141 | 1,780,971 |
| | | | $12,752,843 |

**[Exhibit 127]**

| ROSS-SIMMONS PROFIT PROJECTION | |
|---|---|
| **BASED ON TRENDING THREE-YEAR AVERAGE PROFIT FOR 1993-1995** | |
| Year | Pretax Profit |
| 1996 | $2,120,800 |
| 1997 | $2,311,300 |
| 1998 | $2,518,800 |
| 1999 | $2,745,000 |
| 2000 | $2,991,500 |
| 2001 | $3,260,200 |

[Exhibit 400]

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## NWH Projected Supply Share

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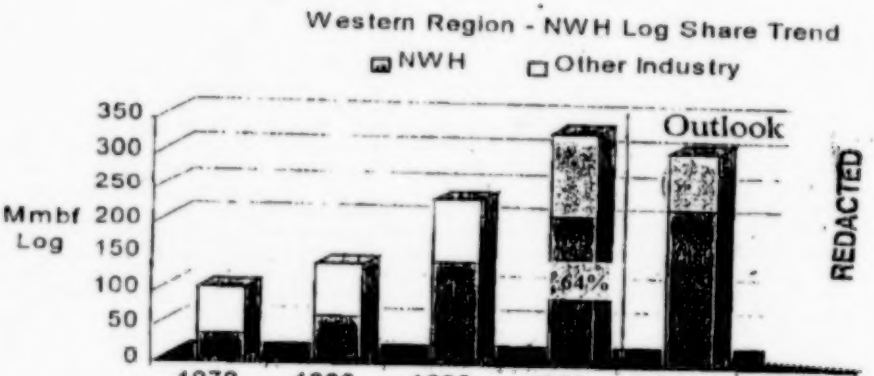


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REDACTED

| | 1970 | 1980 | 1990 | 1998 | 1998-2002 | 2003-2007 |
|---|---|---|---|---|---|---|
| # of Producing Mills | 60 | 40 | 23 | 16 | ? | |
| # of NWH Mills | 2 | 3 | 4 | 6 | 6 | |

REDACTED

*Source: Dick Wakely, Del Fisher 3/99; Assumes 65% sawable fiber*
*Salmon impact: Land out of production estimated at 3%*

EXHIBIT 400
CV 00 1693 PA
055900A

4
HIGHLY CONFIDENTIAL
SEALED EXHIBIT
Page 1

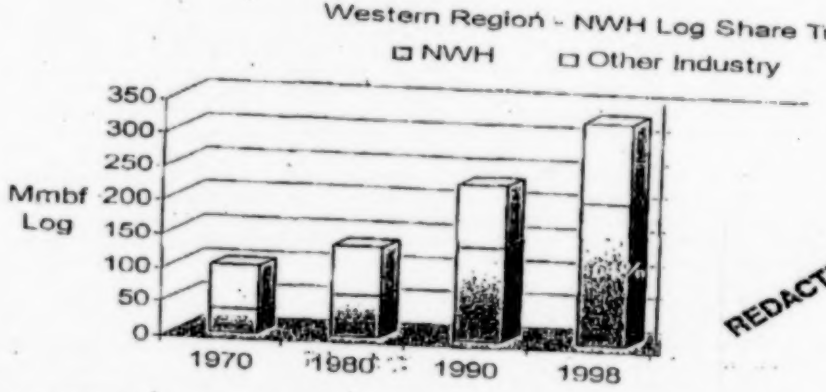
## Western Region Outlook - Industry Consolidation History



WY 055595

- Industry consolidation has occurred in the West - NWH is the consolidator

**REDACTED**




REDACTED

REDACTED

| | 1970 | 1980 | 1990 | 1998 |
|---|---|---|---|---|
| # of Producing Mills | 60 | 40 | 23 | 16 |
| # of NWH Mills | 2 | 3 | 4 | 6 |

*Source: Dick Wakely, Del Fisher 3/99; Assumes 65% useable fiber Salmon impact; Land out of production estimated at 3%*

EXHIBIT
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401

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[Exhibit 401]

[Exhibit 402]

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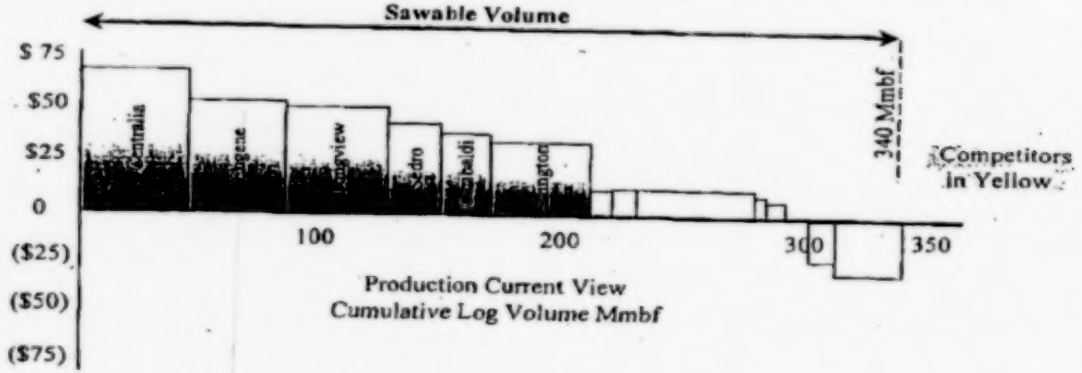
## Western Competitive Position

*Industry Attractiveness*
*Western Region*
April 24, 2001

- Alder log supply and demand is in better balance due to curtailment last year; 30-40 Mmbf over capacity still in system
- The balance of supply and capacity varies within the 5 sourcing areas with Northern Washington and NW Oregon the most constrained
- Western competitors and NWH realized lower margins for third consecutive year




*Source: Competitor margins and capacity based on internal market knowledge*

EXHIBIT
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402

WY 055611

# [Exhibit 403]

NWH IDS 2000(log volume only; rest in 1999)
WA & OR ALDER SUPPLY & COMPETITOR MARGINS INPUT = YELLOW

Alder/Maple Saw Timber Harvest: Source Dick Wakely & Del Fisher 4/2000

| **Western WA – Sawable projected harvest volumes** | | | | | | | |
|---|---|---|---|---|---|---|---|
| | 1995-1999 | 2000-2004 | 2005-2009 | 2010-2014 | 205-214 | 00-04 | 95-99 |
| Fees | 38 | | | | | | |
| Other Large Private | 78 | | | | | | |
| Small Private | 62 | | | | | | |
| Public | 22 | | | | | | |
| Total Alder/maple sawable | 200 | | | | | | |
| Total hardwood | 351 | | | | | | |
| % Alder/maple | 95% | | | | | | |
| % Sawable | 80% | | | | | | |
| | | | | | | | |
| **Western OR – Sawable projected harvest volumes** | | | | | | | |
| | 1995-1999 | 2000-2004 | 2005-2009 | 2010-2014 | 205-214 | 00-04 | 95-99 |
| Fees | 4 | | | | | | |
| Other Large Private | 71 | | | | | | |
| Small Private | 18 | | | | | | |
| Public | 5 | | | | | | |
| Total Alder/maple sawable | 97 | | | | | | |
| Total hardwood | 214 | | | | | | |
| % Alder/maple | 70% | | | | | | |
| % Sawable | 65% | | | | | | |
| | | | | | | | |
| **Western WA & OR** | | | | | | | |
| | 1995-1999 | 2000-2004 | 2005-2009 | 2010-2014 | 205-214 | 00-04 | 95-99 |
| Fees | 42 | | | | | | |
| Other Large Private | 149 | | | | | | |
| Small Private | 80 | | | | | | |
| Public | 27 | | | | | | |
| | 297 | | | | | | |
| **Alder Industry Margin Analysis – 5 year Outlook** | | | | | | | |

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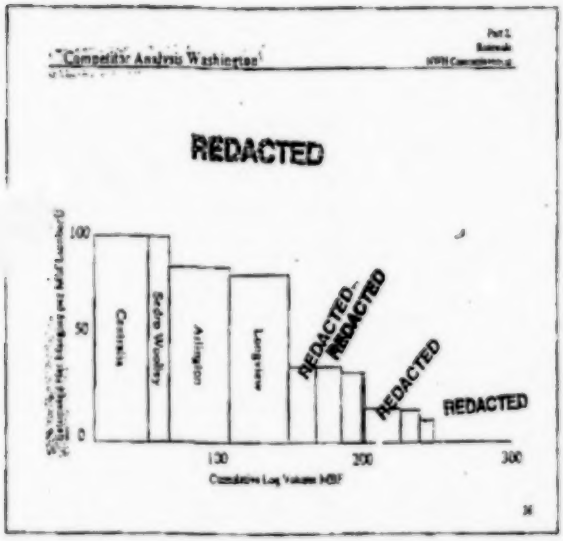
**HIGHLY CONFIDENTIAL**

# [Exhibit 405]

Del

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Intent is to determine extent of over capacity based on log supply projections and which facilities are best positioned - we used net margin as the indicator (cost in not appropriate because of the variation in lumber realizations)

1. Net margins - > NWH
2. Estimated margins of competitors based on sourcing, operating and marketing knowledge of competitors.
3. Competitor margins have dropped below this level in 1999.

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405

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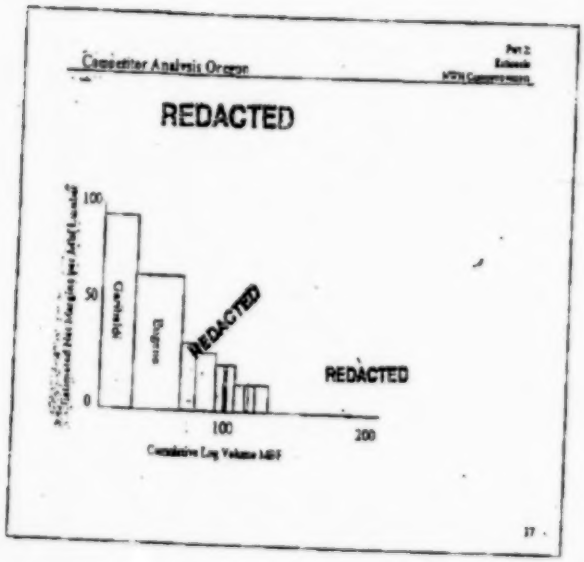
Page 6

# [Exhibit 406]




Del

1. Eugene is our last Western mill to have small log conversion line (late 1999 installation)

EXHIBIT
CV 00-1693 PA
406

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## Raw Material Price Sensitivity

*Industry Attractiveness*
*Western Region*
April 24, 2001

- Of the ~340 Mmbf annual Sawlog harvest, 69% is come-along volume and is less sensitive to price.
- Main driver for sustained supply is conifer harvest level

| | WA | | | OR | | | Total | | |
|---|---|---|---|---|---|---|---|---|---|
| | MMbf Sawlog | % Come-along | Mmbf Come-along | Mmbf Sawlog | % Come-along | Mmbf Come-along | Mmbf Sawlog | % Come-along | Mmbf Come-along |
| WY Fee | 39 | 80% | 31 | 5 | 70% | 3 | 44 | | 34 |
| Large Private | 84 | 80% | 67 | 66 | 70% | 46 | 150 | | 113 |
| Small Private | 61 | 55% | 34 | 21 | 50% | 10 | 82 | | 44 |
| Public | 30+ | 70% | 21 | 3 | 66% | 2 | 33 | | 23 |
| Sawlog | 214 | 72% | 153 | 95 | 64% | 61 | 309 | | 214 |
| Sawable Pulp | 31 | 72% | 22 | | | | 31 | | 22 |
| Total | 245 | 72% | 175 | 95 | 64% | 61 | 340 | 69% | 236 |
| Consumption: | | | | | | | | | |
| NWH | 150 | | | 65 | | | 215 | | |
| Competitors | 95 | | | 30 | | | 125 | | |
| Total | 245 | 100% | 245 | 95 | 100% | 95 | 340 | 100% | 340 |
| Volume Sensitive to Price | | | 70<br>28% | | | 34<br>36% | | | 104<br>31% |

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WY 055612

EXHIBIT 407 CV 00-1693 PA

[Exhibit 407] 750a

# [Exhibit 408]



NORTHWEST HARDWOODS
A Weyerhaeuser Company

33330 8th Avenue South, Suite 200
Federal Way, Washington 98003 USA
Tel (253) 874-5663
Toll Free (800) 333-0331
Fax (253) 838-2639







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Western Consolidation - Logs

| | 1970 | 1980 | 1990 | 1998 | 1998-2002 | 2003-2007 |
|---|---|---|---|---|---|---|
| NWH | 33 | 59 | 139 | 211 | | |
| Other Industry | 67 | 75 | 93 | 119 | | |
| Total | 100 | 133 | 232 | 330 | | |
| | | | | REDACTED | | |
| Supply share | 33% | 44% | 60% | 64% | | |

IDS FU Question Response - Western Margins and Log Cost History

| | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 |
|---|---|---|---|---|---|---|---|---|---|
| Net Margin ($/Mbf) | 75 | 83 | 91 | 84 | 112 | 113 | 92 | 88 | 71 |
| Log Cost (Lumber $/Mbf) | 182 | 187 | 195 | 192 | 214 | 262 | 323 | 364 | 346 |

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WY055498A

NORTHWEST HARDWOODS
A Weyerhaeuser Company
33330 8th Avenue South, Suite 200
Federal Way, Washington 98003 USA
Tel (253) 874-5683
Toll Free (800) 323-4331
Fax (253) 838-2639

% Increase 5%
Incremental to 1998

REDACTED

**Western US Industry - Price Indicator & Log Price Indicator**
*Source: Lumber Price: Stephanie H, HP System History. 5-year projection - NWH Sales*
*Log R/M - Centralia avg $/mbf scribner. 5-year projection per Del Fisher*

| $/Mbf Lumber | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 |
|---|---|---|---|---|---|---|---|---|---|
| Centralia Avg Realization | 410 | 470 | 520 | 570 | 585 | 610 | 615 | 634 | 634 |
| Centralia Sawlog | 192 | 214 | 262 | 323 | 354 | 346 | 368 | 352 | 362 |
| | | | | | | | | 282 | |
| $/Mbf Log | | | | | | | | | |
| Centralia Sawlog | 250 | 278 | 340 | 420 | 460 | 450 | 479 | 457 | 457 |

**Western US Industry - Alder Sawtimber Prices (Use Centralia Log Price)**

| SPECIES | 91.1 | 91.2 | 91.3 | 91.4 | 92.1 | 92.2 | 92.3 | 92.4 | 93.1 |
|---|---|---|---|---|---|---|---|---|---|
| Alder - Net Surfaced | 1000 | 1000 | 1040 | 1050 | 1075 | 1085 | 1115 | 1115 | 1145 |

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2001 | 2003 | 2004 |
|---|---|---|---|---|---|---|---|---|---|
| Log Cost | $ 321 | $ 342 | $ 326 | $ 339 | 353 | | | | |
| Net margin/mbf | 110 | 148 | 101 | 65 | 82 | | | | |
| | 1.4 | | | | | | | | |
| PPI Index | | | | | | 1.02 | 1.035 | 1.04 | 1.03 |

REDACTED

Outlook for Centralia margin:
West estimated at $65, Actual 4/99 YTD Centralia is $75.
Outlook based on 65/80 of IDS Western Outlook 115%

Alder 4/4 Sup w/inflation 1390

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WY055497A-R

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[Exhibit 409]

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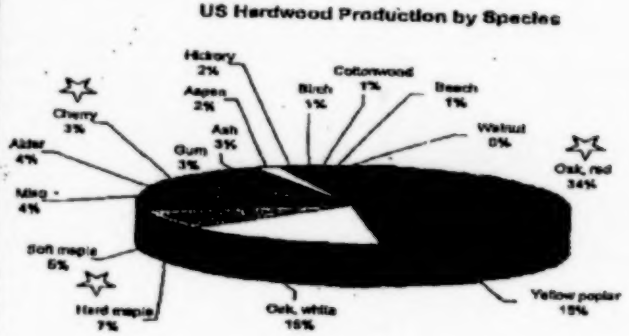
## Species Mix



- Industry lumber production consists of multiple species
- Highest volume species are Red & White Oak, Maples, Alder & Yellow Poplar
- We are 2X the size of the next largest competitor, and hold 75% market share of Alder lumber and <1% of other species
- Our customer demand exceeds our supply of Red Oak, Maples & Cherry

| | Industry | | NWH | | |
|---|---|---|---|---|---|
| Species | US vol. (mmbf) | % of Total | NWH vol. (mmbf) | NWH % | NWH Market Share |
| Red Oak | 3,842 | 33% | 41 | 10% | 1% |
| Yellow poplar | 1,717 | 15% | 1 | 0% | <1% |
| White Oak | 1,699 | 15% | 5 | 1% | <1% |
| Hard maple | 814 | 7% | 5 | 1% | <1% |
| Soft maple | 510 | 5% | 8 | 2% | <1% |
| Misc | 461 | 4% | 5 | 1% | <1% |
| Alder | 408 | 4% | 311 | 79% | 76% |
| Cherry | 375 | 3% | 4 | 1% | <1% |
| Gum | 358 | 3% | 0 | 0% | <1% |
| Ash | 355 | 3% | 2 | 0% | <1% |
| Aspen | 232 | 2% | 0 | 0% | <1% |
| Hickory | 193 | 2% | 1 | 0% | <1% |
| Birch | 139 | 1% | 0 | 0% | <1% |
| Cottonwood | 130 | 1% | 7 | 2% | <1% |
| Beech | 122 | 1% | 2 | 0% | <1% |
| Walnut | 47 | 0% | 1 | 0% | <1% |
| Total | 11,202 | 100% | 391 | 100% | 4% |

*Source: Hardwood Management Report 1999; NWH Business sales summary 1999.*



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409

WY 055588

**[Exhibit 410]**

**Species Mix**

*Target Markets & Products*
April 24, 2001

- Hardwood lumber production remains consistent in the US at an estimated 11.5 Bbf
- We are more than 2X the size of the next largest competitor at 4% of market share
- Our customer demand exceeds our supply of Red Oak, Maples & Cherry

| | NWH Vol (mmbf) | NWH% | NWH Market Share |
|---|---|---|---|
| Red Oak | 36 | 9% | 1% |
| Yellow poplar | 1 | 0% | <1% |
| White Oak | 5 | 1% | <1% |
| Hard maple | 5 | 1% | <1% |
| Soft maple | 7 | 2% | <1% |
| Misc-includes Basswood & PCM | 10 | 2% | 2% |
| Alder | 312 | 75% | 65% |
| Cherry | 4 | 1% | <1% |
| Gum | 0 | 0% | <1% |
| Ash | 2 | 0% | <1% |
| Aspen | 0 | 0% | <1% |
| Hickory | 1 | 0% | <1% |
| Birch | 0 | 0% | <1% |
| Cottonwood | 8 | 2% | <1% |
| Beech/Int'l | 22 | 5% | <1% |
| Walnut | 1 | 0% | <1% |
| **Total** | **414** | **100%** | **4%** |

*Source: Market Share based on Hardwood Management Report 2000; NWH Business sales summary 2000.*

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**[Exhibit 411]**

[P. 1] March 22, 2001

Re: Alder Business

Rob,

You referred to me as an "Ace Analyst" in your brief reply yesterday in response to my e-mail and Excel attachment that I sent you regarding the Alder operations.

Ace, I don't know, but I think that I am very good and believe that I have an excellent sense for business opportunity, especially as it relates to NWH. I feel that twenty years of hard work effort and years of developing my skills with our management team and its managers has provided me an excellent understanding of What makes this business operate successfully.

You know that I have never been one to mince words, not share an opinion, challenges issues etc. There are those in and outside of our organization that think, I am or have been a difficult person to work with etc. I just happen to be a person who believes. I can or could make a difference in the success of NWH.

Some may think and you may be one of those that feel that I have abandoned NWH when I chose not to remain in the leader position for the financial activities. Well that is not the case, I elected to take a different course for my health, family and frankly I did not want to deal with the corporate activities that I knew would be to numerous.

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Your note asked for my thoughts/impressions. I guess I could assume that this referred to my data in the Excel work-sheet. I will respond with a few technical thoughts in regard to what it is that I see in numbers. I also will share with you some general and specific impressions or opinions, if you will of NWH as I view it today.

Technical Thoughts/Impressions:

- We have raw material cost that average between $500 - $600 per mbf scribner.
- We have an approximate lumber to log recovery ratio of 1.40
- 40% of our sales is pallet products that generally sell for $240 /mbf
- 48 – 50% of the KT) products are less than # 1 with an average value of $700 /mbf or less
- The balance of product is upper grade items
- We have average manufacturing costs of $190 - $200 /mbf
- We have average mill period cost of $55- $60/mbf
- We have SG&A, costs that no longer are charged to the mills that range $35 - $45 mbf

This then means that we have raw materials cost on a lumber basis of $355 -$430 /mbf lumber measure. Adding up the costs of raw materials, lumber manufacturing and mill period you have a cost range from $600 $690/mbf without allocated SG&A add those and the cost range is $635-$735/mbf average for the making of our products. Without being sarcastic, this is not "rocket scientist" work. So roughly without the benefit of residual chip and by-product revenues approximately 70% of our products lose money. The only way we

offset some of this is through the higher volumes we have manufactured.

- The trend data says that the average cost of logs has more than doubled the pace of the average sales realizations for lumber if you trend back to 1981. This is not the case for some locations, but they either came aboard in 1985 or 1995.

[P. 2] If we have what we believe to be 65 – 70% of the Alder activity in the form of logs and lumber then why have we NWH seen this prolific increase in the price of logs. When you look at the fact that NWH expanded in size though acquisition and internal growth you would think that the opposite would have occurred for obvious.

- We have increased our mill levels of productivity from 50 - 80 % through efficiencies, log recovery and overtime postures. In fact our technological factors have gone from 1.00 to 1.40. We have increased our employees wages and benefits and maintained a mill profit margin of 15 to 25 % that also included allocation of SG&A costs that were 4 to 6 %. Now we are down to the 8 to 10 % level and no longer charge the mills these costs.

- We have seen our mills increase the capacity of chips to levels that exceed 600,000 bdt's. With this we saw the run up of pulp raw material costs that at times have exceed $351 green log ton. We now face the reality that most export sources for these chips no longer exists and the threat of domestic loss for sales is ever present. Chips prices are soft and we have continued to purchase excess pulp because we are being told it has to be this way. For who?

If I understood some of the thoughts that came out of the meetings over the past few weeks, it is my understanding that NWH annual potential opportunity for raw materials costs

improvements range up to $20 million dollars. Does that infer that we have given up some $40 to $60 million dollars in the last three years?

General Thoughts/Impressions:

If I may I would like to share with you the values that I felt NWH represented over the years.

- NWH represented calculated, but quickly executed Risk Taking based upon our knowledge of the markets etc, which included our ability to operate profitably in all types of markets.

- Personal responsibility and accountability were the mainstreams for all employees, especially those in managerial or professional functions. In effect get the job done, but do so ethically and legally.

- Don't try to make yourself look good at the expense of others on. the teams. The teams being raw materials, manufacturing, sales and financial operating in a mode of togetherness.

- We did not depend upon a tree farm mentality to supply source our mills. We purchased logs and timber open market with the bottom line return as the basis for procurement. Weyco fee was considered a viable source not a dependency factor.

- We never focused on the concept that we had a given raw material supply in the operation of our business.

- We purchased all wood economically with our ability to generate high bottom line results.

- We generated an excellent RONA based upon the valued products manufactured for our customers

- We use our competitive size and superior skill sets to achieve these results.

- We provided our banker (Weyco) and excellent return for the funds we used.

- We trusted our people to make the right decisions without layers of management making the task next to impossible to perform.

[P. 3] Western Alder Operations Thoughts/Impressions:

- I believe that there is a very distinctive disconnects in our management team between sales, manufacturing and raw materials. Some of this is turf, but most in my view is the lack of managers fully understanding the overall business metrics that lead to highly profitable returns. I believe that Jerry Martin s the only manager that fully understands this. David Weyerhaeuser is not too far behind. I think Del and Terry have very little understanding of the keys.

- I believe that NWH made a very fundamentally major mistake when it set up a separate raw materials manager in tile West. I think it was a political issue at the time and I think that the organizational structure that exists today is not workable. One of three things needs to change in this area. Change reporting of this job to the Alder Manufacturing Vice President, eliminate the position or change the person in the job. The present situation is untenable!

- Develop a business strategy for Alder, communicate among the leaders, carry it down to the managers and understand before hand the economics of the strategy in terms that all will understand. Yes this does include some

form of financial modeling that gets all on the same page. I think that this activity was very instrumental in Little Rock and Titusville. We do not need a linear model, but I do think that this could bean effective tool if built properly. (This is not a sales job far me to have a position.)

- We need to source our mills with raw materials that will work for manufacturing at a cost that will enable NWH to have a RONA that meets our goals. Minimum of 15% in my opinion. We do this with pretax profits not just a lowering of the asset base, but that is important also.

- We need to stop thinking that the Weyerhaeuser tree farm is the ultimate solution to our raw material needs and we need to be Risk takers to the extent that we may at times not have wood. Developing a strategy that is focused around 3, 5, 10 year plans personally remind me of why socialism fails. I know they have to be done, but lets not loose site of the trees for the forest.

- I think that there is a possibility that we may have made our Alder product line to broad and complicated, not only for our customers, but for our sales and manufacturing teams

Why is it that the eastern operations have improved returns the past three years? Why is it that these locations are achieving this essentially without Weyerhaeuser tree farms except Arkansas/Oklahoma and in this location it is not the primary factor. I believe it is a good balance of leadership in all areas with a fully understood basis that raw material procurement either in the forma of logs or lumber is to be accomplished with a good margin in hand. I also believe that the organizational structure lends itself to success. Raw materials personnel report to the Vice-Present and he stays in contact with the sales organization for opportunity results. This worked very well in the West for years.

Rob, I will close by saying that the performance of the raw materials area is in fact unacceptable. This would never have been tolerated in the manufacturing, sales or the financial areas. Why is it acceptable in the raw materials area?

Thank you for the opportunity to hear my thoughts and impressions. I have much pride in what NWH has been and I find it very hard to believe that we have come to where we are in the year 2001.

Gene

**[Exhibit 412]**

| NOVAK, GENE | |
|---|---|
| | |
| **From:** | Martin, Jerry (Centralia) |
| **Sent:** | Thursday, March 22, 2001 10:54 AM |
| **To:** | Novak, Gene |
| **Subject:** | RE: PERSONAL |
| **Sensitivity:** | Confidential |

Thanks for the candid views…as always you have had the best interests of the company at heart!!!!! J.T.M.

| **From:** | Novak, Gene |
|---|---|
| **Sent:** | Thursday, March 22, 2001 6:29 AM |
| **To:** | Martin, Jerry (Centralia) |
| **Subject:** | PERSONAL |
| **Sensitivity:** | Confidential |

Jerry,

This document was sent to Rob this morning after I was asked my thoughts/impressions Like the memo you shared with me last week I would appreciate your confidentiality in this matter.

<<File: Alder 2001Thoughts.doc>>

Thanks,

Gene

**[Exhibit 413]**

| NOVAK, GENE | |
|---|---|
| | |
| **From:** | Barton, Don |
| **Sent:** | Thursday, March 22, 2001 10:49 AM |
| **To:** | Novak, Gene |
| **Subject:** | RE: PERSONAL |
| **Sensitivity:** | Confidential |

There's an important message here. Maybe you out to accidentally broadcast it to a little wider audience.

| **From:** | Novak, Gene |
|---|---|
| **Sent:** | Thursday, March 22, 2001 6:33 AM |
| **To:** | Barton, Don |
| **Subject:** | PERSONAL |
| **Sensitivity:** | Confidential |

Don,

This was my response to Rob this morning in regard to his asking for my thoughts/impressions on the Alder business.
I would appreciate this remaining confidential.

<<File: Alder 2001Thoughts.doc>>

Gene

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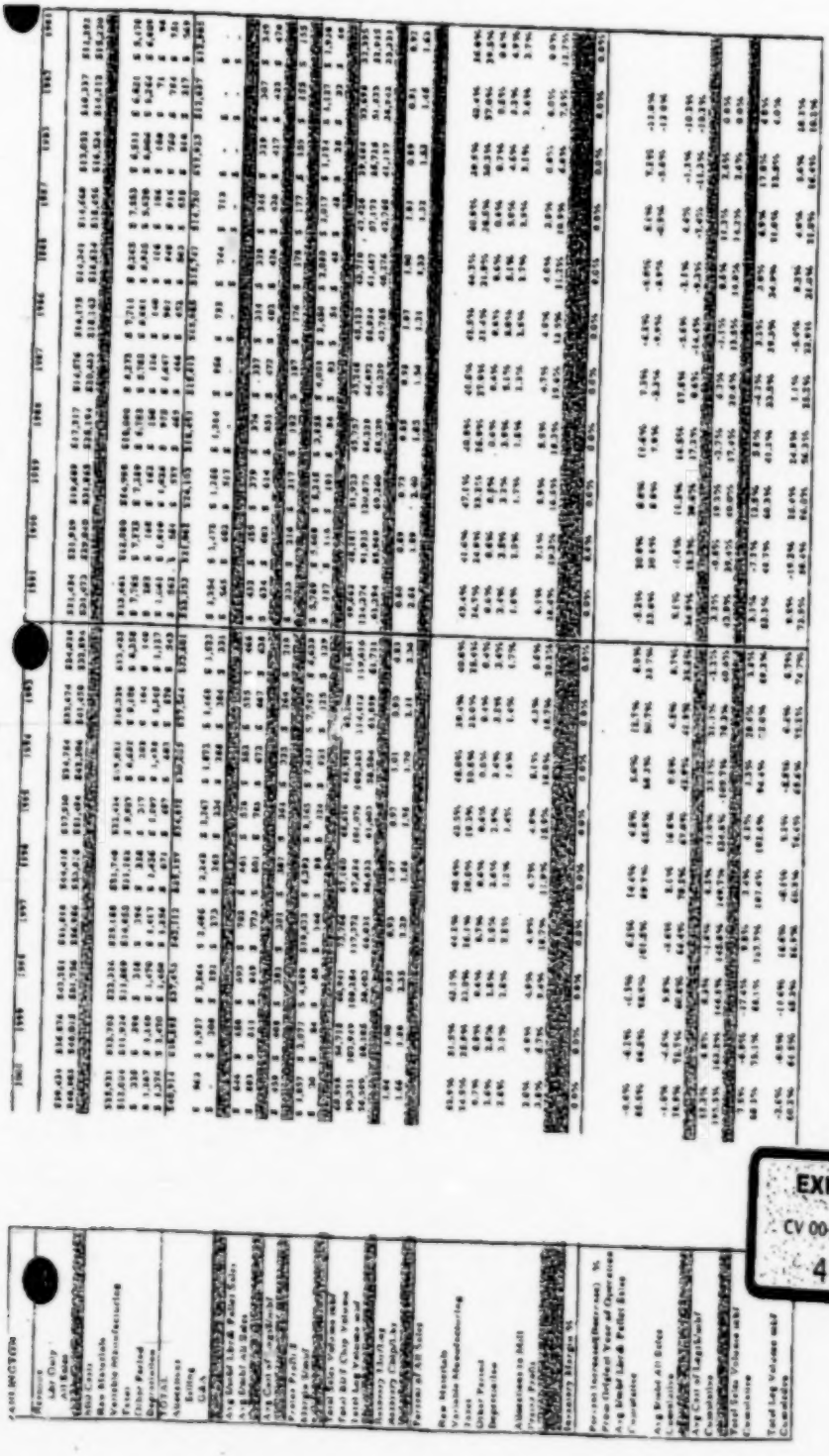
**SEALED EXHIBIT**

BEST AVAILABLE COPY



## [Exhibit 414]



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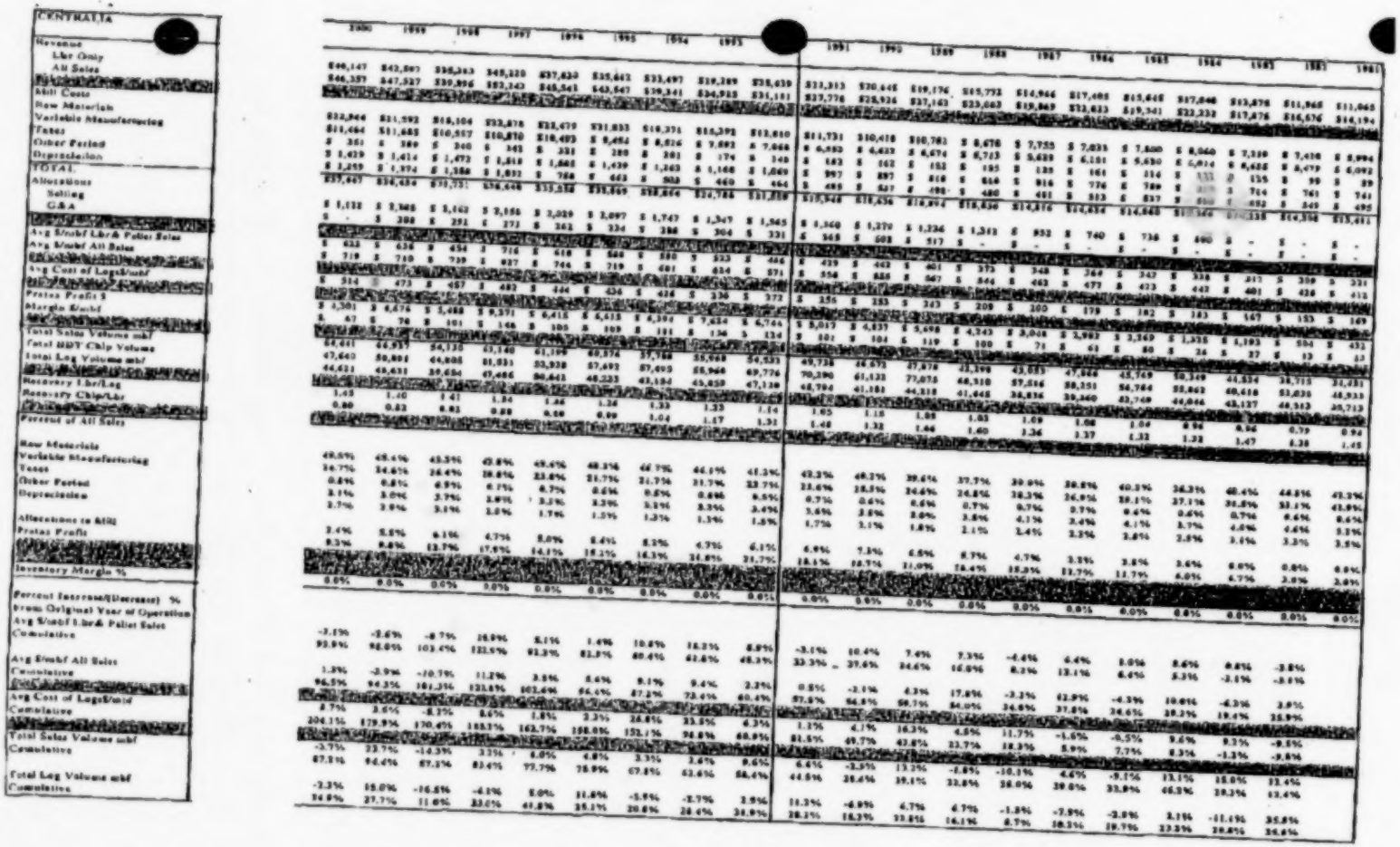
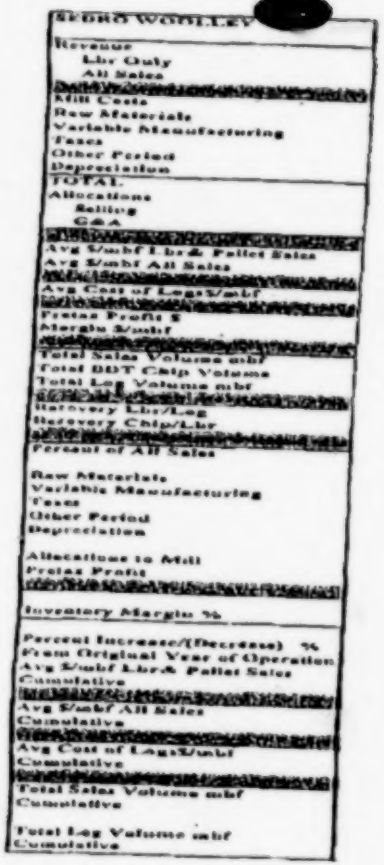


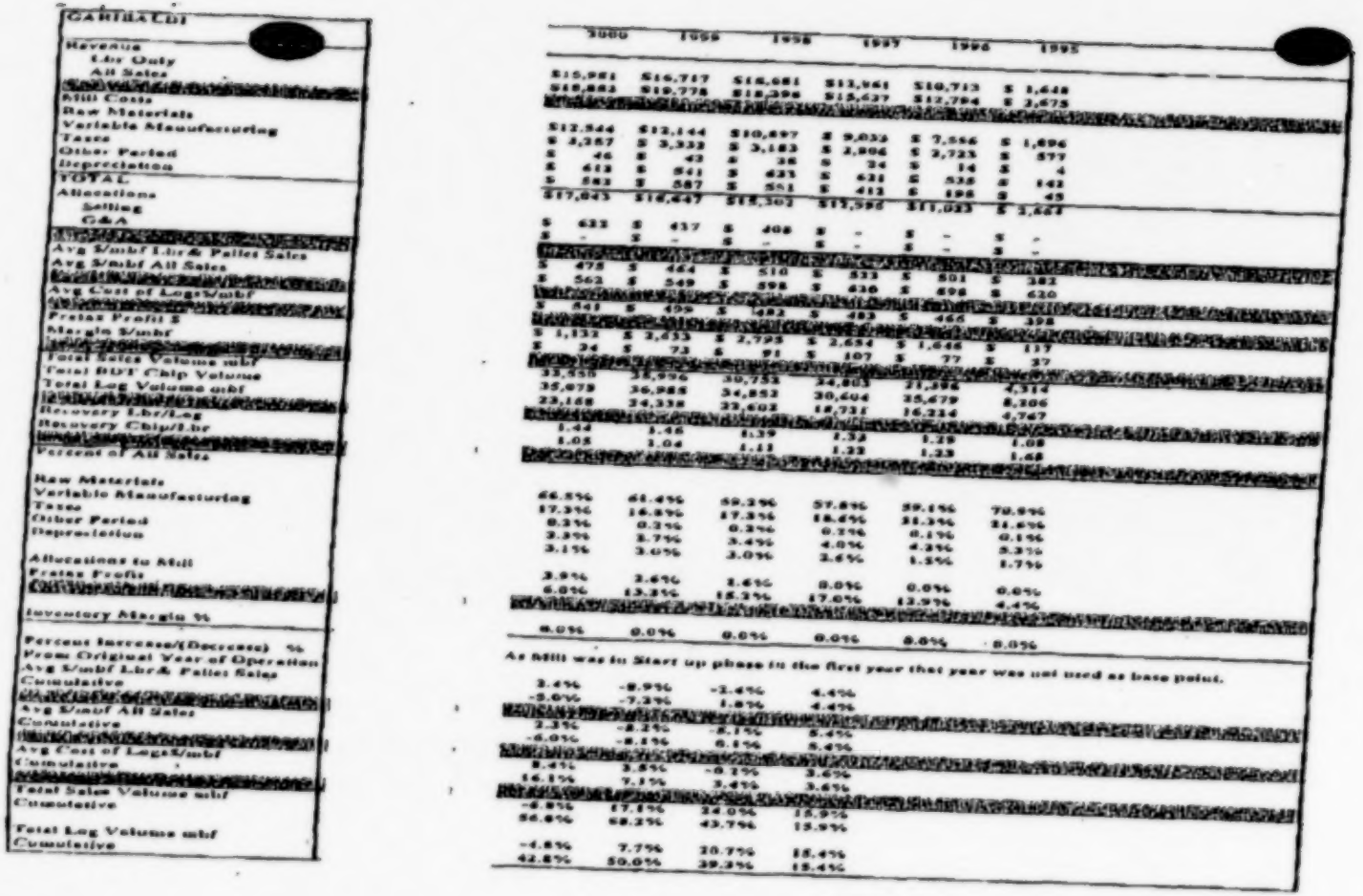
| LONGVIEW | 2008 | 2009 | 1998 | 1997 | 1996 | 1995 | 1994 | 1993 | | 1991 | 1990 | 1989 | 1988 | 1987 | 1986 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Revenue | | | | | | | | | | | | | | | |
| Lbr Only | $39,854 | $37,188 | $30,620 | $38,358 | $36,158 | $41,523 | $38,864 | $37,315 | $30,070 | $27,189 | $24,187 | $26,328 | $23,305 | $13,721 | $ 2,817 |
| All Sales | $66,979 | $48,283 | $39,240 | $47,745 | $48,130 | $56,304 | $49,673 | $50,381 | $41,819 | $36,923 | $31,693 | $41,492 | $34,961 | $21,807 | $ 7,307 |
| Mill Costs | | | | | | | | | | | | | | | |
| Raw Materials | $22,743 | $20,667 | $17,652 | $21,956 | $23,307 | $27,965 | $25,354 | $24,480 | $19,188 | $16,466 | $15,736 | $19,680 | $15,130 | $10,974 | $ 4,147 |
| Variable Manufacturing | $10,949 | $10,888 | $10,441 | $11,909 | $12,816 | $13,477 | $12,519 | $11,896 | $10,036 | $ 8,852 | $ 8,671 | $11,627 | $ 9,437 | $ 7,627 | $ 4,002 |
| Taxes | $ 323 | $ 288 | $ 269 | $ 302 | $ 299 | $ 379 | $ 339 | $ 319 | $ 197 | $ 178 | $ 184 | $ 172 | $ 179 | $ 278 | $ 98 |
| Other Period | $ 1,269 | $ 1,279 | $ 1,431 | $ 1,278 | $ 1,188 | $ 1,306 | $ 1,308 | $ 1,268 | $ 1,062 | $ 1,048 | $ 1,114 | $ 1,112 | $ 1,044 | $ 807 | $ 561 |
| Depreciation | $ 1,914 | $ 1,984 | $ 1,754 | $ 1,670 | $ 1,680 | $ 987 | $ 937 | $ 838 | $ 605 | $ 835 | $ 846 | $ 790 | $ 773 | $ 604 | $ 245 |
| TOTAL | $37,338 | $35,206 | $31,644 | $36,616 | $39,027 | $44,814 | $40,333 | $38,695 | $31,378 | $27,379 | $26,451 | $32,771 | $26,563 | $20,308 | $ 8,990 |
| Allocations | | | | | | | | | | | | | | | |
| Selling | $ 948 | $ 2,067 | $ 1,842 | $ 1,992 | $ 2,206 | $ 2,904 | $ 2,197 | $ 1,785 | $ 1,926 | $ 1,727 | $ 1,485 | $ 1,484 | $ 1,456 | $ 803 | $ 247 |
| G&A | $ - | $ 308 | $ 293 | $ 273 | $ 263 | $ 234 | $ 288 | $ 304 | $ 331 | $ 865 | $ 601 | $ 515 | $ - | $ - | $ - |
| Avg $/mbf Lbr & Pallet Sales | $ 634 | $ 637 | $ 658 | $ 650 | $ 581 | $ 510 | $ 538 | $ 509 | $ 461 | $ 425 | $ 430 | $ 428 | $ 437 | $ 346 | $ 260 |
| Avg $/mbf All Sales | $ 746 | $ 721 | $ 828 | $ 809 | $ 733 | $ 691 | $ 688 | $ 687 | $ 623 | $ 577 | $ 564 | $ 676 | $ 634 | $ 553 | $ 566 |
| Avg Cost of Logs$/mbf | $ 391 | $ 416 | $ 363 | $ 421 | $ 430 | $ 419 | $ 392 | $ 336 | $ 278 | $ 269 | $ 268 | $ 234 | $ 285 | $ 205 | $ 192 |
| Pretax Profit $ | $ 2,853 | $ 2,783 | $ 3,417 | $ 5,698 | $ 4,019 | $ 4,841 | $ 3,918 | $ 6,202 | $ 2,478 | $ 4,417 | $ 1,616 | $ 2,787 | $ 2,022 | $ 721 | $ (490) |
| Margin $/mbf | $ 45 | $ 64 | $ 77 | $ 97 | $ 61 | $ 61 | $ 54 | $ 86 | $ 62 | $ 69 | $ 29 | $ 45 | $ 40 | $ 18 | $ (45) |
| Total Sales Volume mbf | 62,832 | 58,653 | 46,845 | 59,043 | 65,630 | 81,487 | 72,300 | 72,319 | 67,179 | 63,955 | 56,237 | 61,516 | 51,896 | 39,422 | 10,819 |
| Total BDT Chip Volume | 61,574 | 76,656 | 80,667 | 86,629 | 95,191 | 116,564 | 110,581 | 101,430 | 121,619 | 108,899 | 93,671 | 125,978 | 129,979 | 96,041 | 23,098 |
| Total Log Volume mbf | 45,446 | 49,723 | 48,575 | 51,206 | 54,259 | 66,711 | 66,787 | 76,826 | 68,888 | 61,370 | 58,788 | 84,067 | 73,434 | 53,489 | 19,979 |
| Recovery Lbr/Log | 1.33 | 1.14 | 0.99 | 1.12 | 1.15 | 1.14 | 1.07 | 0.90 | 0.93 | 0.94 | 0.94 | 0.66 | 0.63 | 0.77 | 0.52 |
| Recovery Chip/Lbr | 1.00 | 1.41 | 1.80 | 1.55 | 1.55 | 1.63 | 1.67 | 2.20 | 1.96 | 1.90 | 1.69 | 1.62 | 2.01 | 1.81 | 1.70 |
| Percent of All Sales | | | | | | | | | | | | | | | |
| Raw Materials | 48.6% | 48.7% | 48.0% | 48.0% | 48.4% | 49.7% | 51.0% | 48.6% | 48.9% | 44.4% | 49.7% | 46.9% | 43.3% | 58.1% | 57.6% |
| Variable Manufacturing | 23.3% | 24.1% | 26.6% | 26.9% | 25.0% | 23.9% | 25.2% | 23.6% | 24.0% | 24.0% | 27.0% | 26.3% | 27.0% | 24.9% | 65.5% |
| Taxes | 0.7% | 0.9% | 1.0% | 0.6% | 0.7% | 0.7% | 0.5% | 0.4% | 0.5% | 0.8% | 0.6% | 0.4% | 0.5% | 1.3% | 0.5% |
| Other Period | 2.7% | 3.0% | 3.6% | 2.7% | 2.4% | 2.1% | 2.6% | 2.5% | 2.8% | 2.8% | 3.5% | 2.7% | 3.0% | 2.7% | 7.8% |
| Depreciation | 4.1% | 4.4% | 4.5% | 3.8% | 3.3% | 1.8% | 1.9% | 1.7% | 1.6% | 2.3% | 2.7% | 1.9% | 2.2% | 2.8% | 3.4% |
| Allocations to Mill | 2.4% | 5.5% | 6.0% | 5.2% | 5.5% | 7.0% | 5.7% | 4.8% | 6.3% | 6.4% | 5.8% | 6.3% | 7.4% | 5.6% | 8.8% |
| Pretax Profit | 6.1% | 8.4% | 9.2% | 11.9% | 8.4% | 8.6% | 7.9% | 12.5% | 13.1% | 12.0% | 5.1% | 6.6% | 5.8% | 3.3% | -6.8% |
| Inventory Margin % | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Percent Increase/(Decrease) % From Original Year of Operation | As Mill was in Start up phase in the first year that year was not used as base point. | | | | | | | | | | | | | | |
| Avg $/mbf Lbr& Pallet Sales | -0.5% | -3.1% | 1.3% | 11.7% | 14.1% | -5.3% | 5.5% | 10.4% | 8.6% | -1.3% | 1.3% | -2.6% | 26.1% | | |
| Cumulative | 82.3% | 84.8% | 90.1% | 87.7% | 68.0% | 47.3% | 55.8% | 47.0% | 33.3% | 33.7% | 34.3% | 33.0% | 26.1% | | |
| Avg $/mbf All Sales | -3.0% | -8.0% | 3.6% | 10.3% | 6.1% | 0.4% | 0.1% | 10.4% | 7.8% | 2.4% | -16.7% | -1.1% | 23.6% | | |
| Cumulative | 35.3% | 39.5% | 51.6% | 46.2% | 32.7% | 26.0% | 24.5% | 24.3% | 12.6% | 4.5% | 2.0% | 23.6% | 23.6% | | |
| Avg Cost of Logs$/mbf | 20.4% | 14.6% | -13.8% | -2.1% | 2.6% | 6.5% | 16.7% | 20.5% | 3.3% | 0.4% | 14.5% | 14.1% | 0.0% | | |
| Cumulative | 144.4% | 102.9% | 77.1% | 105.4% | 109.0% | 104.4% | 91.3% | 62.9% | 23.6% | 31.2% | 30.7% | 14.1% | 0.0% | | |
| Total Sales Volume mbf | 7.1% | 22.3% | -20.7% | -10.0% | -19.5% | 12.9% | -1.5% | 9.1% | 5.0% | 13.7% | -9.3% | 31.2% | 34.9% | | |
| Cumulative | 58.5% | 48.0% | 18.3% | 46.9% | 65.6% | 106.6% | 81.1% | 85.0% | 69.5% | 61.3% | 41.9% | 56.2% | 34.9% | | |
| Total Log Volume mbf | -8.6% | 2.4% | -7.0% | -3.8% | -18.7% | 3.0% | -13.1% | 11.5% | 12.4% | 4.3% | -30.1% | 14.1% | 37.6% | | |
| Cumulative | -15.0% | -7.0% | -9.1% | -1.5% | 1.5% | 24.0% | 11.1% | 43.7% | 28.9% | 14.6% | 10.0% | 47.3% | 37.6% | | |





| SEDRO WOOLLEY | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|---|---|---|---|---|---|---|
| Revenue | | | | | | |
| Lbr Only | $23,349 | $20,132 | $13,542 | $13,902 | $10,906 | $ 6,218 |
| All Sales | $24,071 | $22,585 | $15,902 | $16,273 | $12,842 | $ 8,862 |
| Mill Costs | | | | | | |
| Raw Materials | $13,347 | $10,379 | $ 7,962 | $ 7,168 | $ 6,582 | $ 5,314 |
| Variable Manufacturing | $ 6,553 | $ 6,117 | $ 5,643 | $ 5,237 | $ 4,713 | $ 2,630 |
| Taxes | $ 399 | $ 318 | $ 77 | $ 32 | $ 47 | $ 97 |
| Other Period | $ 965 | $ 814 | $ 556 | $ 504 | $ 395 | $ 301 |
| Depreciation | $ 946 | $ 964 | $ 855 | $ 593 | $ 484 | $ 315 |
| TOTAL | $22,109 | $18,491 | $15,093 | $13,534 | $12,221 | $ 8,657 |
| Allocations | | | | | | |
| Selling | $ 479 | $ 694 | $ 331 | $ - | $ - | $ - |
| G&A | $ - | $ - | $ - | $ - | $ - | $ - |
| Avg $/mbf Lbr& Pallet Sales | $ 657 | $ 677 | $ 606 | $ 611 | $ 574 | $ 520 |
| Avg $/mbf All Sales | $ 734 | $ 760 | $ 712 | $ 715 | $ 676 | $ 716 |
| Avg Cost of Logs$/mbf | $ 514 | $ 462 | $ 398 | $ 359 | $ 362 | $ 390 |
| Pretax Profit $ | $ 1,315 | $ 1,266 | $ 2,203 | $ 2,690 | $ 896 | $ (1) |
| Margin $/mbf | $ 37 | $ 43 | $ 99 | $ 118 | $ 47 | $ (0) |
| Total Sales Volume mbf | 33,532 | 29,730 | 22,341 | 22,770 | 19,011 | 11,956 |
| Total BDT Chip Volume | 33,453 | 29,252 | 28,750 | 31,498 | 27,329 | 21,672 |
| Total Log Volume mbf | 25,990 | 22,454 | 19,982 | 19,981 | 18,175 | 13,620 |
| Recovery Lbr/Log | 1.28 | 1.28 | 1.23 | 1.15 | 1.08 | -0.86 |
| Recovery Chip/Lbr | 1.00 | 1.05 | 1.18 | 1.39 | 1.42 | 1.74 |
| Percent of All Sales | | | | | | |
| Raw Materials | 51.3% | 46.0% | 50.1% | 44.1% | 51.3% | 62.1% |
| Variable Manufacturing | 25.1% | 27.1% | 35.5% | 32.2% | 36.7% | 30.7% |
| Taxes | 1.1% | 1.0% | 0.5% | 0.2% | 0.4% | 1.1% |
| Other Period | 3.7% | 3.6% | 3.5% | 3.1% | 3.1% | 3.5% |
| Depreciation | 3.6% | 4.3% | 5.4% | 3.6% | 3.8% | 3.7% |
| Allocations to Mill | 1.8% | 3.1% | 2.1% | 0.0% | 0.0% | 0.0% |
| Pretax Profit | 5.0% | 5.6% | 13.9% | 16.5% | 7.0% | 0.0% |
| Inventory Margin % | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Percent Increase/(Decrease) % | As Mill was in Start up phase in the first year that year was not used as base point. | | | | | |
| From Original Year of Operation | | | | | | |
| Avg $/mbf Lbr& Pallet Sales | -3.0% | 11.7% | -0.7% | 6.4% | | |
| Cumulative | 14.5% | 18.0% | 5.7% | 6.4% | | |
| Avg $/mbf All Sales | -3.4% | 6.7% | -0.4% | 5.8% | | |
| Cumulative | 8.0% | 12.5% | 5.4% | 5.8% | | |
| Avg Cost of Logs$/mbf | 11.3% | 16.1% | 10.9% | -0.8% | | |
| Cumulative | 43.0% | 27.6% | 9.9% | -0.8% | | |
| Total Sales Volume mbf | 19.5% | 33.1% | -1.9% | 19.8% | | |
| Cumulative | 197.3% | 148.7% | 86.9% | 19.8% | | |
| Total Log Volume mbf | 15.7% | 12.4% | 0.0% | 9.9% | | |
| Cumulative | 43.0% | 23.5% | 9.9% | 9.9% | | |

| EUGENE | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|---|---|---|---|---|---|---|
| Revenue | | | | | | |
| Lbr Only(Total) | $30,387 | $49,506 | $41,003 | $44,689 | $35,281 | $ 8,152 |
| Garibaldi Trans (Est) | $10,449 | $11,901 | $12,740 | $10,879 | $ 9,148 | $ 1,132 |
| All Sales | $66,163 | $54,698 | $45,074 | $49,277 | $40,655 | $10,091 |
| Mill Costs | | | | | | |
| Raw Materials | $21,251 | $18,118 | $16,470 | $17,821 | $16,091 | $ 3,989 |
| Variable Manufacturing | $10,142 | $10,115 | $ 8,796 | $ 8,289 | $ 8,220 | $ 1,769 |
| Taxes | $ 196 | $ 174 | $ 160 | $ 159 | $ 143 | $ 35 |
| Other Period | $ 1,853 | $ 1,671 | $ 1,709 | $ 2,031 | $ 2,274 | $ 739 |
| Depreciation | $ 2,143 | $ 1,963 | $ 1,875 | $ 1,356 | $ 1,151 | $ 272 |
| TOTAL | $35,584 | $32,041 | $29,010 | $29,656 | $27,879 | $ 6,794 |
| Allocations | | | | | | |
| Selling | $ 1,048 | $ 2,578 | $ 2,364 | $ 1,625 | $ 2,364 | $ 96 |
| G&A | $ - | $ - | $ - | $ - | $ - | $ - |
| Avg $/mbf Lbr& Pallet Sales | $ 608 | $ 614 | $ 614 | $ 648 | $ 538 | $ 523 |
| Avg $/mbf All Sales | $ 677 | $ 677 | $ 674 | $ 718 | $ 620 | $ 648 |
| Avg Cost of Logs$/mbf | $ 506 | $ 458 | $ 449 | $ 501 | $ 463 | $ 447 |
| Pretax Profit $ | $ 4,429 | $ 4,171 | $ 4,299 | $ 4,876 | $ 2,536 | $ 1,534 |
| Margin $/mbf | $ 53 | $ 52 | $ 64 | $ 71 | $ 39 | $ 99 |
| Total Sales Volume mbf | 82,939 | 80,589 | 66,839 | 68,931 | 65,585 | 15,563 |
| Total BDT Chip Volume | 58,181 | 54,475 | 47,701 | 46,970 | 51,317 | 16,510 |
| Total Log Volume mbf | 42,028 | 39,576 | 36,673 | 35,546 | 34,723 | 8,927 |
| Recovery Lbr/Log | 1.53 | 1.51 | 1.50 | 1.53 | 1.54 | 1.43 |
| Recovery Chip/Lbr | 0.91 | 0.93 | 0.90 | 0.90 | 0.99 | 1.39 |
| Percent of All Sales | | | | | | |
| Raw Materials | 46.5% | 42.4% | 50.9% | 46.1% | 51.1% | 44.5% |
| Variable Manufacturing | 22.2% | 23.7% | 27.2% | 21.4% | 26.1% | 19.7% |
| Taxes | 0.4% | 0.4% | 0.5% | 0.4% | 0.5% | 0.4% |
| Other Period | 4.1% | 3.9% | 5.3% | 5.2% | 7.2% | 8.1% |
| Depreciation | 4.7% | 4.6% | 5.8% | 3.6% | 3.7% | 3.0% |
| Allocations to Mill | 1.9% | 4.7% | 5.3% | 3.3% | 5.6% | 1.0% |
| Pretax Profit | 9.7% | 9.8% | 13.3% | 12.6% | 8.0% | 17.1% |
| Inventory Margin % | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Percent Increase/(Decrease) % | As Mill was in Start up phase in the first year that year was not used as base point. | | | | | |
| From Original Year of Operation | | | | | | |
| Avg $/mbf Lbr& Pallet Sales | -1.1% | 0.1% | -5.4% | 20.5% | | |
| Cumulative | 12.9% | 14.2% | 14.1% | 20.5% | | |
| Avg $/mbf All Sales | 0.0% | 0.4% | -5.7% | 15.3% | | |
| Cumulative | 9.2% | 9.3% | 8.8% | 15.3% | | |
| Avg Cost of Logs$/mbf | 10.5% | 2.0% | -10.4% | 8.2% | | |
| Cumulative | 9.3% | -1.1% | -3.0% | 8.2% | | |
| Total Sales Volume mbf | 2.9% | 20.6% | -3.0% | 5.1% | | |
| Cumulative | 26.5% | 22.9% | 1.9% | 5.1% | | |
| Total Log Volume mbf | 6.2% | 7.9% | 3.2% | 2.4% | | |
| Cumulative | 21.0% | 14.0% | 5.6% | 2.4% | | |



| GARIBALDI | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 |
|---|---|---|---|---|---|---|
| Revenue | | | | | | |
| Lbr Only | $15,981 | $16,717 | $16,681 | $13,861 | $10,713 | $ 1,648 |
| All Sales | $18,882 | $19,778 | $18,396 | $15,627 | $12,794 | $ 2,675 |
| Mill Costs | | | | | | |
| Raw Materials | $12,544 | $12,144 | $10,897 | $ 9,032 | $ 7,556 | $ 1,696 |
| Variable Manufacturing | $ 3,387 | $ 3,332 | $ 3,183 | $ 2,804 | $ 2,725 | $ 577 |
| Taxes | $ 46 | $ 43 | $ 38 | $ 34 | $ 14 | $ 4 |
| Other Period | $ 413 | $ 341 | $ 423 | $ 631 | $ 538 | $ 141 |
| Depreciation | $ 583 | $ 587 | $ 581 | $ 413 | $ 196 | $ 45 |
| TOTAL | $17,043 | $16,447 | $15,302 | $13,592 | $11,023 | $ 2,627 |
| Allocations | | | | | | |
| Selling | $ 622 | $ 437 | $ 408 | $ - | $ - | $ - |
| G&A | $ - | $ - | $ - | $ - | $ - | $ - |
| Avg $/mbf Lbr & Pallet Sales | $ 475 | $ 464 | $ 510 | $ 533 | $ 501 | $ 382 |
| Avg $/mbf All Sales | $ 562 | $ 549 | $ 598 | $ 636 | $ 598 | $ 620 |
| Avg Cost of Logs/mbf | $ 541 | $ 499 | $ 482 | $ 483 | $ 466 | $ 398 |
| Pretax Profit $ | $ 1,132 | $ 2,653 | $ 2,793 | $ 2,654 | $ 1,646 | $ 117 |
| Margin $/mbf | $ 24 | $ 73 | $ 91 | $ 107 | $ 77 | $ 37 |
| Total Sales Volume mbf | 33,550 | 35,996 | 30,753 | 24,803 | 21,396 | 4,314 |
| Total BDT Chip Volume | 35,079 | 36,985 | 34,853 | 30,604 | 25,679 | 8,306 |
| Total Log Volume mbf | 23,168 | 24,338 | 22,602 | 18,731 | 16,214 | 4,767 |
| Recovery Lbr/Log | 1.44 | 1.46 | 1.39 | 1.32 | 1.29 | 1.08 |
| Recovery Chip/Lbr | 1.05 | 1.04 | 1.11 | 1.23 | 1.23 | 1.68 |
| Percent of All Sales | | | | | | |
| Raw Materials | 66.5% | 61.4% | 59.2% | 57.8% | 59.1% | 70.9% |
| Variable Manufacturing | 17.9% | 16.8% | 17.3% | 18.0% | 21.3% | 21.6% |
| Taxes | 0.2% | 0.2% | 0.2% | 0.2% | 0.1% | 0.1% |
| Other Period | 2.2% | 1.7% | 2.3% | 4.0% | 4.2% | 5.3% |
| Depreciation | 3.1% | 3.0% | 3.0% | 2.6% | 1.5% | 1.7% |
| Allocations to Mill | 3.3% | 2.6% | 1.6% | 0.0% | 0.0% | 0.0% |
| Pretax Profit | 6.0% | 13.3% | 15.2% | 17.0% | 12.9% | 4.4% |
| Inventory Margin % | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% | 0.0% |
| Percent Increase/(Decrease) % From Original Year of Operation | | | | | | |
| Avg $/mbf Lbr & Pallet Sales Cumulative | 3.4% | -8.9% | -3.4% | 4.4% | | |
| | -5.0% | -7.2% | 1.8% | 4.4% | | |
| Avg $/mbf All Sales Cumulative | 2.3% | -8.2% | -5.1% | 5.4% | | |
| | -6.0% | -8.1% | 0.1% | 5.4% | | |
| Avg Cost of Logs/mbf Cumulative | 8.4% | 3.5% | -0.2% | 3.6% | | |
| | 16.1% | 7.1% | 3.4% | 3.6% | | |
| Total Sales Volume mbf Cumulative | -6.8% | 17.1% | 24.0% | 15.9% | | |
| | 56.8% | 68.2% | 43.7% | 15.9% | | |
| Total Log Volume mbf Cumulative | -4.8% | 7.7% | 20.7% | 15.4% | | |
| | 42.8% | 50.0% | 29.3% | 15.4% | | |

As Mill was in Start up phase in the first year that year was not used as base point.

**[Exhibit 433]**

[P. 1] [Handwriting- Illegible]

STUMPAGE SALE AND DELIVERY AGREEMENT

DATED: MARCH 31, 1999

PARTIES: CROWN PACIFIC LIMITED
PARTNERSHIP ("Seller")
HAMILTON TREE FARM
P.O. BOX 28
HAMILTON, WA 98255

and

NORTHWEST HARDWOOD ("Buyer")
A DIVISION OF THE
WEYERHAEUSER COMPANY
P.O. BOX 7
ARLINGTON, WA 98223

RECITAL:

Buyer wishes to purchase from Seller standing timber ("The Stumpage) of the species and size and of the volume designated below located on the property legally described in the attached Exhibit A (the "Property"), which by this reference is made a part hereof. Additionally, Buyer wishes to have Seller, as Buyer's agent, harvest the Stumpage and deliver the same in accordance with the Harvest-Delivery Schedule.

NOW, THEREFORE, to accomplish the intents and purposes of the parties, the parties hereby agree as follows:

1. Stumpage Purchased. Buyer hereby purchases from Seller the stumpage consisting of Approximately 4500 MBF of standing merchantable Red Alder timber with a minimum top size diameter of 6 inches, and a minimum length of 10 feet, standing on the Property (the "Stumpage").

2. Harvest and Delivery. Buyer further engages Seller and Seller agrees to act as Buyer's agent in the harvest and delivery of the Stumpage in accordance with the harvest and delivery schedule set forth in the attached Exhibit B, which by this reference is made a part hereof ("Harvest-Delivery Schedule").

3. Purchase Price. The total of the price to be paid for the delivered Stumpage purchased herein by Buyer and harvested and delivered to Buyer by Seller is mutually agreed by the parties to equal Two Million Twenty Five Thousand Dollars ($2,025,000). Saw Logs delivered under this agreement will have the Per MBF Value agreed' to by Both Parties, and outlined in "Exhibit C" (Contract Log Price Schedule) of this contract. The estimated Composite Contract Per M Rate is apportioned $220/MBF for Stumpage and $230/MBF for harvest and delivery.

[P.2] 4. Payment of Purchase Price.

4.1 Down Payment. Upon execution of this Agreement and delivery of title to the Stumpage to Buyer, Buyer will pay to the Seller a nonrefundable down payment (25% of the value of This Contract) in the amount of Five Hundred and Six Thousand Two Hundred and Fifty Dollars (($506,250) "Down Payment")).

4.2 Balance of Purchase Price. When the value of the wood products delivered equals the down payment, $506,250.00, (to be depleted as volume delivered times Rates in paragraph 3 and "Exhibit C") the balance of the Actual Timber Value is due as volume is delivered and will be paid in accordance with the terms and rates in Paragraph (3).

5. Term. This Agreement shall become affective on the date it is executed and shall terminate on the earlier of: (1) April 30, 2000; or (2) the date Buyer has received the to-

tal value of Stumpage contracted for herein ("Termination Date").

6. Title and Risk of Loss. Title to the Stumpage shall pass to Buyer upon the execution of this Agreement end delivery of the Down Payment. The risk of loss to the Stumpage being purchased herein, including, but not limited to, fire, weather damage, mortality, disease, bug infestation, theft, etc., will be retained by Seller, but Seller reserves the right to deliver to Buyer substitute stumpage of similar species and quality set forth in Section 1 to fulfill Seller's obligations under this Agreement. Responsibility for Real estate Excise Tax and Forest Excise Tax will remain with the seller.

7. Remedies of Buyer in the Event of Seller's Non-performance. In the event Seller falls to deliver to Buyer the Stumpage in the volumes and at the time and place required in accordance with the Harvest-Delivery Schedule, Buyer will provide written notice to Seller specifying in detail the Seller's breach of this Agreement. If Seller fails to remedy its failure within thirty (30) days of receipt of the default notice from Buyer, then Buyer and/or its agents or assigns, will have the right to come on the Property and harvest and deliver the Stumpage pursuant to this Agreement, in which case the amount due Seller, if any, will be reduced to the Stumpage Per M Rate for the volume of timber harvested by Buyer. In addition, the Termination Date set forth in the prior Section 5 will be extended by an amount of time sufficient for Buyer to exercise the remedy provided in the prior sentence. In the event Buyer has paid the purchase price in full in accordance with Section 4, above, at the time of Seller's non-performance, Seller will refund to Buyer the Delivery Per M Rate for the volume of timber harvested by Buyer.

8. Remedies of Seller in the Event of Buyer's Refusal to Take Delivery or Non-payment. If Buyer, for any reason, refuses to take delivery of the Stumpage volume or any of the Stumpage volume in accordance with the Harvest-

Delivery Schedule, and any amount of the Purchase Price remains unpaid as of the Termination Data of this Agreement, the balance of the Purchase Price will be immediately due and payable to Seller, to be calculated at the contract stumpage rate only for unharvested contract volume. Buyer acknowledges that this Agreement is a take-or-pay agreement.

[P. 3] 9. Retained Security Interest. As security for Buyer's payment of the Deferred Purchase Price, Seller will retain a security interest in the Stumpage sold herein, and Buyer will execute any and all agreements, in addition to this Agreement, required by Seller to retain its security interest in the Stumpage, including, but not limited to, any UCC filings, security agreement, timber mortgages, timber trust deeds, etc.

10. Payment and Scaling.

Buyer will pay Seller for merchantable volume delivered under Buyer's normal payment schedule, based on Individual load tickets summarized in a scale or weight summary certificate in a form acceptable to Seller. Quantities sold under this Agreement will be measured at The (Northwest Hardwoods) scaling locations. Scaling shall be in Scribner Decimal C net scale, westside, as per USFS Region 6 Handbook. If payment is not received by Seller within ten (10) business days of the normal payment date, interest on the unpaid balance will be charged at the rate of 1.0% per month. Seller has the right at any time to check scale loads. Should the check scale differ from Buyer's scale by more than five percent (5%), the parties agree to have a certified scaling bureau rescale or check scale, as applicable, the disputed loads, and their decision will be binding on the parties.

11. Warranty.

Seller warrants it has marketable title to the Stumpage to be said under this Agreement Seller end Purchaser agree to

hold each other harmless for any liens, claims, or encumbrances arising from their respective actions under it.

12. General Provisions.

12.1 Force Majeure. No party shall be liable or responsible to any other party for delays in the performance of the terms and conditions of this Agreement, other than the payment of money when due, as a result of a cause or causes beyond its reasonable control, including, but not limited to, acts of God, weather conditions making performance extremely impracticable, fire, flood, labor problems, and governmental orders or actions. The party whose performance is delayed shall recommence any excused delay in performance as soon as practicable after cessation of the event of force majeure. In the event Buyer's performance is delayed by more than ninety (90) days due to any event of force majeure, then Seller may terminate this Agreement upon not less then thirty (30) days' prior written notice to Buyer. In the even Seller's performance is delayed by more than ninety (90) days due to any event of force majeure, then time for performance by Seller shall be extended for the number of days of delay in Seller's ability to harvest and deliver the Stumpage, or Buyer may terminate this Agreement upon not less than thirty (30) days' prior written notice to Seller.

[P. 4] 12.2 Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.

12.3 Assignment. Buyer shall be entitled to assign its rights and obligations under this Agreement only upon obtaining Seller's prior written consent Such consent will not be unreasonably withheld.

12.4 Notices. Notices under this Agreement shill be in writing and shall be. effective when actually delivered or two business days after being deposited in the United States Mails, certified, return receipt requested, directed to the other patty at the address set forth below, or to such other address as the party may indicate by written notice to the other party:

If to Seller. Crown Pacific United Partnership
Hamilton Tree Farm
P.O. Box 28
Hamilton, WA 98255

If to Buyer: Northwest Hardwoods
P.O. Box 7
Arlington, WA 98223

12.5 Waiver. Failure of either party at any time to require performance of any provision of this Agreement shall not limit such party's right to enforce such provision, nor shall any waiver of any breach of any provision of this Agreement constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.

12.6 Amendment. This Agreement may not be modified or amended except by the written agreement of the parties.

12.7 Attorneys' Fees. If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted in connection with any controversy arising out of this Agreement or to interpret or enforce any rights hereunder, the prevailing party shall be entitled to recover its attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith,

as determined by the court at trial or on any appeal or review, in addition to all other amounts provided by law.

12.8 Severability. If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be invalid or [P. 5] unenforceable, the remainder of this Agreement and the application of such term or provision to parsons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

12.9 Brokerage Commissions. Each party represents and warrants to the other that it has neither used nor consulted with any real estate broker or similar person or entity in connection with the transactions contemplated by this Agreement and each party (the "Indemnitor") agrees to indemnify and hold harmless the other party from and against any claims by any such person or entity for brokerage or similar commissions or fees arising by reason of action taken by the Indemnitor.

12.10 Integration. This Agreement contains the entire agreement and understanding of the parties with respect to the purchase and sale of Stumpage located on the Property and supersedes all prior and contemporaneous agreements between them with respect to such purchase and sale.

12.11 Construction and Interpretation. The headings or titles of the sections of this Agreement are intended for ease of reference only and shall have no effect whatsoever on the construction or interpretation of any provision of this Agreement. The use in this Agreement of the words "including," "such as," and words of similar import following any general statement, term, or matter shall not be construed to limit such statement, term, or matter in any manner, whether or not language of non-

limitation (such as "without limitation" or "but not limited to") is used in connection therewith, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the scope of the general statement, term, or matter. All provisions of this Agreement have been negotiated at arms length and this Agreement shall not be construed for or against any part by reason of the authorship or alleged authorship of any provision hereof.

12.12 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

[P. 6] IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

| NORTHWEST HARDWOODS. (PURCHASER) | CROWN PACIFIC LTD. (SELLER) |
|---|---|
| By:/s/ Robert W. Taylor | By:/s/ Dennis Buss |
| Title:VP & General Manager | Title: Sales Manager |

Attachments: Exhibit "A" – Stumpage Area Designation
Exhibit "B" – Harvest and Delivery Schedule
Exhibit "C" – Contract Price Schedule

STATE OF WASHINGTON )
) ss
County of Skagit )

The foregoing instrument was acknowledged before me this 30th day of March, 1999 by /s/ Dennis Buss, who is the Sales Manager of Crown Pacific Limited Partnership, on behalf of the Partnership.

| | /s/ David W. Lambert |
|---|---|
| | Notary Public for Crown Pacific My Commission Expires: 1/5/2003 |

STATE OF WASHINGTON )
) ss
County of King )

The foregoing instrument was acknowledged before me this 26th day of March, 1999 by /s/ Robert W. Taylor, who is the VP & General Manager of Northwest Hardwoods, a Division of The Weyerhaeuser Company on behalf of the Buyer.

| | /s/ |
|---|---|
| | Notary Public for Northwest Hardwoods My Commission Expires: |

| | |
|---|---|
| | 5/19/2000 |
| | |

[P. 7]

**EXHIBIT A**

**STUMPAGE SALE AND DELIVERED LOG AGREEMENT (HAMILTON TREE FARM)**

**NORTHWEST HARDWOODS**

**AGREEMENT (HAMILTON TREE FARM)**

| SALE NAME | BRAND | ACRES | SAWLOG VOLUME (MBF) | SECTIONS | TWP | RANGE |
|---|---|---|---|---|---|---|
| BURPEE BASIN | 523 | 75 | 825 | 3 | 35N | 8E |
| STIHL HIGH | 564 | 160 | 960 | 3 & 10 | 32N | 9E |
| HANDS DOWN | 505 | 40 | 323 | 28,29 & 33 | 36N | 8E |
| CAD EDGE | 560 | 22 | 118 | 26 & 27 | 36N | 8E |
| HURRICANE | 506 | 148 | 1448 | 29 | 36N | 5E |
| ~~RUXALL~~ | 560 | 78 | 826 | 22, 27 &28 | 35n | 8E |
| | TO-TALS | 523 | 4,500 | | | |

It is understood by Both Parties that with the written consent of Both Parties that this Exhibit can be altered to include more or delete from Parcels on This list in order to comply with the volume and terms of This Contract.

[Handwriting – Partially Illegible]

[P. 8]

**EXHIBIT B**

**STUMPAGE SALE AND DELIVERED LOG AGREEMENT (HAMILTON TREE FARM)**

**NORTHWEST HARDWOODS**

| | |
|---|---|
| DELIVERY VOLUME | 4500 MBF |
| DELIVERY START DATE | 1-Apr-99 |
| CONTRACT ENDING DATE | 30-Apr-00 |

SELLER WILL ENDEAVOR TO DELIVER APPROXIMATELY 35 MBF OF ALDER PRODUCT PER DAY TO BUYERS FACILITY BETWEEN Apr 1st and May 15th 1999. THEREAFTER, BETWEEN MAY 17TH AND AUGUST 31ST 1999, SELLER WILL ACCOMMODATE BUYER'S PRODUCTION REQUESTS, AS REGARDS, HARVEST AND DELIVERY, BASED UPON BUYER'S INVENTORY LEVEL SHOULD BUYER DESIRE TO REDUCE OR ELIMINATE DELIVERIES FROM THE ASSIGNED BRANDS.

[P. 9]

**EXHIBIT C**

**CONTRACT LOG PRICE SCHEDULE**

**STUMPAGE SALE AND DELIVERED LOG AGREEMENT (HAMILTON TREE FARM)**

**NORTHWEST HARDWOODS**

| DIAMETER | PRICE BY QUALITY SORT ($$/MBF) | | |
|---|---|---|---|
| | HIGH | MEDIUM | LOW |
| 15"+ | $525.00 | $525.00 | $125.00 |
| 12" TO 14" | $500.00 | $500.00 | $125.00 |
| 10" to 11" | $475.00 | $475.00 | $125.00 |
| 9" | $425.00 | $425.00 | $125.00 |
| 8" | $375.00 | $375.00 | $125.00 |
| 6" TO 7" | $250.00 | $200.00 | $125.00 |
| 4" TO 5" | $200.00 | $200.00 | $125.00 |

It is understood by Both Parties that while this Contract is specific to Alder Saw Logs the Seller will deliver and the buyer will accept deliveries of Alder Pulp Logs separate of this Agreement at the rate of $24.00 per ton.

It is understood by both parties that the prices listed above are to serve as a price floor for this Contract and that during the term of this Contract prices will not fall below this floor but may be raised should the purchaser and seller deem that market conditions warrant such an increase.

**[Exhibit 446]**

NORTHWEST HARDWOODS
A Division of Weyerhaeuser
120 INDUSTRIAL WAY
LONGVIEW, WASHINGTON 98632
206/577-6878 FAX 206/577-7112

10220 SW Greenburg Road, Suite 570
Portland, Oregon 97223 USA
Tel (503) 246-5700
Toll Free (800) 553-5345
Fax (503) 245-5838

September 23, 1999

Mr. James E. Brown
State Forester
Oregon Department of Forestry
2600 State Street
Salem, Oregon 97310

Subject: Hardwoods – Possible Exemption from "Substitution" Rules

Dear Mr. Brown:

Weyerhaeuser Company and its Northwest Hardwoods division support the efforts of the State Forester and the Department of Forestry to amend Oregon's "substitution" rules to exempt hardwood species. We believe such a rule changed would be in the best interests of the schools, counties and other institutions that receive proceeds from state timber sales, and of Oregonians generally. We have retained a consultant to assist in documenting the facts on which those beliefs are based, and to report these to the department in the near future. We request that the state forester consider the report of the outside consultant in making its final decision

Hardwoods are minor species that occur throughout most Oregon timberlands and comprise a portion of most state

timber sales. Red alder is the most common and is a nitrogen-fixing pioneer species that often is the first timber to grow on sites disturbed by natural or human events, stabilizing and improving the soils for subsequent softwood species that are dominant in the forests of the Pacific Northwest. Although hardwoods generally have relatively short life spans compared to conifers, they provide habitat for many species and a forest landscape with biological diversity.

Oregon's softwood and hardwood industries are very different. Manufacturing of softwood lumber and other softwood commodity products has been a major Oregon industry for well over 100 years with well-established national and international distribution channels. Historically, hardwoods were considered "weed species" of little commercial or ecological value. Prior to 1970, hardwoods were used mainly for firewood and small-scale local crafts. Today, value-added products distributed directly to secondary manufacturers worldwide characterize the hardwood industry. Northwest Hardwoods and others have developed worldwide markets in furniture, cabinets, millwork, flooring and other specialty products manufactured from native hardwoods, predominantly red alder.

Northwest Hardwoods has become the largest producer and marketer of hardwood lumber, with six specialized hardwood mills in Oregon and Washington. Weyerhaeuser owns and manages 600,000 acres of western Oregon forestlands that contain well managed, fast growing stands, primarily Douglas-fir and other softwoods, with components of hardwoods as minor species. Weyerhaeuser sells substantial volumes of both standing timber and logs to other domestic firms, as well as supplying logs to its own Cottage Grove, Eugene and Garibaldi sawmills and Wilbur pole facility.

[P. 2] Although the hardwood industry remains much smaller than the softwood industry, it provides year-round family wage jobs and other economic benefits to small towns and

rural areas, and solid markets for species that previously provided no economic return to forestland owners. In the communities of Coos Bay, Eugene and Garibaldi, Northwest Hardwoods provides direct employment to 252 people. Applying to economic impact multiplier of 1.7 to one, we also generate an additional 428 indirect jobs associated with our hardwoods operations.

Northwest Hardwoods' parent Weyerhaeuser now manages some of its lands specifically for hardwoods. Hardwood management could be an economically and environmentally attractive alternative on suitable sites for some state lands if markets for hardwoods remain strong and competitive. At this point the current substitution rules threaten to weaken markets for hardwoods and jeopardize opportunities for better management of state forestlands.

The current "substitution" rules in Oregon impair our parent company's ability to compete, requiring that we consent to be at a competitive disadvantage in either the hardwood industry or the much larger softwood industry. If Weyerhaeuser were to sell softwood logs to the highest bidder, and even a very small number of them ended up in export, Northwest Hardwoods would be disqualified from buying hardwood logs produced from Oregon state and local government lands. Those logs are estimated to provide about 50 percent of the raw materials for our hardwood facilities at Coos Bay and Eugene. Thus, for Weyerhaeuser to fully develop the potential of its major softwood business, Northwest Hardwoods would have to sacrifice our smaller but equally important hardwood business. The State of Washington has had an exemption for hardwoods form its "substitution" rules for some time, allowing Northwest Hardwoods and Weyerhaeuser to compete in both the hardwood and softwood industries on equal footing with companies that operate in only one.

We believe the current Oregon rules are not in the best interests of the citizens of Oregon. The state can and should en-

courage further development of both its hardwood and softwood industries, and cease penalizing firms that strive to compete in both. In Washington State, the hardwood exemption has not prevented smaller, independent companies from remaining competitive in hardwoods. The hardwood exemption benefits purchasers of state and local government timber, who need markets for hardwoods produced as a minor portion of the harvest from timber sales purchased primarily for their softwood species. It also benefits the state and local governments, which, under the current Oregon approach, would not be able to obtain full market value for the hardwood components of their timber sales.

Thank you for your consideration of our position. We fully support your efforts to amend the "substitution" rules to exempt hardwood species.

Very truly yours,

/s/ Rod Buck

Rod Buck, Mill Manager

Northwest Hardwoods, Eugene

(541) 689-2581

[Exhibit 463]

[redacted]

NORTHWEST HARDWOODS

A Weyerhaeuser Company

# SUPPLIER GUIDE TO:

# SAWLOG SPECIFICATIONS And SORT AND QUALITY REQUIREMENTS

Eugene

1999

EXHIBIT
CV 00-1693 PA
463

# NORTHWEST HARDWOODS
# LOG QUALITY AND SORT
# SPECIFICATIONS SUMMARY

Northwest Hardwoods produces hardwood lumber at several locations throughout the west, using mostly Alder, Maple and Ash. Our product differs from softwood in that our lumber grades are based on visual and not structural characteristics, so log quality plays a major roll in producing quality lumber. Bruising, scaring and age stain can cause a significant reduction in lumber value. The following pages will cover the Northwest Hardwoods sorts and quality specifications.

Northwest Hardwoods scaling is done based on the official Log Scaling and Grading Bureau rules. Scalers are familiar with the official rules for taking measurements and deductions followed by the Bureaus. Scalers are also trained on Northwest Hardwoods sort designations and log quality reporting codes.

## I. SAWMILL LOG SPECIFICATIONS

A. **PREFERRED CUTTING LENGTHS** Northwest Hardwoods maximizes the production of 10' lumber. Preferred lengths will maximize 10' multiples and allow 8' multiples when necessary. The preferred lengths are as follows:

1) **First Preference** - 40', 38' & 30' Lengths
2) **Second Preference** - 28', 20' Lengths
3) **AVOID** - 16', 24' and 32' Lengths
4) **NOT ACCEPTABLE** - 12', 14' and 22' lengths.

B. **TRIM** 4" of trim is required for every 10' and 8' multiple.

C. **SPECIES**

1) ALDER, MAPLE, ASH
2) Cherry and Chinquapin if it is less than 15" on the big end.

D. SIZE REQUIREMENTS

1) **Minimum top diameter**: 5"
2) **Maximum butt diameter**: Alder: 40" Maple: 30"
3) **Length:** 10' Minimum, 40' Maximum

E. GENERAL LOG REQUIREMENTS If an excessive percentage of the volume is outside of the specifications, refusal of load or reduction of price may be assessed.

1) **Fresh cut** sound timber, suitable for the manufacturing of lumber.
2) **Mechanically processed** logs will be a specific sort or downgraded.
3) **Age stained** logs (down too long) will be a specific sort or downgraded.
4) **Mechanically debarkable**
5) **Limbs & knots** trimmed flush with the log.
6) **Broken ends** bucked back to 1/2 the log diameter.
7) **Remove deformity and defects.**

II. **SORT SPECIFICATIONS** All logs will be given a grade sort. The following are the Northwest Hardwoods sorts and the requirements for each.

A. **High -"H"** High grade sawmill logs will have at least 75% surface clear and no more than 25% deductible defect.

B. **Medium -"M"** Medium grade sawmill logs will have at least 25% surface clear and no more than 50% deductible defect.

C. **Low -"L"** Low grade (pulp) logs are those that do not meet the minimum sawmill log requirements, or those that have more than three feet of stain on either the large or small end of the log. A low must that have at least 50% recovery in firm usable chips.

D. **Age Stain -"A"** Any alder log with at least six inches, but not more than three feet of stain on either end will be identified as an "Age Stained" log and will be a specific sort, with no deductions being made for the sound stain. Any rot will still be deductible. Logs with more than three feet of end stain will be sorted to a LOW.

E. **Mechanically Processed Logs -"P"** A log that has been manufactured by a press roll processor will leave imprints of the press roll surface on the log in varying degrees. A log will receive the "P" sort designation when surface penetration or bruising or oxidizing of the fiber is evident to a depth of ¼" or more over 25% of the length of the log.

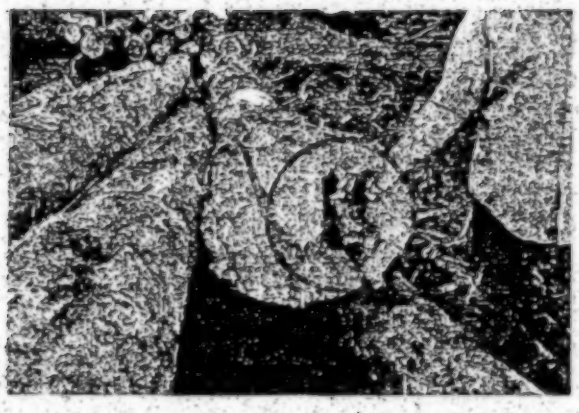
F. **Cull -"C"** Cull logs are those that do not meet the minimum recovery requirements of the Low sort.

G. **Reject -"R"** Reject logs are those that are not usable in the respective facilities because of excessive deformity, defect or species.

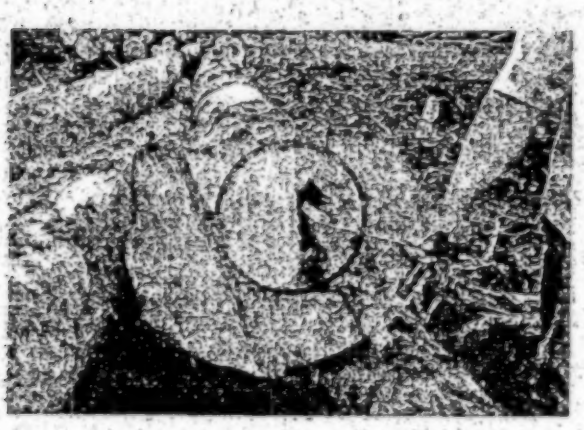
III. **AGE STAIN** Age stain is a major problem in Alder. Age stain occurs after trees have been cut when the weather is above about 65 degrees. Often the stain can begin to appear within two weeks of harvest, so it is important to plan harvesting to allow for prompt delivery to the mill.

Alder is not a structural wood but rather an appearance wood. Sound stain in the structural grades of softwood lumber is not an issue as it doesn't affect the strength of the lumber. Age stain in Alder lumber however can cause a significant reduction in lumber values since it affects the appearance, thereby lowering the grade and value of the lumber.

The following pictures show age stain in alder logs, as well as other defect and quality issues.

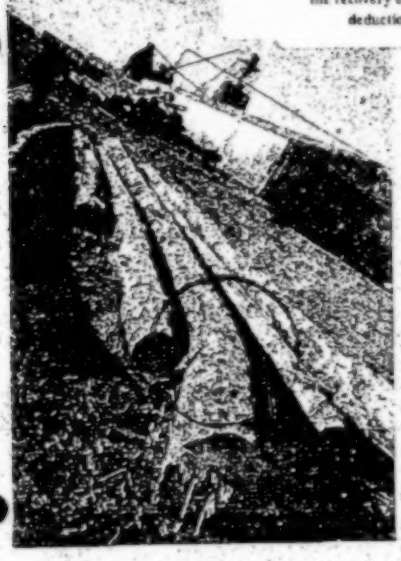


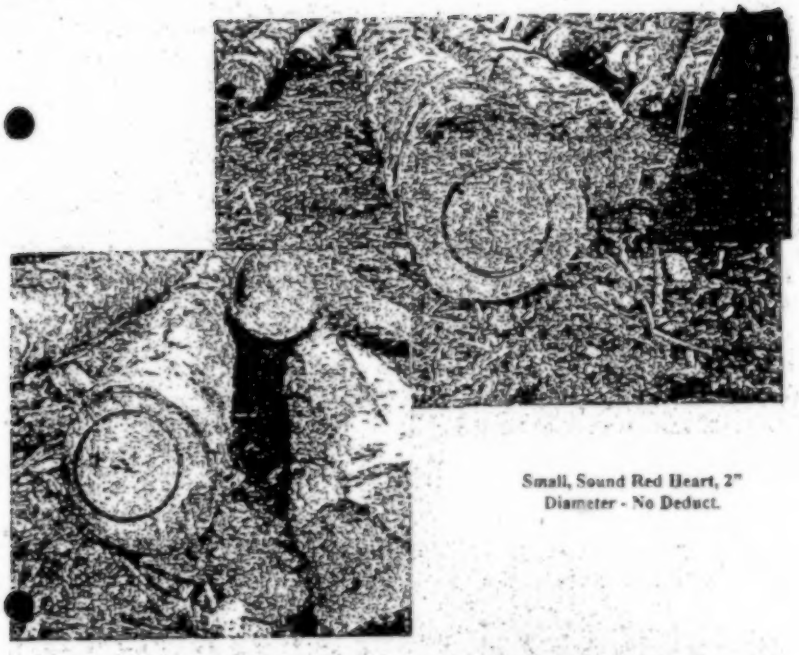
Stump Pull - 1' Deduct



Sweep - No Deduct

If the sweep is gentle enough to not affect the recovery of 8' or 10' blocks, no deduction is necessary.



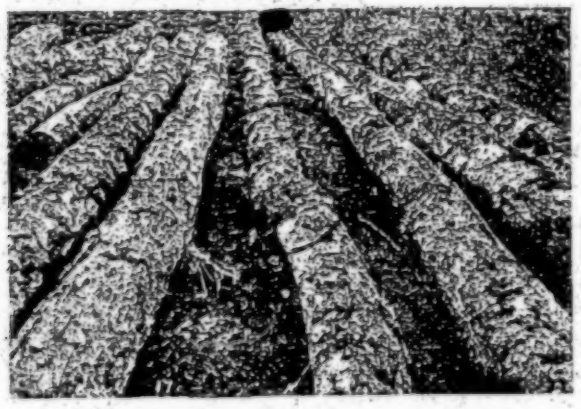


Small, Sound Red Heart, 2" Diameter - No Deduct.

6" Red Heart and Rot - 1'-2' Deduct

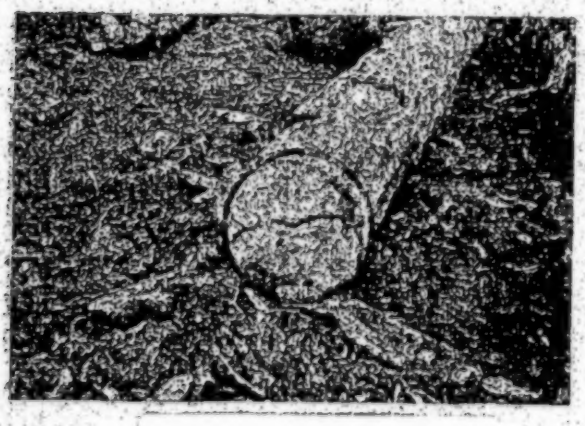
Hooked Butt - 2' deduct

Crook - 1' Deduct

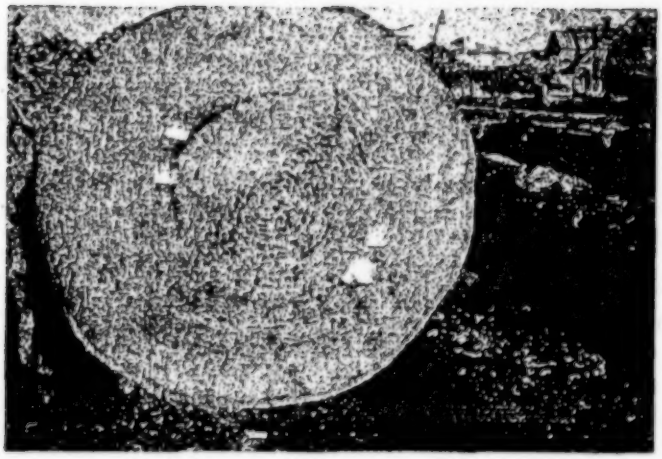


**Stump Pull and Split, 6' up the log - 4' Deduct**

A straight split will allow for recovery on either side of the split, deducting the entire split area may be excessive.



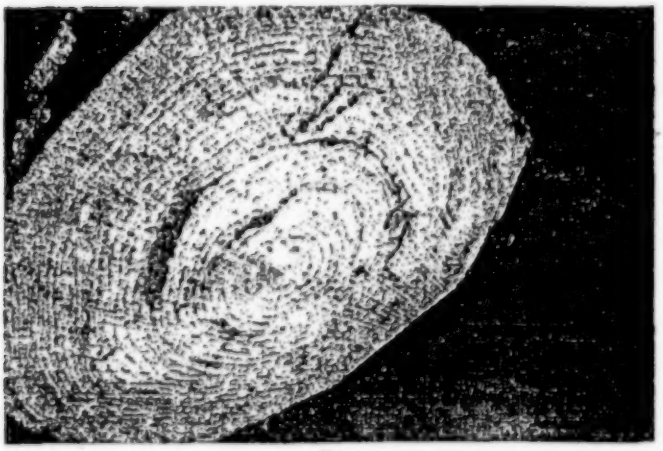
**3' Split - 2' Deduct**



**Shake Ring**

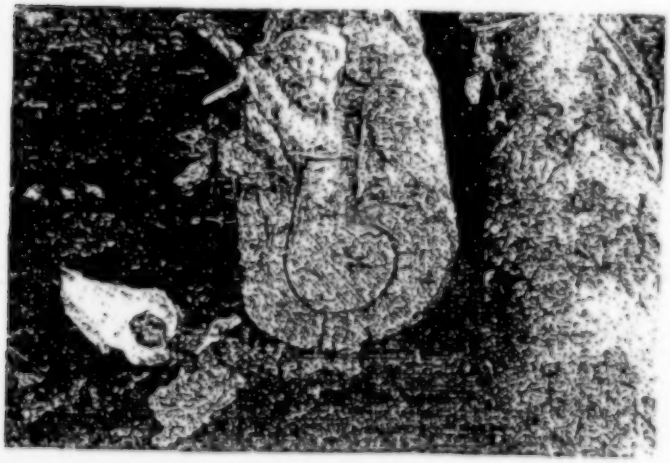
These pictures show shake in alder. This defect often shows up in both ends of the log, although it may be difficult to see. A diameter deduction is the proper way to remove the defect.

This log has a full ring in both ends of the log. Recovery is still possible on the outside of the ring, a 3" deduction is sufficient here.



**Shake Ring**

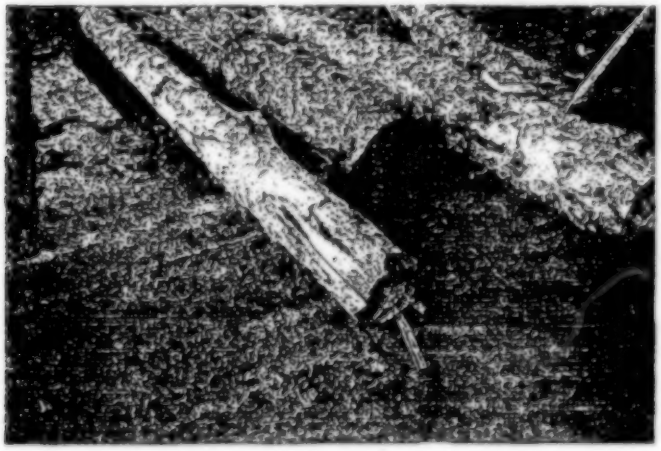
These logs show the separation on the growth ring. The log above has the ring in both ends and associated break. Taking a 3" diameter deduction (See Page 4) reduced the log to less than half scale and made the log a Low. The log below shows break along the ring. With the ring and the break this log is also less than half scale so is sorted to a Low.



Shake Ring

The log above shows the delamination caused by the shake. This log has the ring on both ends. The 4" deduction reduced the log to a Low

The log below shows the ring separation and break. This is the large end of the log. There is no recovery outside of the ring so the log is sorted to a Low.

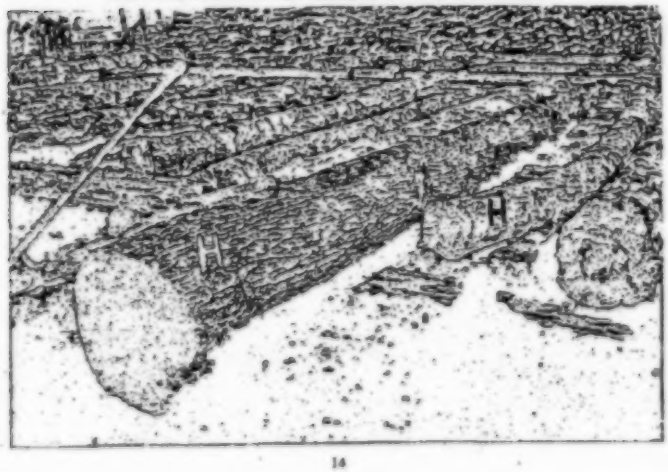


High Sort Logs - Sort "H"

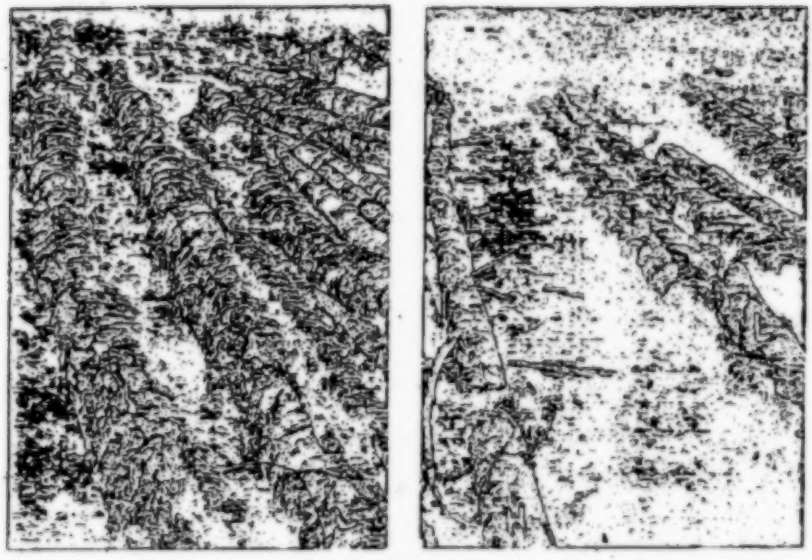
At least 75% surface clear and no more than 25% defect.

Medium Sort Logs - Sort "M"

At least 25% surface clear and no more than 50% defect.



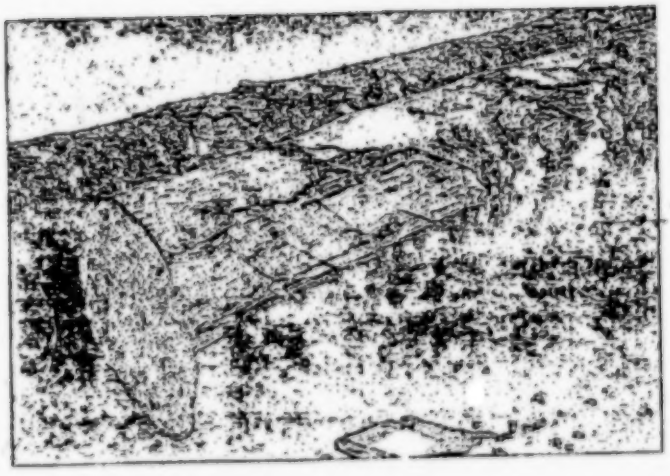

14



Limbs should be bucked flush with the bole of the log. L Quality Call.

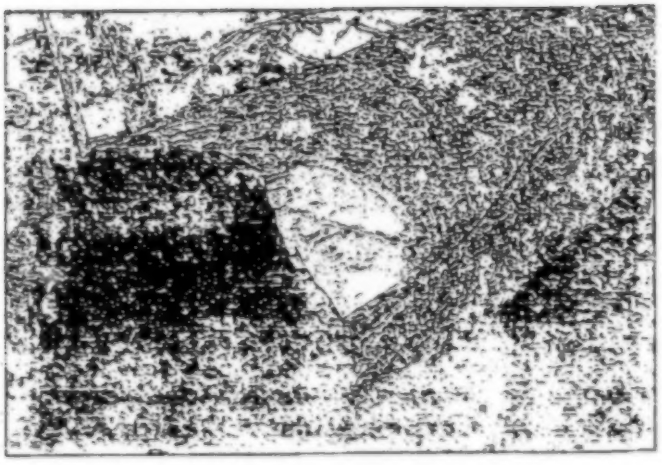
**Low Sort Logs - Sort "L"**

Logs that do not meet the minimum recovery for the analog sorts but have at least 50% recovery in firm usable chips.



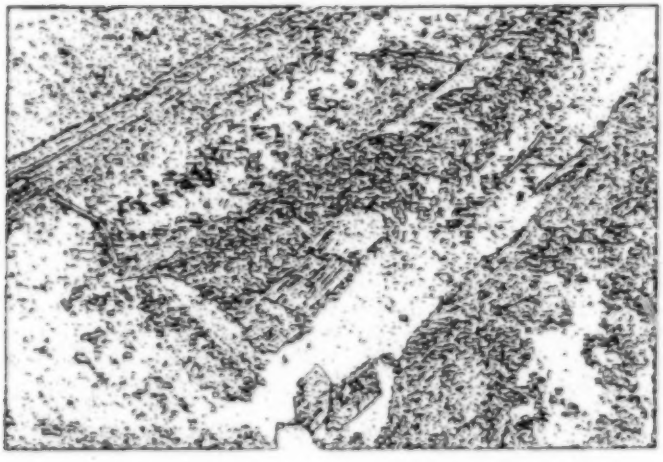
**Age Stained Logs - Sort "A"**
Age Stained logs (A) are those with at least 6" but less than 3' of end stain. Both of these logs would be an "A" sort.

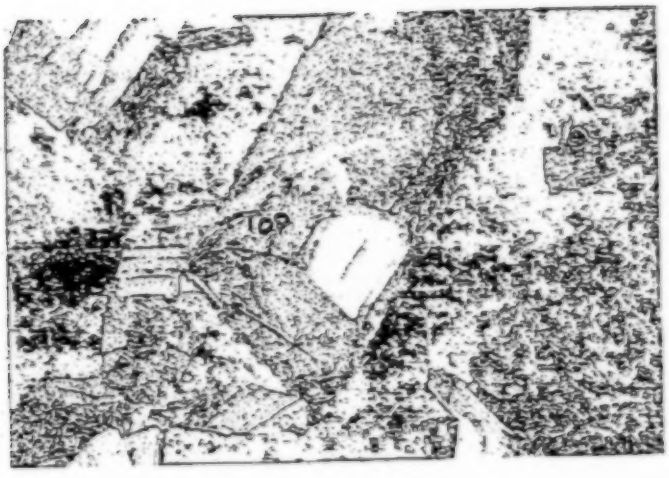
**Age Stained Logs - Sort "A"**
It is necessary to sample logs to
determine the amount of stain that exists.
This log would fall into the "A" sort



Looks can be deceiving. This log above looks worse than it is, but it has less than 6" of end stain so would not be an "A" sort. The log below looks similar on the outside but has more than 6" of end stain.

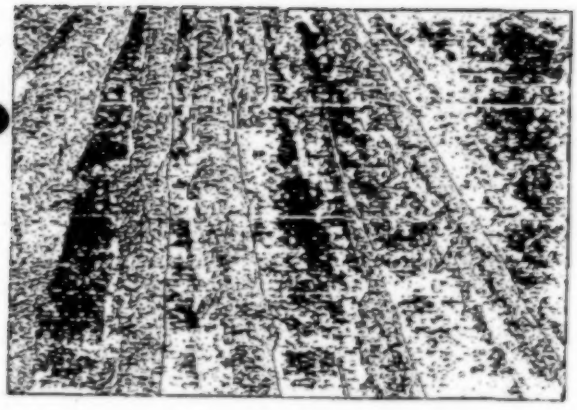
Watch for indications of stain and rot, as in the end of the log above. These logs look quite fresh, but upon sampling are determined to be Age Stained.





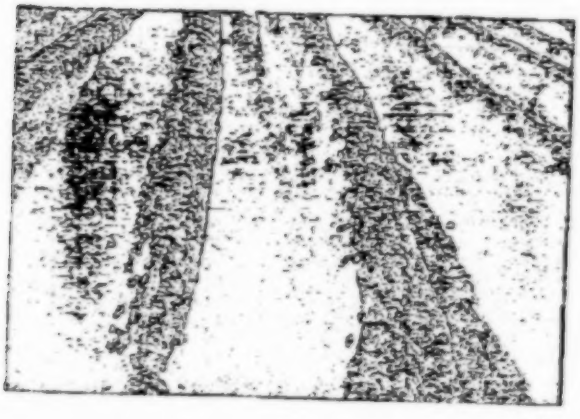

**Age Stained Logs - Sort "A"**

It is important to check both ends of the log. This log has no stain on the top, but over 6" on the butt. It would be an "A" sort.

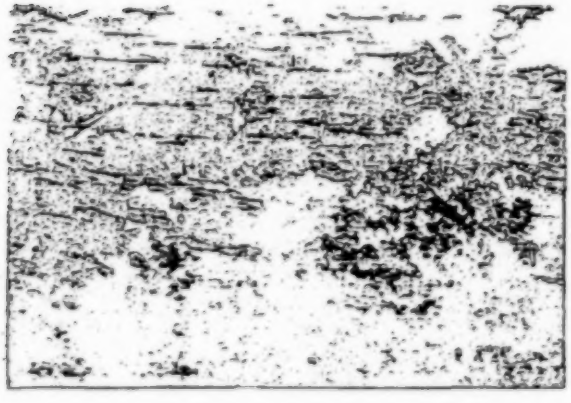


**Press Roll Processed Logs – Sort "P"**

Several of these logs have bruising or damage to a depth of over ¼" over more than 25% of the log, so would fall under the "P" sort.



Press Roll Processed Logs - Sort "F"
These spikes often bruise the log and leave white spots in the finished lumber. "F" sort logs should be sampled with an ax to determine depth of bruising and damage.



IV. **Log Quality/Defect Codes** A quality code is usually recorded for logs that are mis-manufactured where there has not been a good faith effort to correct the problem. Some calls are certain, i.e. broken ends, unbucked limbs, multiple tops and poor trim. The following are the codes that are to be input into the handheld and a description of each.

A. **Age Stain - Code "AS"** Used when age stain is present in sawlogs purchased by weight or sawlogs in sample scaled pulp loads.

B. **Broken End - Code "B"** Good faith efforts to buck broken ends will not have a quality call. The unbucked end or the improperly bucked end will have a call.

C. **Butt Rot - Code "BR"** Good faith effort to reduce it to a third or less of the diameter will not have a quality call.

D. **Crook/Dogleg - Code "CR"** Should be called when less than 8' of a good block exists on either end of the defect, or when the defect is so pronounced as to cause a hangup in the manufacturing process.

E. **Catface - Code "CF"** Should be called when less than 8' of a good block exists on either end of the defect, or when the defect is so pronounced as to cause a hangup in the manufacturing process.

F. **Deadwood - Code "DW"** A log from a tree that has been dead or down for some time, not just stained but obviously dead. Low or Cull.

G. **Flutes/Flares/Wildly Angled Stump Cuts - Code "F"** If untrimmed or unbucked, these will be called. Improper trim is often the result.

H. **Excessively Hooked Butts - Code "H"** Deformity that yields little recovery or presents serious manufacturing problems.

I. **Untrimmed Limbs/Knots - Code "L"** This is a certain call for a log with knots that are not trimmed flush with the log.

J. **Mechanical Damage - Code "M"** Excessive grapple or processor damage will get this call, i.e. chatter broken ends, slabs and gouges.

K. **Not Debarkable - Code "ND"** Excessive deformity, unbucked suckers, limbs or surface irregularities.

L. **Shake Ring - Code "SR"** An exception to the rule of a good faith effort. This is a defect that should reported at all times.

M. **Mistrim - Code "T"** A certain call when the off spec trim requires recording of unneeded length or insufficient trim for the number of segments in the log.

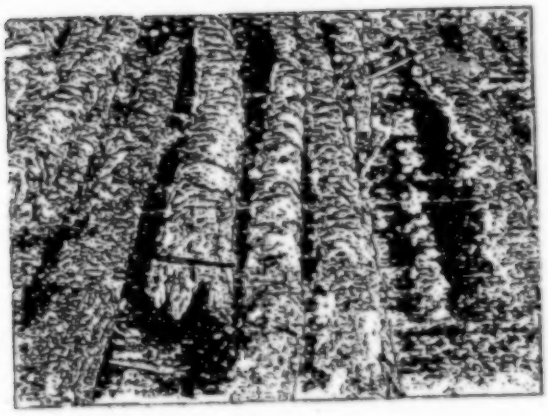
N. **Too Long - Code "TL"** A log over 40' plus trim.

O. **Undersize - Code "U"** Undersize in length or diameter as specified in the Purchase Agreement.

P. **Multiple Top/Crotch - Code "Y"** A crotched or multiple top that has not been bucked to remove the bark seam or the double heart. A certain call.

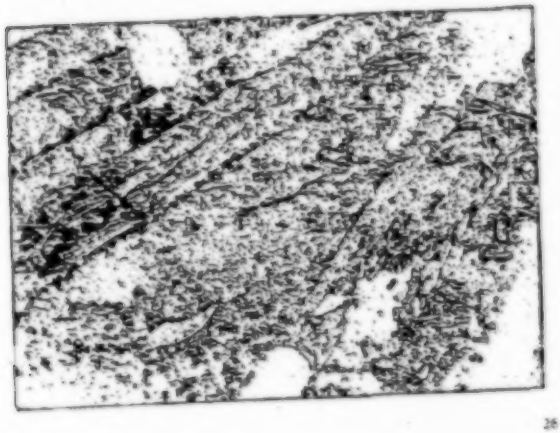
**THE FOLLOWING PICTURES SHOW EXAMPLES**

**OF QUALITY AND DEFECT CALLS**



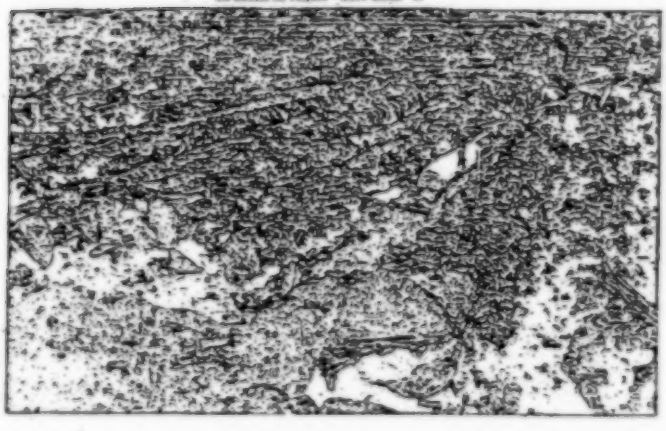
**Log Quality Issues**

**Broken End - quality code "B"**
Should have been bucked at half the scale diameter.



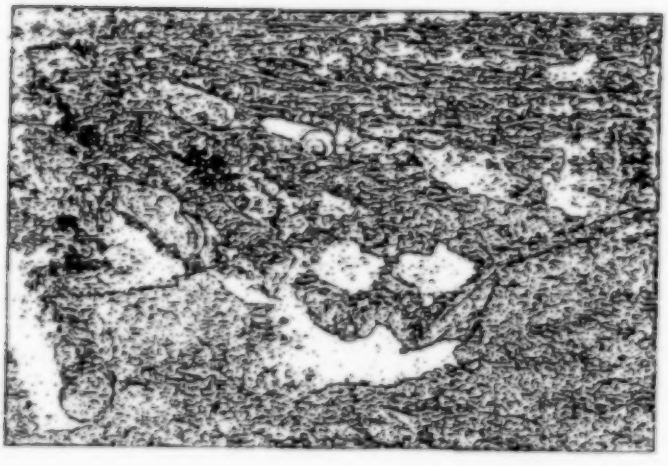
**Log Quality Issues**

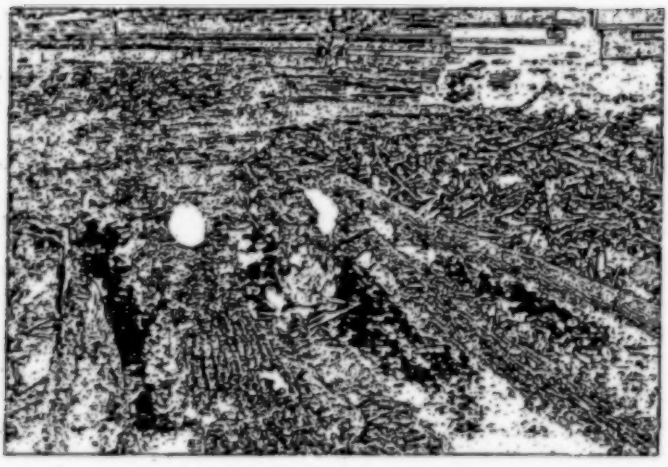
Crotched Tops - Code "Y"
Should have been bucked below the crotch.
The log below is not debarkable, so should
be coded as Reject - Sort Code "R"



**Log Quality Issues**

Above: Crotched Tops - "Y"
Below: Not Debarkable - "ND"
Excessive deformity or defect, Reject - R



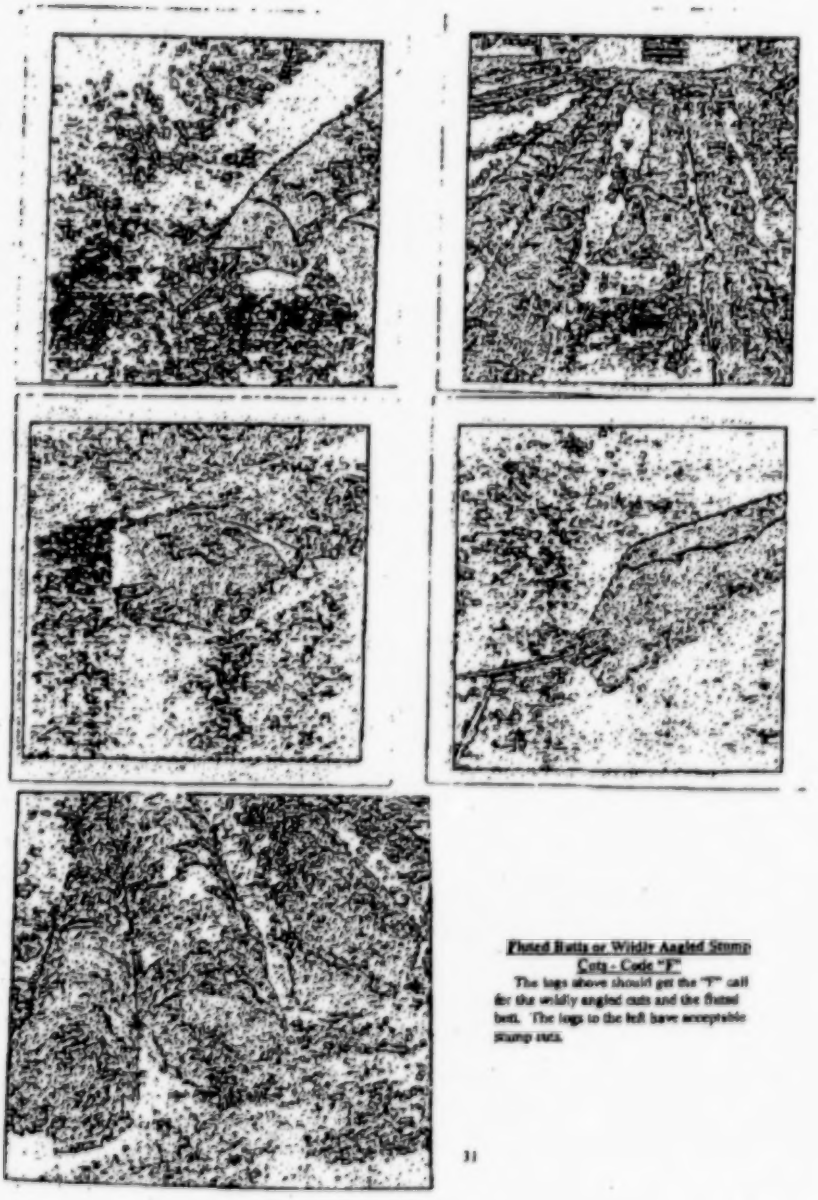


**Log Quality Issues**

Above: Crotched/poorly bucked sucker,
Code "Y"
Below: Deadwood - "DW"

29

**Mechanical Damage - Code "M"**
All of these logs would get the "M" call. The logs above were damaged by a grapple or fork, the log to the left was bucked with a processor which, done improperly, caused this "chatter break".



**Fluted Butts or Wildly Angled Stump Cuts - Code "F"**

The logs above should get the "F" call for the wildly angled cuts and the fluted butt. The logs to the left have acceptable stump cuts.

Conifers - Code "CF"
The conifer on this log should get the "CF" call as there isn't an 8' block below the affected area or any recovery on the back side of the log.

Reject or Cull - Code "R" or "C"
This log has excessive defect and will be coded as an R. It may also be graded a Cull as it most likely does not have 50% recovery in firm, usable chips.

**[Exhibit 472]**

**Weyerhaeuser Speeches and Interviews**

**Corrugated Packaging in our Consolidating / Globalizing / Modernizing Industry**

**Remarks by Steve Rogel, Chairman, President and CEO at the TAPPI Corr Expo 2001, Washington State Convention Center, Seattle, Washington - October 15, 2001**

Good morning and thank you for inviting me to your conference. The corrugated packaging business occupies a special place in my heart as I've spent the greatest part of my career in the containerboard packaging industry.

And a chemical engineer like me always feels at home in a room with so many technical people. You know what they say about engineers?

An optimist says the glass is half-full.
A pessimist says it's half-empty.
The engineer says: "Looks like you've got 100 percent more capacity than you need."

Amusing perhaps, but I think the stark reality of our business is that we do have a bit more capacity than we need at this time. In the case of the North American packaging business, that means more corrugators and linerboard mills than demand justifies.

What I'd like to do this morning is share my thoughts about how we've arrived at such a state of affairs and how we might get out of it. My focus will largely be on North America, but those of you from other parts of the world should be able to grasp the implications for your regions.

First, however, I believe it's appropriate to spend a few moments discussing how the terrorist attacks of a month ago have impacted the United States and our global business en-

vironment. To some degree, we're experiencing a paradigm shift.

For the U.S. – and for many nations – assumptions about normalcy and security have been altered. Suddenly, we must contemplate the possibility of unexpected, wrenching disruptions to our financial and commercial markets. Suddenly, we're confronted with the possibility that our homes and workplaces are not immune from attack.

As we all know, there is nothing stakeholders in the business world hate more than uncertainty and risk.

For the past decade, we have invested in, gloried in, and fantasized about the boundless promise of new technologies. At the same time, it's become painfully obvious that technology also has enabled individuals or small groups to wreak havoc to a degree that would have, heretofore, required armies.

This was proven not only by the events of September 11, and by the worldwide computer viruses of the following week, but now by biological terrorism.

So, technology has both empowered us and made us more vulnerable. We now face the fact that small cells of fanatics can cripple cities and stagger societies.

On a more positive note, these events have made Americans – and peoples around the world – even more aware of how dependent nations are upon each other. The blows to the U.S. quickly reverberated throughout the global economy. No one can any longer doubt that some issues can only be resolved on a global basis.

And, perhaps the flip side of America's heightened recognition of global interdependence, is our rediscovery of our common bonds. A long period of partisan politics and glorification of our differences has been replaced by a renewal our of shared values and a common cause.

I hope this spirit lasts. We must celebrate our similarities as well as our differences.

What does all this mean to the corrugated packaging business? In the short run, it probably means an even more difficult second half of the year than we were projecting. Even prior to September 11, box shipments in the U.S. [P. 2] were down 5 percent for the year. And, even before the attacks, consumer confidence had experienced one of its largest month-to-month drops ever – reaching its lowest level since 1996.

But the challenges to the North American box business did not begin last month . . . or last year. Our problems began decades ago when U.S. manufacturing started moving offshore. This was the first of three waves of change that have undercut our growth and profitability.

Some have termed the first wave the de-industrialization of America. Others have called it, on the positive side, the "Information Economy." Because of perceived, or real, advantages of manufacturing overseas – including lower labor costs and less restrictive regulatory environments – many traditionally American products began to be made in other countries.

This trend has been exacerbated by the fact that much of the emerging American labor force lacks enthusiasm for manual labor, including the making of boxes.

At first, these foreign-made, but U.S. bound products, were shipped back in American-made boxes. But it wasn't long before the producing countries developed their own box plants. Even then, these plants bought their linerboard from North America.

Now, as we all know, linerboard capacity is mushrooming outside of North America. One result is that linerboard exports from North America have declined more than 50 percent since 1998.

However, overseas packaging producers still need softwood fiber. They've been getting it from recycled old corrugated containers – OCC – from North America. So, the trend has been a substitution of OCC for linerboard exports.

Eventually, of course, recycled fibers lose their strength – and there is a finite supply – and virgin fiber is still required. I'll return to the source of that fiber later in my remarks.

A second wave of change facing our business is the increasing importation of agricultural products into the United States – for example, grapes from Chile, vegetables from Mexico, and ag products from virtually every part of the globe. As I indicated, this produce is not being shipped to us in U.S.-made boxes.

Finally, we are seeing increasing substitution of competing forms of shipping containers, primarily plastic boxes.

By now, I'm sure you've heard enough about the threats to our North American packaging industry. What do we do about them?

Over the long term, I believe stabilization for our U.S. businesses will come from three sources:

- Continued consolidation of our industry and the closure of excess capacity.
- Globalization of our business to capture growth opportunities outside the U.S.
- And, a future-based orientation.

Let's begin with consolidation. It's happening, and I believe that's a good thing.

The fragmentation of our industry has led to construction binges and over-capacity – at both the mill and converting levels. It leads to other manufacturing and distribution inefficiencies. It also makes it difficult to provide top-quality service to customers who increasingly require national and now global supply.

To help illustrate this point, all we need to do is take a look at Europe. Between 1974 and the end of 2000, the stock of Europe's pulp and paper industry underperformed the overall European equity market by a whopping 914 percent!

And, despite several bouts of consolidation, Europe still has more than 1,000 paper companies – many small or medium-sized family firms.

According to *The Economist*, "these marginal producers have long made it hard . . . to avoid price wars when demand for paper has fallen."

[P. 3] On the other hand, several large consolidations in Scandinavia's paper industry have resulted in improved performance numbers.

For example, revenue in 2000 for the Scandinavians was nearly $32 billion, a figure that has doubled since 1996 and quadrupled since 1992. About 90 percent of the sales from this group are outside the region.

How did they do this?

Consolidation was a key, along with favorable currency exchange ratios. To mention two major consolidations:

- UPM and Kymmene, both of Finland, merged to become one of the world's largest forest products companies and recently agreed to buy German paper producer Haindl. UPM-Kymmene also has made purchases in the U.S. and Canada.
- Stora of Sweden and Enso of Finland merged and then purchased Consolidated Papers in the U.S.

The people at Stora-Enso say size does count. Size has allowed them to be more disciplined and focused on creating stable returns, while, at the same time, giving them flexibility to sell non-core assets.

It's for reasons like these that we at Weyerhaeuser acquired MacMillan Bloedel and Trus Joist International, and why we're pursuing Willamette Industries. To paraphrase former CEO Jack Welch of GE, we're taking control of our destiny before someone else does.

Of course, consolidation is occurring elsewhere in North America.

Over the past few years, we've seen International Paper acquire Union Camp, Federal Paperboard, and Champion . . . Georgia Pacific absorb Fort James . . . Jefferson Smurfit combine with Stone Container . . . Mead and Westvaco plan to join together . . . and in recent weeks, Temple-Inland has made a bid for Gaylord.

Another major driver of consolidation is the change in channels to the retail market – what we refer to as "big-box stores." For corrugated containers, some of the major players are large supermarket chains. Within the past two years, we've seen Albertson's buy American Stores . . . Safeway purchase Dominick's . . . and Kroger acquire Fred Meyer.

I know this one well, since I was on the board of Fred Meyer and now am on the board of Kroger. I guess you could say I got acquired!

Direct corrugated users are combining too. Iowa Beef Packers bought Food Brands before Tyson Foods bought it . . . Pepsi-Cola bought Quaker Oats . . . Gillette bought Duracell. And the beat goes on!

Why are there so many mergers among our customer base?

Because their customers – our ultimate customers – want:

- Product availability and selection.
- Damage-free goods.
- Choice of features.
- Ease of payment.

- No stock-outs.
- In a word, value.

Consequently, then, our direct box customers want:

- Consistent quality and supply over a wide geographic basis.
- The strongest boxes possible for the least fiber input.
- Specific qualities for their boxes, often including eye-catching graphics.
- Simplified procure-to-pay systems that are convenient and lower their transition costs.
- Vendor-managed inventories.
- In a word, value – just like their customers.

[P. 4] Changing gears, where does globalization come in and how can it help us in North America?

Primarily by opening up new markets for our North American production as markets in other geographies grow – and they're growing faster than those in North America.

On a long-term, global basis, demand for corrugated packaging is projected to rise at rates higher than GDP, especially in the developing world.

For example, Asian countries, excluding Japan, are expected to account for 45 percent of world paper and paperboard growth over the next decade.

In this regard, China's output of paper and packaging products – 13 million tons last year is projected to rise to 20 million tons by 2005 and up to 30 million tons by 2010.

And, statistics show that, in the past, half of the paper and paperboard for packaging use has been imported into China.

Of course, if you're a non-North American producer, you're already looking at these same markets. So, we here in North America have our work cut out for us.

These are some of the obstacles we face:

- Our labor costs are high on a global scale.
- We face long transport lanes to foreign markets, with attendant high freight costs.
- We must also contend with environmental costs and more restricted availability of softwood fiber than many other nations.

We do have advantages, of course:

- We are among the quality leaders in building boxes.
- Our graphics design and production capabilities are very high.
- No region yet compares with North America in creating, managing and improving forests. We're still the source of the world's best softwood fiber. And we can never forget that softwood fiber drives the box business.

However, harkening back to my theme of globalization, the source of our virgin fiber is becoming ever more international. In the future, we'll see significant virgin fiber from South America and Australasia. I know because Weyerhaeuser will be providing some of it! Even with virgin softwood fiber, we have to think globally.

Finally, I want to advocate that we all adopt a future-based orientation. The world is always changing. We must keep moving forward. As the historians Will and Ariel Durant observed, "The future never just happened. It was created."

So what are some of the things we must do to create the future we want? I've already discussed the need for us to con-

tinue to consolidate and globalize our industry. Here are some additional tasks.

Given the ongoing threat of terrorism, we must create a safe and supportive work environment for our employees. This includes a strengthened effort to create a physically safe work place and a safety-focused work force. Distractions caused by world events and marketplace vexations add to the potential dangers in our work places.

Secondly, we must do a better job of recruiting and mentoring our next generation of leaders, scientists, engineers and other professionals. In North America, this task is complicated by the fact that we aren't turning out enough science, math, engineering or business graduates to meet industry's needs in general, let alone our own.

My challenge to all of you is to help promote our industry as an attractive one for talented young people. In the case of Weyerhaeuser, we do so through our support of the International Corrugated Packaging Foundation. I [P. 5] encourage all of you not already part of ICPF to join and help create a pool of highly qualified employees for the future.

We and other companies must also continue to plant the seeds for future success through research. For example, one of the things we're working to develop as an industry is super-strong, wood-fiber materials that will compete successfully with the plastics we see invading our markets today. Some of these are composites, with plastics and resins added.

At Weyerhaeuser, we continue to pursue innovation. For example, we've developed a new produce-grade medium that eliminates the use of wax. This helps us address concerns retailers have with disposing of wax-treated boxes – and better compete with plastics for the produce-packaging business.

We've also developed an automated paper-recycling machine – PaperSort™ – in partnership with MSS, a Nashville, Tennessee, company.

PaperSort™ uses advanced UV (ultra-violet) and LED (liquid electronic display) sensors to process recycled paper at least 40 times faster than via hand-sorting. It can quickly separate solid-color sheets, newspapers, brown board, color-printed items, white paper, off-white and other coated papers so that they can be recycled into the fiber supply for new paper, linerboard and packaging products. This is revolutionary technology and it's environmentally beneficial because of the landfill space it saves.

At this time, I'd like to show you a television news spot showing the use of this technology at our recycling plant. This aired on ABC News with Peter Jennings on April 27 of last year.

Incidentally, since this spot aired, this technology has advanced to a peak of 15 tons of wastepaper sorted per hour at a new installation in Sweden.

So, while technology can make us more vulnerable, it definitely can and should make us more competitive.

In conclusion, despite the current vexing state of our business environment, I'm optimistic about our industry – if we do the things I've outlined.

We must continue to consolidate and globalize our business. We must look to the future – and prepare for it. Also, in a world where intention constantly confronts the unforeseen, we must be adaptable.

Again, if we do these things, I have no doubt that we will succeed.

Thank you for inviting me to share my thoughts with you this morning.

**[Exhibit 478]**

* * *

**Western Raw Material: February 1998**

**Log purchases:** February purchases were 22.5 mmbf at $405/mbf, $27/mbf lower than January, versus plan of $425/mbf, sawlogs (8"+) averaged $445(last month $467), pulplogs (7"-) averaged $228 (last month $307) versus plan of $449 and $342 respectively. All locations were favorable to plan and below last month's averages.
Outlook for prices should continue to be favorable as alignment to lumber and chip markets occur and supply continues above conversion capacity. Relations with major suppliers continues to improve; Crown Pacific, Rayonier, PLS, Willamette, GP and Roseburg are generally in first refusal positions.
**Inventories:** Month end was 25.3 mmbf, down .3 from last month; 8"+ was 19.5 (last month 18.3), 7"- was 5.8 (last month 7.2). All locations were at or above target with exception of Coos Bay pulplogs which continued hand-to-mouth; Centralia and Eugene exceeded capacity inventories requiring alternate storage. Inter yard transfers were limited to small volumes of blocks/logs from Tumwater to Arlington and sort-out logs from Aberdeen (Local) to Garibaldi.
**Timberlands:** Coos Bay Tblds continued in transition to timber sales; first sales likely in April; we expect to have reserve position on hardwoods. We continued to focus on improving planning and tactical timing with Tblds to improve inventory control and log quality; Longview contractors for the first time delivered woods direct to Garibaldi to eliminate second-handle.
**HRMC:** Began fresh look at data refinement and management; expect to eventually tie to data base system and align with log system.
**Chips:** Supply generally in balance, although roundwood

began to build at month end. Several whole log operators with high log inventories as chip prices moved lower at domestic mills. With current export prices below domestic, expect more downward price pressure from domestic mills in second qtr. Log prices could fall to low 20s/tn putting some producers below b/e costs.

**HIGHLY CONFIDENTIAL**

# [Exhibit 482]

Northwest Hardwoods: Longview - Log Purchases

| | | Volume MBF | Price $/MBF |
|---|---|---|---|
| 1997 | | | |
| | 3rd Party | 28,080 | 459 |
| | Weyco | 17,500 | 330 |
| | Difference | | 129 |
| | Total | | $2,257,500 |
| 1998 | | | |
| | 3rd Party | 19,972 | 453 |
| | Weyco | 25,600 | 288 |
| | Difference | | 165 |
| | Total | | $4,224,000 |
| 1999 | | | |
| | 3rd Party | 23,140 | 496 |
| | Weyco | 24,989 | 350 |
| | Difference | | 146 |
| | Total | | $3,698,372 |
| 2000 | | | |
| | 3rd Party | 27,481 | 563 |
| | Weyco | 16,433 | 403 |
| | Difference | | 160 |
| | Total | | $2,629,280 |
| 2001 | | | |
| | 3rd Party | 23,236 | 537 |
| | Weyco | 11,136 | 362 |
| | Difference | | 175 |
| | Total | | $1,948,800 |

EXHIBIT
CV 00-1693 PA
482

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,992 | 1,876 | 941 | 7,433 | 6,797 | 914 | 30,992 | 28,418 | 917 |
| Pulp - MBF | 1,338 | 323 | 240 | 4,618 | 1,133 | 245 | 22,315 | 5,468 | 245 |
| Discounts/Claims/Freight | | (7) | (0) | | (43) | (9) | | (192) | (9) |
| Net 3rd Party Sales - MBF | 3,330 | 1,996 | 599 | 12,051 | 7,887 | 655 | 53,307 | 33,692 | 634 |
| Intra Division Sales | | | | | | | | | |
| Sales - Keene | 131 | 88 | 666 | 322 | 184 | 570 | 1,903 | 1,402 | 737 |
| Sales - CSC | 40 | 54 | 1,340 | 131 | 133 | 1,013 | 322 | 277 | 859 |
| Sales - Ottawa | 0 | (9) | 0 | 18 | 30 | 1,673 | 188 | 262 | 1,392 |
| Sales - Tarrow | 0 | (0) | 0 | 0 | (0) | 0 | 18 | 24 | 1,313 |
| Sales - Indian Wareh | 0 | (0) | 0 | 36 | 52 | 1,437 | 36 | 52 | 1,433 |
| Sales - Thorville | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Midway | 87 | 79 | 901 | 348 | 316 | 901 | 348 | 316 | 915 |
| Lbr Trans. to NWH Wash. Loc. | 47 | 71 | 1,543 | 205 | 334 | 1,588 | 1,221 | 1,126 | 917 |
| Lbr Trans. to NWH Ore. Loc. | 63 | 86 | 973 | 179 | 197 | 1,014 | 1,276 | 1,270 | 1,027 |
| Total Lumber Sales - MBF | 3,701 | 2,331 | 629 | 13,295 | 8,956 | 673 | 59,043 | 38,355 | 650 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 2 | 1 | 386 | 5 | 3 | 513 | 33 | 8 | 299 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | 0 | | | 0 | | | 0 |
| NWH WA - MBF | 18 | 6 | 312 | 58 | 16 | 272 | 447 | 176 | 398 |
| NWH OR - MBF | 1,226 | 603 | 492 | 1,917 | 930 | 485 | 1,917 | 930 | 485 |
| Total Log Sales - MBF | 1,246 | 610 | 489 | 1,981 | 949 | 479 | 2,385 | 1,117 | 468 |
| Chip Sales - 3rd Party - BDT | 0 | (0) | 0 | 9 | 1 | 112 | 95 | 11 | 116 |
| Chip Sales - Weyco - BDT | 9,112 | 679 | 96 | 29,311 | 2,801 | 96 | 88,334 | 8,039 | 91 |
| Total Chip Sales - BDT | 9,112 | 679 | 96 | 29,320 | 2,809 | 96 | 86,429 | 8,050 | 93 |
| By-Products | 2,784 | 28 | 10 | 10,234 | 130 | 13 | 40,845 | 564 | 14 |
| Other Services | 0 | 1 | 0 | 0 | 15 | 0 | 0 | 28 | 0 |
| Total Sales Revenue - MBF | 2,71 | 3,453 | 994 | 13,280 | 13,491 | 946 | 99,843 | 48,133 | 815 |
| Beg. Inventory - Logs | 5,988 | 2,693 | 437 | 4,937 | 2,209 | 731 | 7,722 | 3,484 | 931 |
| Purchased Logs - 3rd Party | 1,748 | 833 | 476 | 8,347 | 3,837 | 467 | 28,990 | 12,388 | 839 |
| Purchased Logs - Weyco | 2,367 | 788 | 339 | 6,279 | 1,868 | 293 | 19,508 | 5,777 | 288 |
| Tbr Transferred In | 0 | 0 | 0 | 906 | 449 | 484 | 1,227 | 692 | 450 |
| Logs Transferred In - NWH WA | 9 | 4 | 443 | 38 | 18 | 433 | 1,914 | 906 | 379 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 490 | 188 | 384 |
| Raw Materials Available | 10,112 | 4,323 | 419 | 20,507 | 8,381 | 407 | 57,344 | 24,135 | 421 |
| Sawmill Conversion - MBF | 2,341 | 1,013 | 429 | 12,181 | 5,181 | 429 | 51,853 | 20,836 | 393 |
| Sawmill Conversion - Scribner | 3,874 | 1,613 | 399 | 13,234 | 5,195 | 386 | 47,872 | 20,836 | 443 |
| 3rd Party Sales | 3 | 1 | 334 | 9 | 2 | 307 | 30 | 10 | 296 |
| Logs Transferred Out - NWH WA | 18 | 6 | 312 | 59 | 16 | 272 | 438 | 169 | 395 |
| Logs Transferred Out - NWH OR | 1,226 | 603 | 492 | 1,917 | 930 | 485 | 1,917 | 930 | 485 |
| Ending Inventory - Logs | (7,042) | (2,990) | 424 | (5,042) | (2,990) | 424 | (7,042) | (2,990) | 424 |
| Timber Company/Mill | 0 | 1 | 0 | 0 | 29 | 0 | 0 | 29 | 0 |
| Total Net Abt Cost to Loc. | 5,078 | 2,050 | 404 | 19,215 | 8,153 | 424 | 52,286 | 18,994 | 421 |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 147 | 599 | 949 | 1,438 | 1,193 | 809 | 2,587 | 2,088 | 851 |
| Lumber Transfers from Ore. Loc. | 47 | 91 | 1,893 | 432 | 727 | 831 | 888 | 944 | 874 |
| Custom Services | 9 | 4 | 0 | 0 | 19 | 0 | 0 | 62 | 0 |
| Total Outside Inventory Lbr | 194 | 774 | 967 | 1,870 | 1,541 | 813 | 4,995 | 3,946 | 830 |

EXHIBIT 482 P. 2

WY-CONT-01345

Longview - Mill Summary Results

Northwest Hardwoods - Longview

($000)

| | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,341 | 239 | 72 | 12,161 | 1,001 | 82 | 55,842 | 4,887 | 88 |
| Maintenance Labor | | 91 | 27 | | 323 | 26 | | 1,240 | 22 |
| Payroll Loading | | (22) | (7) | | 338 | 28 | | 2,102 | 38 |
| Operating Supplies | | 48 | 14 | | 172 | 14 | | 949 | 17 |
| Maintenance Supplies | | 92 | 28 | | 253 | 21 | | 1,044 | 19 |
| Natural Gas | | 28 | 11 | | 110 | 9 | | 382 | 7 |
| Electricity/Utilities | | 41 | 12 | | 133 | 11 | | 538 | 10 |
| Rent | | 1 | 0 | | 3 | 1 | | 25 | 0 |
| Outside Services | | 93 | 28 | | 193 | 16 | | 827 | 15 |
| Outside Services - Drying | | 12 | 3 | | 38 | 3 | | 131 | 2 |
| Fee on Lumber | | 3 | 1 | | 7 | 1 | | 37 | 1 |
| Fee on Chips/By-Prod | | 28 | 8 | | 93 | 8 | | 331 | 6 |
| Miscellaneous | | 10 | 3 | | 32 | 3 | | 77 | 1 |
| Total Variable Costs | 3,341 | 675 | 202 | 12,161 | 2,693 | 221 | 55,842 | 12,277 | 220 |
| Depreciation | 3,711 | 83 | 25 | 13,209 | 299 | 23 | 59,043 | 1,378 | 24 |
| Taxes | | (34) | (9) | | 3 | 0 | | 117 | 2 |
| Other | | 100 | 27 | | 319 | 24 | | 1,231 | 21 |
| Period Costs | 3,711 | 151 | 41 | 13,209 | 621 | 48 | 59,043 | 2,577 | 43 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 5,078 | 3,235 | 637 | 4,706 | 3,126 | 664 | 4,667 | 3,047 | 653 |
| Ending Inventory Lumber - MBF | (3,215) | (2,643) | 685 | (3,215) | (2,643) | 685 | (3,215) | (2,643) | 685 |
| Total Cost of Sales | 3,711 | 3,973 | 818 | 13,209 | 10,329 | 781 | 59,043 | 39,766 | 674 |
| Gross Profit Contribution | 3,711 | 509 | 154 | 13,209 | 2,183 | 165 | 59,043 | 8,358 | 142 |
| Depreciation | 3,711 | 0 | 0 | 13,209 | 0 | 0 | 59,043 | 0 | 0 |
| Taxes | | 10 | 3 | | 42 | 3 | | 188 | 3 |
| Other | | 0 | 0 | | 0 | 0 | | 27 | 0 |
| Subtotal - Log G&A | 3,711 | 10 | 3 | 13,209 | 50 | 4 | 59,043 | 215 | 4 |
| Selling Expense Allocation | 3,711 | 41 | 11 | 13,209 | 230 | 23 | 59,043 | 1,992 | 34 |
| G&A Expense Allocation | | 25 | 7 | | 79 | 6 | | 275 | 5 |
| Total SG&A Expense | 3,711 | 77 | 21 | 13,209 | 456 | 35 | 59,043 | 2,482 | 42 |
| Misc Rev/(Exp) | 3,711 | 26 | 6 | 13,209 | 31 | 2 | 59,043 | 84 | 1 |
| Other Rev/(Exp) | 3,711 | (191) | (52) | 13,209 | (700) | (53) | 59,043 | (2,121) | (36) |
| Pre-Tax Profit/(Loss) | 3,711 | 366 | 98 | 13,209 | 1,537 | 116 | 59,043 | 5,699 | 97 |
| Lumber Recovery/Log | | 0.37 | | | 0.91 | | | 1.11 | |
| Chips Recovery/Lumber MBF | | 2.13 | | | 2.07 | | | 1.55 | |

EXHIBIT 482 P. 3

WY-CONF-01346

Longview - Mill Summary Results

Northwest Hardwoods - Longview

($000)

| December 1998 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 2,422 | 2,029 | 834 | 8,299 | 7,064 | 851 | 27,984 | 24,631 | 880 |
| Pallet - MBF | 1,433 | 378 | 263 | 4,822 | 1,247 | 259 | 15,243 | 3,942 | 261 |
| Discounts/Claims/Freight | | (17) | (3) | | (79) | (2) | | (149) | (1) |
| Net 3rd Party Sales - MBF | 3,855 | 2,389 | 617 | 13,122 | 8,232 | 633 | 44,228 | 28,424 | 643 |
| Intra Division Sales | | | | | | | | | |
| Sales - Kenai | 0 | (5) | 0 | 0 | (2) | 0 | 997 | 814 | 816 |
| Sales - CSC | 30 | 36 | 1,217 | 123 | 118 | 963 | 248 | 229 | 922 |
| Sales - Ukiah | 9 | (0) | 0 | 33 | 44 | 1,339 | 186 | 254 | 1,366 |
| Sales - Taiwan | 0 | (2) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Baker Warehouse | 0 | (0) | 0 | 0 | 1 | 0 | 28 | 33 | 1,182 |
| Sales - Belgium Warehouse | 36 | 49 | 1,342 | 72 | 97 | 1,342 | 344 | 459 | 1,339 |
| Sales - Mildred | 0 | (0) | 0 | 0 | (0) | 0 | 203 | 456 | 1,123 |
| Sales - Chanute | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Wash. Lor. | 2 | 4 | 1,869 | 39 | 72 | 923 | 307 | 297 | 968 |
| Lbr Trans. to NWH Ore. Lor. | 18 | 24 | 1,327 | 80 | 59 | 1,182 | 332 | 458 | 1,159 |
| Total Lumber Sales - MBF | 3,931 | 2,483 | 631 | 13,451 | 8,672 | 645 | 46,845 | 30,828 | 658 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 337 | (28) | (79) | 1,847 | 311 | 168 | 1,360 | 313 | 230 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | 0 | | | 0 | | | 0 |
| NWH WA - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 48 | 10 | 209 |
| NWH OR - MBF | 0 | (0) | 0 | 339 | 139 | 410 | 779 | 326 | 419 |
| Total Log Sales - MBF | 337 | (28) | (83) | 2,186 | 450 | 205 | 2,187 | 651 | 297 |
| Chip Sales - 3rd Party - BDT | 0 | (0) | 0 | 0 | (0) | 0 | 781 | 84 | 108 |
| Freight - 3rd Party | | (0) | 0 | | (0) | 0 | | (0) | (0) |
| Chip Sales - Weyco - BDT | 6,020 | 541 | 90 | 19,169 | 1,703 | 89 | 82,821 | 7,436 | 90 |
| Freight - Weyco | | (12) | (2) | | (43) | (2) | | (150) | (2) |
| Total Chip Sales - BDT | 6,020 | 529 | 87 | 19,169 | 1,660 | 87 | 83,647 | 7,369 | 90 |
| By-Products | 3,616 | 34 | 13 | 9,589 | 129 | 93 | 39,899 | 532 | 84 |
| Freight - By-Products | | (0) | (0) | | (24) | (2) | | (139) | (0) |
| Other Services | | 0 | 0 | | 5 | 0 | | 55 | 0 |
| Total Sales Revenue - MBF | 3,931 | 3,011 | 766 | 13,451 | 10,906 | 811 | 46,845 | 39,245 | 838 |
| Beg. Inventory - Logs | 2,976 | 1,164 | 391 | 4,679 | 1,854 | 397 | 9,843 | 3,898 | 396 |
| Purchased Logs - 3rd Party | 1,206 | 531 | 440 | 4,224 | 1,821 | 432 | 19,972 | 9,043 | 453 |
| Purchased Logs - Weyco | 2,132 | 633 | 297 | 7,224 | 1,932 | 383 | 23,609 | 9,128 | 386 |
| Thr Transferred In | 102 | 129 | 854 | 282 | 130 | 694 | 831 | 375 | 450 |
| Logs Transferred In - NWH WA | 143 | 69 | 484 | 143 | 69 | 484 | 143 | 69 | 484 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Raw Materials Available | 6,760 | 2,566 | 379 | 16,651 | 5,885 | 354 | 51,598 | 19,068 | 369 |
| Sawmill Conversion - MBF | 3,649 | 1,201 | 329 | 12,643 | 2,916 | 309 | 45,382 | 16,991 | 375 |
| Sawmill Conversion - Scribner | 3,383 | | 355 | 11,398 | | 344 | 43,888 | | 389 |
| 3rd Party Sales | 337 | 112 | 333 | 1,847 | 354 | 192 | 1,216 | 323 | 265 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 48 | 10 | 209 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 339 | 163 | 480 | 779 | 280 | 423 |
| Ending Inventory - Logs | (3,010) | (1,233) | 410 | (3,010) | (1,233) | 410 | (3,010) | (1,233) | 410 |
| Timber Company/Kai | 0 | (9) | 0 | 0 | (154) | 0 | 0 | (154) | 0 |
| Total Net A/C Cost to Lor. | 3,763 | 1,084 | 349 | 12,584 | 4,479 | 338 | 48,575 | 17,453 | 363 |

EXHIBIT 482 P. 4

WY-CDNP-01321

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 1998 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 282 | 209 | 1,037 | 628 | 692 | 1,101 | 2,820 | 2,930 | 1,039 |
| Lumber Transfers from Ore. Loc. | 5 | 9 | 1,726 | 41 | 39 | 960 | 152 | 163 | 1,068 |
| Custom Services | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 18 | 0 |
| Total Outside Incoming Lbr | 287 | 218 | 1,053 | 669 | 731 | 1,093 | 2,972 | 3,111 | 1,047 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,649 | 277 | 76 | 12,043 | 967 | 76 | 45,362 | 3,762 | 83 |
| Maintenance Labor | | 71 | 19 | | 289 | 23 | | 1,145 | 25 |
| Payroll Loading | | 235 | 92 | | 787 | 62 | | 2,228 | 49 |
| Operating Supplies | | 36 | 10 | | 143 | 11 | | 623 | 14 |
| Maintenance Supplies | | 43 | 17 | | 255 | 20 | | 930 | 20 |
| Natural Gas | | 38 | 10 | | 88 | 7 | | 419 | 9 |
| Electricity/Utilities | | 34 | 15 | | 139 | 11 | | 469 | 10 |
| Rent | | 9 | 2 | | 34 | 3 | | 105 | 2 |
| Outside Services | | 104 | 28 | | 206 | 16 | | 684 | 15 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 33 | 1 |
| Fri on Lumber | | 1 | 0 | | 7 | 1 | | 25 | 1 |
| Distributed Expenses | | 0 | 0 | | 1 | 0 | | 7 | 0 |
| Miscellaneous | | 0 | 0 | | 2 | 0 | | 12 | 0 |
| Total Variable Costs | 3,649 | 987 | 270 | 12,063 | 2,919 | 231 | 45,362 | 10,441 | 230 |
| Depreciation | 3,931 | 143 | 36 | 13,431 | 457 | 34 | 46,845 | 1,754 | 37 |
| Taxes | | 41 | 10 | | 73 | 5 | | 234 | 5 |
| Other | | 111 | 28 | | 370 | 27 | | 1,482 | 30 |
| Period Costs | 3,931 | 295 | 75 | 13,431 | 900 | 67 | 46,845 | 3,370 | 72 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 4,903 | 4,621 | 660 | 6,938 | 4,864 | 701 | 5,315 | 3,613 | 680 |
| Ending Inventory Lumber - MBF | (6,812) | (4,715) | 691 | (6,812) | (4,715) | 692 | (6,812) | (4,715) | 692 |
| Total Cost of Sales | 3,931 | 2,710 | 689 | 13,431 | 9,178 | 682 | 46,845 | 33,473 | 715 |
| Gross Profit Contribution | 3,931 | 281 | 77 | 13,431 | 1,728 | 128 | 46,845 | 5,768 | 123 |
| Depreciation | 3,931 | 0 | 0 | 13,431 | 0 | 0 | 46,845 | 0 | 0 |
| Taxes | | 13 | 3 | | 46 | 3 | | 171 | 4 |
| Other | | 0 | 0 | | 1 | 0 | | 19 | 0 |
| Subtotal - Loc. G&A | 3,931 | 13 | 3 | 13,431 | 47 | 3 | 46,845 | 190 | 4 |
| Selling Expense Allocation | 3,931 | 310 | 79 | 13,431 | 650 | 48 | 46,845 | 1,842 | 39 |
| G&A Expense Allocation | | 31 | 8 | | 84 | 6 | | 292 | 6 |
| Total SG&A Expense | 3,931 | 357 | 91 | 13,431 | 780 | 58 | 46,845 | 2,324 | 50 |
| Misc Rev/(Exp) | 3,931 | 0 | 0 | 13,431 | (2) | (0) | 46,845 | 186 | 4 |
| Other Rev/(Exp) | 3,931 | (1) | (0) | 13,431 | 14 | 1 | 46,845 | 17 | 0 |
| Pre-Tax Profit/(Loss) | 3,931 | (57) | (15) | 13,431 | 959 | 71 | 46,845 | 3,637 | 77 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 1.08 | 1.11 | 0.99 |
| Chips Recovery/Lumber MBF | 1.67 | 1.51 | 1.80 |

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EXHIBIT 482 P. 5

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 1999 | Week | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,379 | 2,634 | 522 | 10,081 | 8,326 | 826 | 26,408 | 20,128 | 823 |
| Pallet - MBF | 1,202 | 277 | 230 | 4,476 | 1,034 | 231 | 18,338 | 4,489 | 238 |
| Discounts/Claims | | (23) | (5) | | (55) | (4) | | (214) | (8) |
| Net 3rd Party Sales - MBF | 4,581 | 2,951 | 650 | 14,557 | 9,305 | 639 | 55,446 | 34,412 | 621 |
| Intra Division Sales | | | | | | | | | |
| Sales - Aurora | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CSC | 0 | (0) | 0 | 42 | 37 | 880 | 305 | 271 | 887 |
| Sales - Clarkdale/Tacoma | 0 | (0) | 0 | 18 | 24 | 1,340 | 176 | 236 | 1,340 |
| Sales - Intl Duty Warehouse | 18 | 18 | 1,007 | 36 | 42 | 1,159 | 176 | 232 | 1,321 |
| Lbr Trans. to NWH Midwest Loc. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Roland Loc. | 0 | (0) | 0 | 0 | (0) | 0 | 337 | 33 | 474 |
| Lbr Trans. to NWH Utah Loc. | 33 | 29 | 880 | 121 | 146 | 1,212 | 1,359 | 1,197 | 881 |
| Lbr Trans. to NWH Ore. Loc. | 181 | 133 | 827 | 391 | 368 | 940 | 1,876 | 933 | 912 |
| Total Lumber Sales - MBF | 4,754 | 3,131 | 658 | 15,165 | 9,992 | 659 | 58,453 | 37,288 | 637 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 248 | 54 | 217 | 846 | 183 | 218 | 1,994 | 442 | 221 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (1) | 0 |
| Log Transfers | | | 0 | | | 0 | | | 0 |
| NWH WA - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| NWH OR - MBF | 83 | 33 | 333 | 83 | 22 | 275 | 821 | 292 | 421 |
| Total Log Sales - MBF | 332 | 86 | 257 | 834 | 195 | 234 | 2,815 | 734 | 261 |
| Chip Sales - 3rd Party - BDT | (10) | (2) | 186 | 3,933 | 842 | 93 | 2,896 | 118 | 94 |
| Freight - 3rd Party | | (0) | 0 | | (0) | 0 | | (2) | (2) |
| Chip Sales - Weyco - BDT | 4,991 | 462 | 94 | 14,846 | 1,386 | 94 | 71,960 | 6,682 | 93 |
| Freight - Weyco | | (33) | (7) | | (41) | (3) | | (193) | (3) |
| Total Chip Sales - BDT | 4,981 | 451 | 91 | 18,779 | 2,487 | 91 | 75,856 | 6,681 | 88 |
| By-Products | 3,120 | 48 | 16 | 10,720 | 167 | 15 | 41,969 | 512 | 12 |
| Freight - By-Products | | (13) | (4) | | (36) | (4) | | (142) | (3) |
| Other Services | | 0 | 0 | | 2 | 0 | | 29 | 0 |
| Total Sales Revenue - MBF | 9,954 | 3,703 | 779 | 15,165 | 11,697 | 771 | 58,452 | 45,202 | 773 |
| Beg. Inventory - Logs | 3,861 | 1,414 | 470 | 3,469 | 1,645 | 474 | 3,828 | 1,253 | 444 |
| Purchased Logs - 3rd Party | 1,971 | 574 | 639 | 4,920 | 2,364 | 533 | 23,142 | 17,104 | 993 |
| Other Handling Costs | | (9) | (3) | | 25 | 5 | | 93 | 4 |
| Purchased Logs - Weyco | 1,626 | 633 | 334 | 4,981 | 1,737 | 348 | 24,389 | 8,735 | 330 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Log Transferred In | 400 | 220 | 550 | 586 | 318 | 542 | 971 | 360 | 536 |
| Log Transferred In - NWH WA | 0 | 0 | 0 | 222 | 137 | 621 | 334 | 210 | 628 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Log Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 41 | 0 | 302 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Available | 6,168 | 2,850 | 462 | 14,211 | 6,354 | 450 | 52,483 | 22,183 | 423 |
| Sawmill Conversion - MBF | 3,748 | 1,509 | 403 | (2,951) | 4,291 | 379 | 51,742 | 20,081 | 374 |
| Sawmill Conversion - Scribner | 3,210 | | 470 | 10,595 | | 407 | 47,107 | | 426 |
| 3rd Party Sales | 248 | 54 | 218 | 846 | 217 | 259 | 1,941 | 533 | 278 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH OR | 83 | 33 | 395 | 83 | 33 | 395 | 821 | 292 | 434 |
| Ending Inventory - Logs | (2,823) | (1,261) | 482 | (2,823) | (1,261) | 482 | (2,823) | (1,261) | 482 |
| Timber Conversion/Adj | 0 | 12 | 0 | 0 | (13) | 0 | 0 | (251) | 0 |
| Total Net Rbl Cost to Loc. | 3,543 | 1,594 | 450 | 11,529 | 5,116 | 444 | 49,722 | 20,663 | 416 |

EXHIBIT 482 P. 6

WY-CONF-01297

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 65 | 73 | 1,124 | 389 | 415 | 1,067 | 3,103 | 3,134 | 1,009 |
| Freight from Wash. Loc. | | 2 | 36 | | 5 | 14 | | 20 | 10 |
| Lumber Transfers from Ore. Loc. | 8 | 82 | 1,357 | 601 | 480 | 667 | 2,172 | 1,512 | 696 |
| Freight from Ore. Loc. | | 0 | 0 | | 18 | 29 | | 44 | 20 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Outside Incoming Lbr | 73 | 87 | 1,183 | 990 | 839 | 847 | 5,275 | 4,720 | 895 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,748 | 297 | 79 | 12,921 | 1,028 | 80 | 53,742 | 4,234 | 79 |
| Maintenance Labor | | 92 | 25 | | 296 | 23 | | 1,199 | 22 |
| Payroll Loading | | 236 | 63 | | 673 | 52 | | 2,373 | 44 |
| Operating Supplies | | 40 | 11 | | 179 | 13 | | 723 | 13 |
| Maintenance Supplies | | 72 | 19 | | 185 | 14 | | 880 | 16 |
| Natural Gas | | 47 | 13 | | 116 | 9 | | 367 | 7 |
| Electricity/Utilities | | 59 | 15 | | 140 | 11 | | 581 | 10 |
| Rent | | 10 | 3 | | 10 | 1 | | 77 | 1 |
| Outside Services | | 15 | 4 | | 63 | 3 | | 398 | 5 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Fee on Lumber | | 2 | 1 | | 5 | 0 | | 10 | 0 |
| Distributed Expenses | | 0 | 0 | | 8 | 1 | | 23 | 0 |
| Miscellaneous | | 9 | 2 | | 27 | 2 | | 58 | 1 |
| Total Variable Costs | 3,748 | 871 | 232 | 12,921 | 1,728 | 715 | 53,742 | 10,838 | 233 |
| Depreciation | 4,754 | 144 | 30 | 15,165 | 465 | 31 | 58,652 | 1,984 | 34 |
| Taxes | | 13 | 3 | | 43 | 3 | | 194 | 3 |
| Other | | 91 | 19 | | 320 | 21 | | 1,299 | 22 |
| Period Costs | 4,754 | 248 | 52 | 15,165 | 827 | 55 | 58,652 | 3,456 | 59 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 8,164 | 6,181 | 753 | 8,624 | 6,890 | 723 | 6,813 | 4,715 | 692 |
| Ending Inventory Lumber - MBF | (7,171) | (5,509) | 768 | (7,171) | (5,509) | 768 | (7,171) | (5,509) | 768 |
| Total Cost of Sales | 4,754 | 3,993 | 714 | 15,165 | 10,098 | 665 | 58,652 | 38,937 | 664 |
| Gross Profit Contribution | 4,754 | 310 | 65 | 15,165 | 1,007 | 106 | 58,652 | 6,265 | 107 |
| Depreciation | 4,754 | 0 | 0 | 15,165 | 0 | 0 | 58,652 | 0 | 0 |
| Taxes | | 12 | 3 | | 49 | 3 | | 192 | 3 |
| Other | | 0 | 0 | | 1 | 0 | | 3 | 0 |
| Subtotal - Loc. G&A | 4,754 | 16 | 3 | 15,165 | 50 | 3 | 58,652 | 195 | 3 |
| Selling Expense Allocation | 4,754 | 185 | 35 | 15,165 | 534 | 35 | 58,652 | 2,057 | 35 |
| G&A Expense Allocation | | 25 | 5 | | 80 | 5 | | 308 | 5 |
| Total SG&A Expense | 4,754 | 206 | 43 | 15,165 | 664 | 44 | 58,652 | 2,561 | 44 |
| Misc Rev/(Exp) | 4,754 | 7 | 0 | 15,165 | 7 | 0 | 58,652 | 15 | 0 |
| Other Rev/(Exp) | 4,754 | (2) | (0) | 15,165 | (5) | (0) | 58,652 | 64 | 1 |
| Pre-Tax Profit/(Loss) | 4,754 | 103 | 22 | 15,165 | 938 | 62 | 58,652 | 2,783 | 44 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 0.37 | 0.33 | 0.34 |
| Chips Recovery/Lumber MBF | 0.23 | 0.27 | 0.41 |

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EXHIBIT 482 P. 7

WY-CONF-01298

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 2000 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| London - MBF | 2,734 | 2,387 | 873 | 9,078 | 7,755 | 854 | 34,360 | 29,472 | 858 |
| Palco - MBF | 1,834 | 448 | 228 | 6,187 | 1,438 | 232 | 22,153 | 5,109 | 231 |
| Discounts/Claims | | (23) | (5) | | (72) | (5) | | (249) | (11) |
| Net 3rd Party Sales - MBF | 4,568 | 2,787 | 609 | 15,185 | 9,098 | 599 | 57,891 | 34,348 | 603 |
| Inter Division Sales | | | | | | | | | |
| Sales - Remco | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CSC | 20 | 26 | 1,294 | 81 | 97 | 1,203 | 321 | 385 | 930 |
| Sales - Otsego/Tahoe | 18 | 28 | 1,543 | 53 | 78 | 1,457 | 230 | 328 | 1,423 |
| Sales - Hdl/Daly Warehouse | 0 | (0) | 0 | 0 | (0) | 0 | 143 | 190 | 1,330 |
| Lbr Trans. to NWH Hideaway Lac. | 0 | (0) | 0 | 0 | (0) | 0 | 43 | 72 | 1,673 |
| Lbr Trans. to NWH Acland Lac. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Wash. Lac. | 40 | 38 | 959 | 535 | 533 | 1,004 | 2,984 | 2,964 | 993 |
| Lbr Trans. to NWH Ore. Lac. | 190 | 193 | 1,019 | 390 | 418 | 1,072 | 2,611 | 1,996 | 993 |
| Total Lumber Sales - MBF | 4,836 | 2,867 | 636 | 16,248 | 10,223 | 629 | 62,832 | 39,854 | 634 |
| Log Trade Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0) | 0 | 0 | (17) | 0 | 3,023 | 714 | 236 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | 0 | | | 0 | | | 0 |
| NWH WA - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| NWH OR - MBF | 0 | (0) | 0 | 147 | 57 | 403 | 653 | 345 | 526 |
| Total Log Sales - MBF | 0 | (0) | 0 | 147 | 57 | 387 | 3,681 | 1,057 | 287 |
| Chip Sales - 3rd Party - BDT | 510 | 50 | 98 | 647 | 64 | 98 | 2,905 | 281 | 96 |
| Freight - 3rd Party | | (4) | (7) | | (4) | (7) | | (9) | (99) |
| Chip Sales - Weyco - BDT | 3,838 | 356 | 93 | 12,896 | 1,192 | 93 | 52,688 | 4,926 | 93 |
| Freight - Weyco | | (11) | (3) | | (39) | (3) | | (141) | (3) |
| Chip Sales - PFP - BDT | 0 | (0) | 0 | 0 | (0) | 0 | 6,381 | 594 | 93 |
| Freight - PFP | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Total Chip Sales - BDT | 4,348 | 392 | 90 | 13,492 | 1,256 | 93 | 61,974 | 5,812 | 94 |
| By-Products | 2,833 | 65 | 23 | 9,330 | 154 | 16 | 39,646 | 887 | 22 |
| Freight - By-Products | | (10) | (4) | | (34) | (4) | | (139) | (3) |
| Other Services | | 0 | 0 | | 2 | 0 | | 10 | 0 |
| Total Sales Revenue - MBF | 4,836 | 3,454 | 714 | 16,348 | 11,466 | 714 | 67,832 | 48,579 | 748 |
| Beg. Inventory - Logs | 2,199 | 1,599 | 727 | 3,341 | 2,343 | 522 | 2,625 | 1,963 | 482 |
| Purchased Logs - 3rd Party | 2,191 | 1,350 | 616 | 7,580 | 4,436 | 394 | 27,481 | 15,461 | 563 |
| Other Handling Costs | | 7 | 3 | | 0 | 0 | | 44 | 2 |
| Purchased Logs - Weyco | 1,128 | 527 | 467 | 3,676 | 1,536 | 432 | 14,431 | 6,624 | 459 |
| Other Handling Costs | | 8 | 8 | | 0 | 0 | | 0 | 0 |
| Log Transferred In | 75 | 48 | 636 | 75 | 48 | 635 | 253 | 179 | 710 |
| Logs Transferred In - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 1,729 | 920 | 532 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 128 | 63 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Available | 6,173 | 3,481 | 564 | 13,943 | 7,397 | 545 | 48,635 | 24,604 | 506 |
| Sawmill Conversion - MBF | 4,801 | 1,643 | 411 | 12,827 | 5,499 | 394 | 35,383 | 21,103 | 597 |
| Sawmill Conversion - Softwood | 2,981 | | 588 | 10,210 | | 538 | 31,767 | | 570 |
| 3rd Party Sales | 0 | 0 | 0 | 0 | 0 | 0 | 3,023 | 712 | 235 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 642 | 57 | 403 | 653 | 345 | 526 |
| Ending Inventory - Logs | (2,199) | (1,561) | 577 | (3,189) | (1,861) | 577 | (3,189) | (1,861) | 577 |
| Total Net Rm. Cost to Lbr. | 3,983 | 1,643 | 980 | 10,357 | 3,549 | 526 | 15,448 | 22,763 | 501 |

EXHIBIT 482 P. 8

WY-CONF-01273

Longview - Mill Summary Results

Northwest Hardwoods - Longview

($000)

| December 2000 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Lac. | 183 | 288 | 1,106 | 630 | 715 | 1,162 | 2,096 | 2,264 | 1,080 |
| Freight from Wash. Lac. | | 1 | 5 | | 4 | 6 | | 14 | 7 |
| Lumber Transfers from Ore. Lac. | 113 | 156 | 733 | 816 | 607 | 744 | 3,668 | 2,796 | 731 |
| Freight from Ore. Lac. | | 0 | 32 | | 23 | 28 | | 81 | 22 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Outside Incoming Lbr | 346 | 336 | 964 | 1,466 | 1,389 | 947 | 5,764 | 5,963 | 778 |
| Chip Costs - PEP | 0 | 0 | 0 | 0 | 0 | 0 | 6,331 | 609 | 97 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 4,981 | 291 | 73 | 13,927 | 956 | 72 | 55,283 | 4,128 | 75 |
| Maintenance Labor | | 83 | 21 | | 283 | 20 | | 1,071 | 19 |
| Payroll Loading | | 233 | 53 | | 854 | 58 | | 2,746 | 50 |
| Operating Supplies | | 49 | 12 | | 186 | 13 | | 703 | 14 |
| Maintenance Supplies | | 83 | 20 | | 238 | 17 | | 882 | 16 |
| Natural Gas | | 36 | 9 | | 97 | 7 | | 362 | 7 |
| Electricity/Utilities | | 62 | 15 | | 185 | 13 | | 584 | 12 |
| Rent | | 11 | 3 | | 33 | 3 | | 149 | 3 |
| Outside Services | | 34 | 8 | | 52 | 4 | | 203 | 4 |
| Outside Services - Drying | | 9 | 0 | | 0 | 0 | | 0 | 0 |
| Fill or Lumber | | 0 | 0 | | 0 | 0 | | 3 | 0 |
| Distributed Expenses | | 0 | 0 | | 0 | 0 | | (10) | (0) |
| Miscellaneous | | (0) | (0) | | 1 | 0 | | 27 | 0 |
| Total Variable Costs | 4,981 | 971 | 243 | 13,927 | 3,887 | 269 | 55,283 | 10,849 | 193 |
| Depreciation | 4,826 | 303 | 63 | 16,248 | 1,020 | 63 | 65,832 | 1,910 | 29 |
| Taxes | | 9 | 2 | | 29 | 2 | | 133 | 2 |
| Other | | 129 | 27 | | 365 | 22 | | 1,289 | 20 |
| Period Costs | 4,826 | 441 | 91 | 16,248 | 914 | 56 | 65,832 | 3,336 | 51 |
| Mad Date Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 2,916 | 2,692 | 923 | 4,541 | 3,674 | 809 | 7,176 | 5,689 | 793 |
| Ending Inventory Lumber - MBF | (3,479) | (4,998) | 909 | (3,479) | (4,998) | 909 | (3,479) | (4,998) | 909 |
| Total Cost of Sales | 4,826 | 3,494 | 724 | 16,248 | 10,931 | 673 | 65,832 | 43,256 | 657 |
| Gross Profit Contribution | 4,826 | 0 | 0 | 16,248 | 670 | 42 | 65,832 | 3,729 | 57 |
| Depreciation | 4,826 | 0 | 0 | 16,248 | 0 | 0 | 65,832 | 0 | 0 |
| Taxes | | 15 | 3 | | 49 | 3 | | 190 | 3 |
| Other | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Interest - Lac. G&A | 4,826 | 15 | 3 | 16,248 | 49 | 3 | 65,832 | 190 | 3 |
| Selling Expense Allocation | 4,826 | 83 | 18 | 16,248 | 227 | 15 | 65,832 | 948 | 15 |
| G&A Expense Allocation | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total SG&A Expense | 4,826 | 100 | 21 | 16,248 | 286 | 18 | 65,832 | 1,138 | 18 |
| Misc Rent/(Exp) | 4,826 | 0 | 0 | 16,248 | 5 | 0 | 65,832 | 23 | 0 |
| Other Acct/Exp | 4,826 | (2) | (0) | 16,248 | 157 | 10 | 65,832 | 226 | 3 |
| Pre-Tax Profit/Loss | 4,826 | (102) | (21) | 16,248 | 531 | 34 | 65,832 | 2,343 | 40 |
| Lumber Recovery/Logs | | 5.33 | | | 5.34 | | | 5.33 | |
| Chips Recovery/Lumber MBF | | 0.68 | | | 0.97 | | | 1.00 | |

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 2001 | Month | | | Quarter To Date | | | Year To Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 1/9/2002 15:19 | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 2,029 | 1,755,306 | 865 | 7,918 | 6,689,001 | 844 | 33,794 | 27,583,267 | 816 |
| Pallet - MBF | 1,505 | 361,336 | 240 | 4,991 | 1,133,075 | 227 | 22,930 | 5,068,100 | 221 |
| Discounts/Claims | | (14,455) | (4) | | (34,367) | (5) | | (217,412) | (9) |
| Net 3rd Party Sales - MBF | 3,534 | 2,101,588 | 595 | 12,909 | 7,788,708 | 603 | 56,723 | 32,435,965 | 572 |
| Intra Division Sales | | | | | | | | | |
| Sales - Roman | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - CSC | 0 | (0.000) | 0 | 20 | 20,352 | 1,005 | 253 | 244,653 | 969 |
| Sales - Okmee/Tijeras | 0 | (0.000) | 0 | 20 | 27,373 | 1,375 | 143 | 192,832 | 1,352 |
| Sales - Oak/Delq Warehouse | 0 | (0.000) | 0 | 18 | 23,081 | 1,318 | 36 | 44,572 | 1,249 |
| Lbr Trans. to NWH Midwest Loc. | 9 | 8,581 | 939 | 30 | 34,587 | 1,156 | 73 | 95,569 | 1,308 |
| Lbr Trans. to NWH Retail Loc. | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Work. Loc. | 18 | 26,772 | 705 | 171 | 181,677 | 1,118 | 1,950 | 1,882,861 | 966 |
| Lbr Trans. to NWH Ore. Loc. | 121 | 36,349 | 1,127 | 478 | 508,510 | 1,067 | 1,759 | 1,647,575 | 937 |
| Total Lumber Sales - MBF | 3,702 | 2,234,296 | 604 | 13,646 | 8,556,212 | 627 | 58,946 | 36,529,831 | 620 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 65 | 11,430 | 178 | 99 | 16,646 | 168 | 102 | 17,673 | 173 |
| Weyco - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| | | | 0 | | | 0 | | | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| NWH OR - MBF | 193 | 49,102 | 254 | 193 | 49,102 | 254 | 313 | 91,966 | 293 |
| Total Log Sales - MBF | 258 | 60,531 | 235 | 292 | 65,747 | 225 | 415 | 102,639 | 247 |
| Chip Sales - 3rd Party - BDT | 2,021 | 157,411 | 78 | 4,321 | 330,528 | 76 | 12,709 | 1,091,310 | 86 |
| Freight - 3rd Party | | (13,531) | (7) | | (28,051) | (6) | | (80,049) | (6) |
| Chip Sales - Weyco - BDT | 667 | 44,503 | 67 | 1,028 | 420,232 | 91 | 34,699 | 2,798,663 | 81 |
| Freight - Weyco | | (1,340) | (2) | | (15,671) | (3) | | (99,991) | (3) |
| Chip Sales - PFP - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Freight - PFP | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Chip Sales - BDT | 2,688 | 188,644 | 70 | 10,347 | 707,437 | 68 | 47,208 | 3,726,934 | 79 |
| By-Products | 2,511 | 36,257 | 14 | 8,491 | 128,160 | 15 | 36,644 | 555,287 | 15 |
| Freight - By-Products | | (7,500) | (3) | | (23,356) | (3) | | (170,619) | (5) |
| Other Services | | 0.519 | 0 | | 0.796 | 0 | | 2,798 | 0 |
| Total Sales Revenue - MBF | 3,702 | 2,513,626 | 690 | 13,646 | 9,421,978 | 691 | 58,946 | 40,806,670 | 692 |
| Beg. Inventory - Logs | 2,219 | 942,599 | 424 | 1,521 | 675,795 | 444 | 3,189 | 1,841,510 | 577 |
| Purchased Logs - 3rd Party | 1,385 | 919,247 | 664 | 4,661 | 3,329,629 | 699 | 23,234 | 13,432,999 | 537 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 4,875 | 0 |
| Purchased Logs - Weyco | 1,021 | 322,843 | 316 | 2,579 | 918,202 | 388 | 11,336 | 4,034,691 | 356 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 46,346 | 4 |
| Tfr Transferred In | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 236 | 115,626 | 535 |
| Logs Transferred In - NWH WA | 2 | 1,756 | 585 | 926 | 437,682 | 473 | 1,249 | 549,852 | 436 |
| Other Handling Costs | | 0.000 | 0 | | 30,967 | 34 | | 30,759 | 29 |
| Logs Transferred In - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Raw Materials Available | 4,660 | 2,002,642 | 429 | 10,090 | 4,391,474 | 435 | 39,026 | 19,111,319 | 490 |
| Sawmill Conversion - MBF | 3,698 | 981,511 | 265 | 11,486 | 3,269,983 | 285 | 52,185 | 14,838,371 | 284 |
| Sawmill Conversion - Scribner | 2,187 | | 443 | 7,570 | | 445 | 36,383 | | 406 |
| 3rd Party Sales | 65 | 10,279 | 158 | 99 | 15,739 | 159 | 102 | 16,473 | 161 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred Out - NWH OR | 193 | 49,102 | 254 | 193 | 49,102 | 254 | 313 | 94,966 | 303 |
| Ending Inventory - Logs | (2,222) | (794,530) | 433 | (2,222) | (794,530) | 433 | (2,222) | (794,530) | 433 |
| Total Net RM Cost to Loc. | 7,445 | 1,349,893 | 426 | 7,862 | 3,475,974 | 436 | 36,798 | 15,169,749 | 493 |

EXHIBIT 482 P. 10

## Longview - Mill Summary Results

### Northwest Hardwoods - Longview

($000)

| December 2001 | March | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Wash. Loc. | 42 | 83.112 | 2,026 | 481 | 637.319 | 1,325 | 3,032 | 3,674.727 | 1,212 |
| Freight from Wash. Loc. | | 1.288 | 31 | | 3.593 | 7 | | 20.382 | 7 |
| Lumber Transfers from Ore. Loc. | 71 | 72.700 | 1,103 | 340 | 380.867 | 1,118 | 1,716 | 1,200.103 | 1,075 |
| Freight from Ore. Loc. | | 0.532 | 8 | | 2.527 | 7 | | 14.187 | 13 |
| Custom Services | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total Outside Inventory Use | 113 | 160.632 | 1,446 | 931 | 1,023.489 | 1,247 | 4,748 | 4,909.402 | 1,184 |
| Chip Costs - FFP | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,493 | 224.684 | 64 | 11,486 | 702.289 | 61 | 55,183 | 3,570.007 | 65 |
| Maintenance Labor | | 74.500 | 21 | | 252.301 | 22 | | 1,053.103 | 19 |
| Payroll Loading | | 11.718 | 3 | | 279.480 | 24 | | 2,016.909 | 37 |
| Operating Supplies | | 25.016 | 7 | | 119.897 | 10 | | 603.792 | 11 |
| Maintenance Supplies | | 28.103 | 8 | | 139.372 | 12 | | 698.233 | 12 |
| Natural Gas | | 68.229 | 20 | | 155.677 | 14 | | 783.349 | 14 |
| Electricity/Utilities | | 86.585 | 25 | | 217.914 | 19 | | 698.830 | 13 |
| Rent | | 9.420 | 3 | | 31.823 | 3 | | 125.110 | 2 |
| Outside Services | | 7.379 | 2 | | 48.870 | 4 | | 221.394 | 4 |
| Outside Services - Drying | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Fee on Lumber | | 0.000 | 0 | | 0.195 | 0 | | 0.640 | 0 |
| Distributed Expenses | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Miscellaneous | | 0.458 | 0 | | 2.225 | 0 | | 10.850 | 1 |
| Total Variable Costs | 3,493 | 536.036 | 153 | 11,486 | 2,029.962 | 177 | 55,183 | 9,763.595 | 177 |
| Depreciation | 3,702 | 147.185 | 40 | 13,646 | 484.394 | 35 | 58,946 | 1,939.420 | 33 |
| Taxes | | 21.423 | 6 | | 69.626 | 5 | | 245.645 | 4 |
| Other | | 89.410 | 24 | | 292.865 | 21 | | 1,299.641 | 21 |
| Period Costs | 3,702 | 258.018 | 70 | 13,646 | 846.883 | 62 | 58,946 | 3,434.707 | 58 |
| Bad Debt Expense | 1 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Beg. Inventory Lumber - MBF | 5,896 | 4,634.431 | 794 | 7,161 | 5,683.914 | 794 | 5,479 | 4,978.189 | 909 |
| Ending Inventory Lumber - MBF | (5,899) | (4,595.183) | 791 | (5,899) | (4,595.183) | 791 | (5,899) | (4,595.183) | 791 |
| Total Cost of Sales | 3,700 | 2,890.711 | 963 | 13,646 | 8,418.909 | 617 | 58,946 | 36,630.288 | 622 |
| Gross Profit Contribution | 3,702 | 462.315 | 125 | 13,646 | 1,013.980 | 74 | 58,946 | 4,156.482 | 71 |
| Depreciation | 3,702 | 0.000 | 0 | 13,646 | 0.000 | 0 | 58,946 | 0.000 | 0 |
| Taxes | | 11.073 | 3 | | 42.736 | 3 | | 177.730 | 3 |
| Other | | 0.133 | 0 | | 0.155 | 0 | | 0.534 | 0 |
| Subtotal - Loc. G&A | 3,702 | 11.038 | 3 | 13,646 | 42.891 | 3 | 58,946 | 178.264 | 3 |
| Selling Expense Allocation | 3,702 | 0.000 | 0 | 13,646 | 0.000 | 0 | 58,946 | 0.000 | 0 |
| G&A Expense Allocation | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 3,702 | 11.038 | 3 | 13,646 | 42.891 | 3 | 58,946 | 178.264 | 3 |
| Misc Rev/(Exp) | 3,702 | 2.488 | 1 | 13,646 | (1.522) | (0) | 58,946 | 16.253 | 0 |
| Other Rev/(Exp) | 3,702 | 7.170 | 1 | 13,646 | (2.307) | (0) | 58,946 | (13.610) | (0) |
| Pre-Tax Profit/(Loss) | 3,702 | 454.942 | 123 | 13,646 | 967.260 | 71 | 58,946 | 3,981.958 | 68 |
| Lumber Recovery/Log | | 1.60 | | | 1.52 | | | 1.52 | |
| Chips Recovery/Lumber MBF | | 0.72 | | | 0.70 | | | 0.86 | |
| Timber Prod/(Loss) | | (5.000) | | | (0.000) | | | 23.000 | |
| Hours | | 454.942 | | | 967.260 | | | 4,004.896 | |
| Difference | | (0.000) | | | (0.000) | | | (0.000) | |

EXHIBIT 482 P. 11

## Delta US- Mill Summary Results

### Northwest Hardwoods - Delta, BC -US

($000)

| December 2007 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 10/2002 15:31 | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,006 | 1,320,722 | 1,315 | 5,112 | 4,144,978 | 788 | 17,146 | 12,628,089 | 737 |
| Pulp - MBF | 819 | 150,871 | 185 | 3,667 | 641,956 | 183 | 17,094 | 3,145,956 | 184 |
| Discounts/Claims | | (7,530) | (4) | | (28,329) | (3) | | (102,784) | (3) |
| Net 3rd Party Sales - MBF | 1,862 | 1,471,663 | 790 | 8,779 | 4,758,645 | 542 | 34,340 | 15,671,677 | 456 |
| Intra Division Sales | | | | | | | | | |
| Sales - CSC | 0 | (0.000) | 0 | 63 | 97,924 | 1,412 | 86 | 115,457 | 1,341 |
| Sales - Ocean/Taiwan | 17 | 25,847 | 1,533 | 17 | 23,847 | 1,535 | 34 | 53,457 | 1,570 |
| Sales - India/Belgium | 0 | (0.000) | 0 | 19 | 25,086 | 1,334 | 19 | 25,086 | 1,334 |
| Sales to NWH Wash. Loc. | 158 | 152,446 | 965 | 333 | 288,343 | 1,046 | 4,830 | 3,740,040 | 774 |
| Sales to NWH Delta CAN Loc. | 66 | 24,437 | 1,439 | 84 | 115,548 | 1,370 | 124 | 161,826 | 1,309 |
| Total Lumber Sales - MBF | 2,054 | 1,674,393 | 815 | 9,213 | 5,269,193 | 572 | 39,353 | 19,767,725 | 540 |
| Chip Sales - 3rd Party - BDT | 3,246 | 244,063 | 75 | 7,696 | 585,962 | 76 | 32,913 | 2,311,346 | 71 |
| Freight - 3rd Party | | (40,114) | (12) | | (65,259) | (8) | | (65,259) | (2) |
| Chip Sales - Weyco - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Freight - Weyco | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Chip Sales - BDT | 3,246 | 203,954 | 63 | 7,696 | 520,703 | 68 | 32,913 | 2,245,886 | 69 |
| Total Sales Revenue - MBF | 2,054 | 1,878,347 | 915 | 9,213 | 5,789,896 | 628 | 39,353 | 22,013,649 | 560 |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Wash Loc. | 66 | 24,437 | 1,499 | 84 | 111,548 | 1,330 | 120 | 156,978 | 1,304 |
| Freight from Wash Loc. | | 0.000 | 0 | | 0.522 | 7 | | 1.166 | 10 |
| Lumber Transfers from Ore Loc. | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 3 | 4.845 | 1,615 |
| Freight from Ore Loc | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Lumber Transfers from Delta-CAN Loc. | 1,108 | 1,672,534 | 506 | 9,129 | 5,146,623 | 564 | 39,219 | 19,587,393 | 499 |
| Freight from Delta-CAN Loc. | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Canusa Sawyers | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total Outside Inventory Lbr | 3,335 | 1,696,971 | 510 | 9,213 | 5,262,733 | 571 | 39,343 | 19,745,387 | 502 |
| Chip Transfer from Delta-Can - BDT | 3,246 | 203,954 | 63 | 7,696 | 520,703 | 68 | 32,913 | 2,245,886 | 69 |
| Taxes | 2,054 | 0.000 | 0 | 9,213 | 0.000 | 0 | 39,353 | 0.000 | 0 |
| Other - MF | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Other - Reserve | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Period Cost | 2,054 | 0.000 | 0 | 9,213 | 0.000 | 0 | 39,353 | 0.000 | 0 |
| Gross Profit Contribution | 2,054 | (22,578) | (11) | 9,213 | 4,463 | 1 | 39,353 | 22,395 | 1 |
| Depreciation | 2,054 | 0.000 | 0 | 9,213 | 0.000 | 0 | 39,353 | 0.000 | 0 |
| Taxes | | 0.000 | 0 | | 0.000 | 0 | | 1.415 | 0 |
| Other | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 2,054 | 0.000 | 0 | 9,213 | 0.000 | 0 | 39,353 | 1,415 | 0 |
| Commission Fee | 2,054 | 41,300 | 22 | 9,213 | 147,190 | 16 | 39,225 | 188,422 | 13 |
| Misc Rev/(Exp) | | (0.000) | (0) | | (0.000) | (0) | | (1.423) | (0) |
| Other Rev/(Exp) | | (1.212) | (1) | | (3.637) | (0) | | (11.350) | (0) |
| Pre-Tax Pro(Of)Loss | 2,054 | 21,510 | 10 | 9,213 | 149,973 | 16 | 39,353 | 597,968 | 15 |
| Lumber Recovery/Loss | | 0.00 | | | 0.00 | | | 0.00 | |
| Chips Recovery/Lumber MBF | | 0.00 | | | 0.00 | | | 0.00 | |
| Timber Profit/Loss | | - | | | - | | | - | |
| Books | | 21,510 | | | 149,973 | | | 597,968 | |
| Difference | | 0.000 | | | 0.000 | | | 0.000 | |

EXHIBIT 482 P. 12

## Delta Can- Mill Summary Results

Northwest Hardwoods - Delta, BC -Canada

($000)

| December 2002 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 1/8/2003 15:51 | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Sales to NWH Delta US Loc. | 3,388 | 1,689.552 | 511 | 9,129 | 5,190.038 | 569 | 39,224 | 19,544.297 | 498 |
| Total Lumber Sales - MBF | 3,388 | 1,689.552 | 511 | 9,129 | 5,190.038 | 569 | 39,224 | 19,544.297 | 498 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0.000) | 0 | 3 | 0.439 | 172 | 277 | 67.263 | 243 |
| Weyco - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| NWH Delta US - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Total Log Sales - MBF | 0 | (0.000) | 0 | 3 | 0.439 | 172 | 277 | 67.263 | 243 |
| Chip Sales - to Delta US- BDT | 3,246 | 264.058 | 75 | 8,662 | 583.962 | 68 | 33,681 | 2,311.174 | 69 |
| Freight - to Delta US | | (40.114) | (13) | | (105.582) | (12) | | (405.582) | (9) |
| Chip Sales - Weyco - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Freight - Weyco | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Chip Sales - BDT | 3,246 | 203.954 | 63 | 8,662 | 482.440 | 56 | 33,681 | 2,205.672 | 65 |
| By-Product | 1,470 | 4.184 | 3 | 1,470 | 4.184 | 3 | 1,470 | 4.184 | 3 |
| Freight - By-Product | | (0.000) | (0) | | (0.000) | (0) | | (0.000) | (0) |
| Other Services | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Sales Revenue - MBF | 3,388 | 1,897.690 | 574 | 9,129 | 5,675.129 | 622 | 39,224 | 21,821.416 | 556 |
| Beg. Inventory - Logs | 7,168 | 2,304.830 | 303 | 3,018 | 890.840 | 295 | 2,022 | 504.894 | 248 |
| Purchased Logs - 3rd Party | 1,364 | 442.829 | 283 | 8,707 | 2,558.220 | 294 | 22,474 | 6,347.606 | 282 |
| Other Handling Costs | | 50.617 | 32 | | 164.233 | 19 | | 600.227 | 27 |
| Purchased Logs - Weyco | 843 | 234.851 | 283 | 2,352 | 661.925 | 281 | 9,847 | 2,778.334 | 282 |
| Other Handling Costs | | 32.034 | 38 | | 39.586 | 17 | | 183.273 | 19 |
| Hr Transferred In | 415 | 125.010 | 309 | 701 | 213.178 | 303 | 6,741 | 1,669.401 | 248 |
| Raw Materials Available | 9,990 | 3,097.110 | 310 | 14,780 | 4,527.991 | 306 | 40,580 | 11,885.814 | 293 |
| Sawmill Conversion - MBF | 2,759 | 654.730 | 237 | 8,519 | 2,162.512 | 254 | 46,158 | 9,868.544 | 214 |
| Sawmill Conversion - Software | 2,871 | | 316 | 6,345 | | 312 | 32,322 | | 281 |
| 3rd Party Sales | 0 | 0.000 | 0 | 3 | 0.363 | 143 | 277 | 62.337 | 225 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred Out - NWH Delta US | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| End. Inventory - Logs | (7,967) | (2,385.090) | 299 | (7,967) | (2,385.090) | 299 | (7,967) | (2,385.090) | 299 |
| Total Net RM Cost to Loc. | 2,023 | 712.050 | 352 | 6,814 | 2,142.904 | 315 | 32,613 | 9,508.734 | 291 |
| Boomsticks/Stray Gear Costs | | 10.581 | | | 101.472 | | | 105.910 | |
| Beg. Inventory - Boomsticks/Gear - MBF | 875 | 368.874 | 421 | 1,570 | 358.634 | 228 | 674 | 368.174 | 813 |
| End. Inventory - Boomsticks/Gear - MBF | (1,037) | (412.788) | 397 | (1,037) | (412.788) | 397 | (1,037) | (412.788) | 397 |
| Total Boomsticks/Gear | 0 | (12.833) | 0 | 0 | 47.319 | 0 | 0 | 241.796 | 0 |
| Total RM & Boomstick/Gear Cost | 2,023 | 699.265 | 346 | 6,814 | 2,190.723 | 322 | 32,613 | 9,749.530 | 299 |

Delta Can- Mill Summary Results

Northwest Hardwoods - Delta, BC -Canada

($000)

| December 2001 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Delta-US Loc. | 16 | 25.934 | 1,517 | 84 | 118.938 | 1,371 | 108 | 121.217 | 1,063 |
| Freight from Delta-US Loc. | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Custom Services | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Total Outside Increasing Lbr | 16 | 25.934 | 1,591 | 84 | 118.938 | 1,410 | 108 | 121.317 | 1,118 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 2,759 | 149.252 | 54 | 8,519 | 563.301 | 66 | 48,150 | 2,718,246 | 68 |
| Maintenance Labor | | 56.555 | 20 | | 193.195 | 23 | | 798,739 | 20 |
| Payroll Loading | | 51.898 | 19 | | 265.017 | 31 | | 1,480,810 | 37 |
| Operating Supplies | | 72.161 | 26 | | 167.528 | 20 | | 759,615 | 19 |
| Maintenance Supplies | | 45.264 | 16 | | 119.147 | 14 | | 653,451 | 16 |
| Natural Gas | | 2.954 | 1 | | 94.305 | 11 | | 469,384 | 12 |
| Electricity/Utilities | | 31.710 | 11 | | 84.759 | 10 | | 482,302 | 10 |
| Rent | | 13.188 | 6 | | 46.264 | 5 | | 177,953 | 4 |
| Outside Services | | 48.250 | 17 | | 119.405 | 14 | | 534,035 | 13 |
| Outside Services - Drying | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Fee on Lumber | | 1.506 | 1 | | 11.523 | 3 | | 68,159 | 2 |
| Distributed Expenses | | (71.489) | (26) | | (31.431) | (4) | | (31,431) | (1) |
| Miscellaneous | | 8.533 | 3 | | 11.466 | 1 | | 104,513 | 3 |
| Total Variable Costs | 2,759 | 413.806 | 150 | 8,519 | 1,434.537 | 192 | 48,150 | 8,955,475 | 202 |
| Depreciation | 3,308 | 66.646 | 20 | 9,129 | 219.607 | 24 | 68,416 | 897,363 | 49 |
| Taxes | | (16.025) | (5) | | 13.545 | 1 | | 122,932 | 3 |
| Stores Adjustment | | 29.213 | 9 | | 74.238 | 9 | | 348,707 | 8 |
| Other - Mill | | 173.600 | 57 | | 383.833 | 42 | | 1,361,804 | 35 |
| Other - Resource | | 21.526 | 6 | | 68.249 | 7 | | 291,333 | 7 |
| Period Costs | 3,308 | 233.331 | 67 | 9,129 | 746.458 | 82 | 68,416 | 3,041,558 | 145 |
| Beg Inv Chips - BDT | 1,025 | 51.830 | 51 | 768 | 43.634 | 56 | 750 | 76,909 | 102 |
| End Inv Chips - BDT | (995) | (53.102) | 54 | (768) | (53.165) | 92 | (300) | (15,188) | 50 |
| Beg Inv Lumber - MBF | 3,964 | 2,742.643 | 687 | 4,742 | 3,148.699 | 663 | 3,422 | 1,799,610 | 526 |
| End Inv Lumber - MBF | (3,974) | (2,426.595) | 611 | (3,974) | (2,426.595) | 611 | (3,974) | (2,426,595) | 611 |
| Total Cost of Sales | 3,309 | 1,713.333 | 518 | 9,129 | 5,431.450 | 595 | 39,224 | 10,436,159 | 530 |
| Gross Profit Contribution | 3,308 | 184.268 | 56 | 9,129 | 249.630 | 27 | 39,224 | 1,345,257 | 35 |
| Depreciation | 3,308 | 0.000 | 0 | 9,129 | 0.000 | 0 | 39,224 | 0.000 | 0 |
| Taxes | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Other | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expenses | 3,308 | 0.000 | 0 | 9,129 | 0.000 | 0 | 39,224 | 0.000 | 0 |
| Stock Rate - Inventories Rev/(Exp) | 0 | 39.351 | 0 | 0 | 21.978 | 0 | 0 | 103,660 | 0 |
| Commission Fee | 0 | (41.842) | 0 | 0 | (143.270) | 0 | 0 | (509,310) | 0 |
| Misc Rev/(Exp) | 3,308 | (2.431) | (1) | 9,129 | 1.834 | 0 | 39,224 | 3,585 | 0 |
| Other Rev/(Exp) | 3,308 | 397.564 | 120 | 9,129 | 398.077 | 44 | 39,224 | 410,844 | 10 |
| Pre-Tax Profit/(Loss) | 3,308 | 613.828 | 185 | 9,129 | 510.249 | 57 | 39,224 | 1,390,810 | 35 |
| Lumber Recovery/Logs | | 1.33 | | | 1.26 | | | 1.24 | |
| Chips Recovery/Lumber MBF | | 1.18 | | | 1.07 | | | 0.84 | |
| Timber Profit/Loss | | (54.902) | | | (248.681) | | | (334,930) | |
| Ratios | | 558.710 | | | 271.698 | | | 1,955,880 | |
| Difference | | 0.000 | | | (0.002) | | | (0.000) | |

EXHIBIT 482 P. 14

## Delta Combined- Mill Summary Results

### Northwest Hardwoods - Delta, BC -Combined

($000)

| December 2001 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| UNIBOL15.31 | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,884 | 1,310,322 | 1,315 | 5,312 | 4,144,978 | 780 | 17,146 | 13,038,005 | 737 |
| Pallet - MBF | 819 | 158,871 | 185 | 3,467 | 641,996 | 185 | 17,094 | 3,149,956 | 184 |
| Discounts/Claims | | (7,539) | (4) | | (28,339) | (3) | | (101,241) | (5) |
| Net 3rd Party Sales - MBF | 1,682 | 1,471,652 | 799 | 8,779 | 4,758,645 | 542 | 34,240 | 15,671,677 | 458 |
| Intra Division Sales | | | | | | | | | |
| Sales - CSC | 0 | (0.000) | 0 | 41 | 57,524 | 1,412 | 86 | 111,437 | 1,345 |
| Sales - Okawa/Taiwa | 17 | 25,847 | 1,535 | 17 | 25,847 | 1,535 | 34 | 53,637 | 1,558 |
| Sales - Indian/Belgium | 0 | (0.000) | 0 | 19 | 25,886 | 1,354 | 19 | 25,886 | 1,354 |
| Sales to NWH Work. Loc. | 158 | 152,446 | 961 | 273 | 286,143 | 1,046 | 4,830 | 3,743,040 | 774 |
| Total Lumber Sales - MBF | 2,057 | 1,649,950 | 810 | 9,123 | 5,153,645 | 565 | 39,209 | 19,626,897 | 500 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0.000) | 0 | 3 | 0,439 | 172 | 277 | 67,243 | 243 |
| Wynn - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Total Log Sales - MBF | 0 | (0.000) | 0 | 3 | 0,439 | 172 | 277 | 67,243 | 243 |
| Chip Sales - 3rd Party - BDT | 3,248 | 244,068 | 75 | 7,696 | 583,962 | 76 | 32,713 | 2,311,374 | 71 |
| Freight - 3rd Party | | (40,314) | (12) | | (195,502) | (14) | | (195,502) | (3) |
| Chip Sales - Wynn - BDT | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Freight - Wynn | | 4,184 | 0 | | 4,184 | 0 | | 4,184 | 0 |
| Total Chip Sales - BDT | 3,246 | 208,138 | 63 | 7,636 | 484,643 | 62 | 32,713 | 2,309,896 | 67 |
| By-Products | 1,470 | 4,184 | 3 | 1,470 | 4,184 | 3 | 1,470 | 4,184 | 3 |
| Freight - By-Products | | (0.000) | (0) | | (0.000) | (0) | | (0.000) | (0) |
| Other Services | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Sales Revenue - MBF | 2,837 | 1,861,277 | 934 | 9,139 | 5,643,911 | 618 | 89,109 | 21,887,199 | 556 |
| Beg. Inventory - Logs | 7,168 | 2,364,856 | 788 | 3,913 | 890,840 | 295 | 2,822 | 501,894 | 248 |
| Purchased Logs - 3rd Party | 1,504 | 442,829 | 283 | 8,707 | 2,578,228 | 294 | 22,674 | 6,347,696 | 282 |
| Other Handling Costs | | 50,580 | 32 | | 163,342 | 19 | | 599,585 | 27 |
| Purchased Logs - Wynn | 845 | 230,851 | 283 | 2,332 | 661,923 | 281 | 9,842 | 2,774,324 | 282 |
| Other Handling Costs | | 32,148 | 38 | | 39,534 | 17 | | 182,711 | 19 |
| To Transformed In | 413 | 128,019 | 309 | 703 | 219,175 | 303 | 6,241 | 1,469,421 | 235 |
| Raw Materials Available | 9,590 | 3,997,188 | 319 | 14,788 | 4,527,219 | 306 | 48,580 | 11,885,080 | 293 |
| Sawmill Conversion - MBF | 2,739 | 654,730 | 237 | 8,519 | 2,102,512 | 247 | 40,150 | 9,008,344 | 224 |
| Sawmill Conversion - Surfaces | 2,071 | | 316 | 6,343 | | 312 | 32,322 | | 281 |
| 3rd Party Sales | 0 | 0.000 | 0 | 3 | 0,343 | 143 | 277 | 62,337 | 225 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| End. Inventory - Logs | (7,967) | (2,385,090) | 299 | (7,967) | (2,385,090) | 299 | (7,967) | (2,385,090) | 299 |
| Total Net RM Cost to Loc. | 2,833 | 712,098 | 252 | 6,814 | 2,142,169 | 314 | 32,613 | 9,499,590 | 291 |
| Boomsticks/Boom Gear Costs | | 10,581 | 0 | | 101,473 | 0 | | 101,918 | 0 |
| Beg. Inventory - Boomsticks/Gear - MBF | 875 | 368,874 | 421 | 1,978 | 918,634 | 228 | 674 | 548,174 | 813 |
| End. Inventory - Boomsticks/Gear - MBF | (1,837) | (412,288) | 397 | (1,837) | (412,288) | 397 | (1,837) | (412,288) | 397 |
| Total Boomsticks/Gear | 0 | (32,833) | 0 | 0 | 47,819 | 0 | 0 | 241,796 | 0 |
| Total RM & Boomstick/Gear Cost | 2,833 | 679,266 | 240 | 6,814 | 2,189,988 | 321 | 32,613 | 9,741,786 | 299 |

EXHIBIT 482 P. 15

WY-CONF-01751

Del_Comb millsumS

Delta Combined- Mill Summary Results

Northwest Hardwoods - Delta, BC -Combined

($000)

| December 2001 | Month | | | Quarter To-Date | | | Year To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average $ | Volume | $000's | Average $ | Volume | $000's | Average $ |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| [illegible] Wash. Log | 16 | 24.427 | 1,699 | 84 | 115.548 | 1,370 | 124 | 161.836 | 1,309 |
| [illegible] Wash. Log | | 0.081 | 5 | | 0.863 | 5 | | 3.247 | 19 |
| [illegible] Inside Differences | | (10.875) | 0 | | (35.038) | 0 | | 3.262 | 0 |
| Total Outside Processing Lbr | 16 | 13.642 | 827 | 84 | 81.173 | 962 | 124 | 166.335 | 1,345 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 2,709 | 149.252 | 54 | 8,519 | 563.702 | 66 | 48,150 | 2,773.244 | 62 |
| Maintenance Labor | | 54.295 | 20 | | 193.195 | 23 | | 796.229 | 20 |
| Payroll Loading | | 51.898 | 19 | | 263.017 | 31 | | 1,480.810 | 37 |
| Operating Supplies | | 72.193 | 26 | | 167.338 | 20 | | 759.013 | 19 |
| Maintenance Supplies | | 43.258 | 0 | | 119.147 | 0 | | 633.431 | 0 |
| Natural Gas | | 2.554 | 1 | | 94.305 | 11 | | 469.304 | 12 |
| Electricity/Utilities | | 31.370 | 11 | | 84.759 | 10 | | 402.382 | 10 |
| Rent | | 17.180 | 6 | | 46.264 | 5 | | 177.952 | 4 |
| Outside Services | | 48.258 | 17 | | 159.403 | 14 | | 516.935 | 13 |
| Outside Services - Drying | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Pre on Lumber | | 1.506 | 1 | | 21.523 | 3 | | 68.259 | 2 |
| Distribution Expenses | | (71.488) | (26) | | (91.431) | (11) | | (31.431) | (1) |
| Miscellaneous | | 8.575 | 3 | | 11.466 | 1 | | 104.513 | 3 |
| Total Variable Costs | 2,709 | 415.856 | 150 | 8,519 | 1,624.737 | 192 | 48,150 | 8,099.871 | 202 |
| Depreciation | 3,208 | 66.446 | 20 | 9,129 | 213.667 | 24 | 39,234 | 897.263 | 23 |
| Taxes | | (16.671) | (5) | | 13.545 | 1 | | 122.922 | 3 |
| Sawn Adjustment | | 21.213 | 8 | | 74.226 | 9 | | 168.797 | 0 |
| Other - MU | | 123.600 | 37 | | 382.831 | 42 | | 1,361 824 | 35 |
| Other - Revenue | | 20.126 | 6 | | 60.249 | 7 | | 251.233 | 7 |
| Period Costs | 3,208 | 222.331 | 67 | 9,129 | 744.458 | 82 | 39,234 | 2,841.728 | 73 |
| Beg Inv Chips - MDF | 1,259 | 51.850 | 41 | 988 | 41.634 | 34 | 930 | 34.909 | 189 |
| End Inv Chips - MDF | (988) | (13.988) | 20 | (930) | (13.988) | 30 | (988) | (13.988) | 30 |
| Beg Inv Lumber - MDF | 3,994 | 2,741.643 | 687 | 4,742 | 3,143.699 | 662 | 3,422 | 1,799 410 | 526 |
| End Inv Lumber - MDF | (3,974) | (2,426.595) | 611 | (3,974) | (2,426.595) | 611 | (3,974) | (2,426.595) | 611 |
| Total Cost of Sales | 3,207 | 3,793.941 | 496 | 9,129 | 5,393.991 | 591 | 39,259 | 31,684.543 | 525 |
| Gross Profit Contribution | 2,337 | 161.231 | 79 | 8,129 | 349.529 | 23 | 39,259 | 1,486.857 | 36 |
| Depreciation | 2,037 | 0.000 | 0 | 9,298 | 0.000 | 0 | 39,436 | 0.000 | 0 |
| Taxes | | 0.000 | 0 | | 0.000 | 0 | | 0.415 | 0 |
| Other | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 2,037 | 0.000 | 0 | 9,298 | 0.000 | 0 | 39,436 | 1.415 | 0 |
| Exch Rate - Inventories Rev/(Exp) | 0 | 79.351 | 0 | 0 | 21.073 | 0 | 0 | 180.000 | 0 |
| Misc Rev/(Exp) | 3,308 | (2.413) | (1) | 9,129 | 1.834 | 0 | 39,234 | 3.285 | 4 |
| Other Rev/(Exp) | 3,308 | 196.357 | 132 | 9,129 | 394.648 | 43 | 39,234 | 389.491 | 10 |
| Pre Tax Profit/(Loss) | 2,037 | 434.520 | 311 | 9,298 | 668.172 | 72 | 39,436 | 1,988.778 | 50 |
| Lumber Recovery/Log | | 1.57 | | | 1.56 | | | 1.54 | |
| Chips Recovery/Lumber MDF | | 1.10 | | | 1.01 | | | 0.81 | |
| Timber Profit/Loss | | (54.502) | | | (160.551) | | | (334.331) | |
| Ratio's | | 579.028 | | | 427.621 | | | 1,652.845 | |
| BF/Tonnes | | (0.000) | | | 0.000 | | | (0.000) | |

EXHIBIT 482 P. 16

WY-CONF-01752

Dn_Comb_mBsumit

Centra 6a - Mill Summary Results

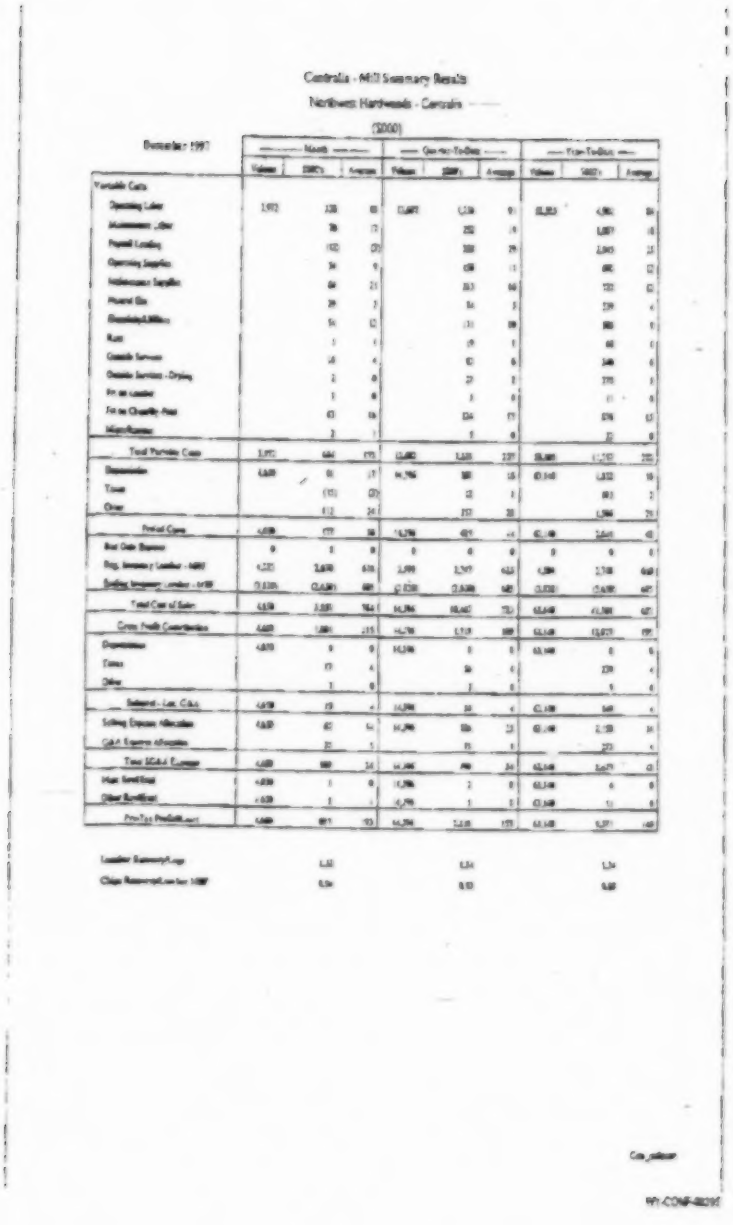
Northwest Hardwoods - Cascadia

($000)

| December 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $/MBF | Average | Volume | $/MBF | Average | Volume | $/MBF | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 2,801 | 2,594 | 926 | 9,110 | 8,370 | 919 | 40,595 | 36,335 | 895 |
| Poles - MBF | 1,264 | 351 | 278 | 4,823 | 1,010 | 209 | 17,177 | 4,884 | 284 |
| Chips/Cubes/Pulp | | 248 | (0) | | 754 | (0) | | 2,565 | (0) |
| Total 3rd Party Sales - MBF | 4,065 | 3,192 | 785 | 13,933 | 10,133 | 727 | 57,772 | 43,784 | 758 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Kenora | 74 | 46 | 623 | 222 | 97 | 437 | 1,000 | 688 | 688 |
| Sales - CDC | 186 | 413 | 1,110 | 592 | 1,116 | 1,884 | 4,617 | 4,977 | 1,078 |
| Sales - Ottawa | 0 | 0 | 0 | 10 | 21 | 1,978 | 382 | 777 | 1,340 |
| Sales - Toronto | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Sales - Arden Warehouse | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Sales - Owensboro - Bonus | 0 | 0 | 0 | 0 | 0 | 0 | 91 | 133 | 1,461 |
| Sales - Thunder | 0 | 0 | 0 | 0 | 0 | 0 | 49 | 26 | 534 |
| Lbr Trfrs, to KWH Mnfg. Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Trfrs. to Kraft Div. Loc. | 87 | 110 | 1,264 | 289 | 266 | 924 | 1,000 | 2,000 | 1,864 |
| Total Lumber Sales - MBF | 27 | 11 | 414 | 92 | 31 | 334 | 930 | 284 | 936 |
| | 1,439 | 1,580 | 1,097 | 14,376 | 10,379 | 721 | 63,140 | 45,339 | 718 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Wayne - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Log Transfers | | | | | | | | | |
| KWH Va. - MBF | 1,725 | 923 | 540 | 1,725 | 922 | 540 | 3,673 | 1,970 | 539 |
| KWH OK - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Log Sales - MBF | 1,727 | 923 | 540 | 1,725 | 922 | 540 | 3,673 | 1,970 | 539 |
| Chip Sales - 3rd Party - BDT | 1,397 | 271 | 194 | 1,397 | 1,224 | 194 | 4,970 | 4,891 | 194 |
| Chip Sales - Wayne - BDT | 191 | 34 | 18 | 191 | 23 | 18 | 1,048 | 1,748 | 18 |
| Total Chip Sales - BDT | 1,587 | 305 | 192 | 11,072 | 1,246 | 192 | 14,021 | 6,639 | 473 |
| By-Products | 2,668 | 21 | 11 | 6,774 | 111 | 11 | 15,196 | 462 | 11 |
| Other Services | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Sales Revenue - $000 | 4,054 | 3,331 | 999 | 14,376 | 10,111 | 711 | 63,140 | 53,670 | 861 |
| Log Inventory - Logs | 3,276 | 1,902 | 532 | 4,827 | 2,914 | 494 | 3,778 | 2,004 | 531 |
| Purchased Logs - 3rd Party | 1,276 | 566 | 494 | 4,765 | 2,625 | 561 | 22,811 | 11,613 | 508 |
| Purchased Logs - Wayne | 1,822 | 747 | 494 | 4,868 | 2,448 | 503 | 14,963 | 6,946 | 439 |
| Tfr Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - KWH Va. | 671 | 277 | 126 | 1,261 | 466 | 454 | 2,561 | 1,284 | 454 |
| Logs Transferred In - KWH OK | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Raw Materials Available | 9,178 | 4,721 | 554 | 17,691 | 8,454 | 556 | 52,191 | 33,179 | 481 |
| Lumber/B Conversion - MBF | 2,972 | 1,499 | 231 | 12,683 | 5,879 | 273 | 38,251 | 19,186 | 223 |
| Lumber/B Conversion - Bonsall | 2,987 | 1,499 | 498 | 13,116 | 5,879 | 333 | 44,412 | 18,881 | 424 |
| 3rd Party Sales | 0 | 0 | 0 | 0 | 0 | 0 | 120 | 46 | 382 |
| Logs Transferred Out - KWH Va. | 1,725 | 923 | 540 | 1,725 | 922 | 540 | 3,561 | 1,758 | 514 |
| Logs Transferred Out - KWH OK | 0 | 0 | 0 | 391 | 298 | 524 | 991 | 503 | 504 |
| Ending Inventory - Logs | 11,903 | (3,180) | 498 | 14,810 | (3,181) | 478 | 14,810 | (3,181) | 465 |
| Timber Consumption | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Tot R.M. Cons in Lbr. | 4,712 | 2,421 | 514 | 13,472 | 6,259 | 464 | 17,476 | 13,678 | 482 |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 87 | 110 | 1,264 | 289 | 266 | 924 | 1,000 | 2,000 | 1,864 |
| Lumber Transfers from Ore. Loc. | 0 | 0 | 0 | 270 | 214 | 794 | 827 | 566 | 684 |
| Custom Services | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Operating Income/(Loss) | 90 | 129 | 1,434 | 1,048 | 1,092 | 1,042 | 1,498 | 1,993 | 1,331 |

Con_wilson

WY-CONF-00284



Centralia - Mill Summary Results

Northwest Hardwoods - Centralia

($000)

| December 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $/MBF | Average | Volume | $/MBF | Average | Volume | $/MBF | Average |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,972 | 338 | 85 | 11,697 | 1,116 | 95 | 51,353 | 4,981 | 97 |
| Maintenance - Labor | | 78 | 20 | | 252 | 22 | | 1,887 | 37 |
| Payroll Loading | | 102 | 26 | | 330 | 28 | | 2,543 | 49 |
| Operating Supplies | | 34 | 9 | | 108 | 9 | | 892 | 17 |
| Maintenance Supplies | | 84 | 21 | | 263 | 22 | | 722 | 14 |
| Power Gas | | 29 | 7 | | 94 | 8 | | 729 | 14 |
| Electricity-Millsite | | 54 | 14 | | 171 | 14 | | 992 | 19 |
| Rent | | 1 | 1 | | 5 | 1 | | 48 | 1 |
| Outside Services | | 6 | 2 | | 19 | 2 | | 348 | 7 |
| Outside Services - Drying | | 2 | 0 | | 7 | 1 | | 170 | 3 |
| Fork Lift Leases | | 1 | 0 | | 3 | 0 | | 17 | 0 |
| Fork Lift Monthly Fees | | 63 | 16 | | 204 | 17 | | 876 | 17 |
| Miscellaneous | | 2 | 1 | | 6 | 0 | | 72 | 1 |
| Total Variable Costs | 3,972 | 664 | 170 | 11,697 | 2,555 | 218 | 51,353 | 14,737 | 287 |
| Depreciation | 4,000 | 70 | 17 | 14,796 | 301 | 25 | 57,340 | 1,202 | 23 |
| Taxes | | (11) | (3) | | 12 | 1 | | 83 | 2 |
| Other | | 112 | 28 | | 357 | 30 | | 1,394 | 27 |
| Period Costs | 4,000 | 177 | 44 | 14,796 | 671 | 56 | 57,340 | 2,641 | 51 |
| Raw Gain Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Location - 4000 | 4,220 | 2,630 | 623 | 3,999 | 2,747 | 687 | 4,284 | 2,718 | 634 |
| Ending Inventory Location - 4000 | (3,335) | (2,438) | 731 | (3,335) | (2,438) | 731 | (3,335) | (2,438) | 731 |
| Total Cost of Sales | 4,885 | 2,369 | 485 | 15,460 | 10,481 | 678 | 57,289 | 41,380 | 722 |
| Gross Profit Contribution | 4,885 | 1,881 | 385 | 14,716 | 1,719 | 117 | 63,148 | 13,673 | 217 |
| Depreciation | 4,885 | 0 | 0 | 14,796 | 0 | 0 | 63,148 | 0 | 0 |
| Taxes | | (1) | 0 | | 24 | 0 | | 229 | 4 |
| Other | | 1 | 0 | | 2 | 0 | | 9 | 0 |
| Interest - Loc. C.A.I. | 4,878 | (1) | 0 | 14,796 | 22 | 0 | 63,148 | 240 | 4 |
| Selling Expense Allocation | 4,885 | 67 | 14 | 14,796 | 994 | 21 | 63,148 | 2,153 | 34 |
| G&A Expense Allocation | | 21 | 4 | | 71 | 1 | | 223 | 4 |
| Total SG&A Expense | 4,885 | 88 | 18 | 14,796 | 994 | 24 | 63,148 | 2,671 | 42 |
| Non Operating | 4,885 | 1 | 0 | 14,796 | 2 | 0 | 63,148 | 6 | 0 |
| Other Significant | 4,885 | 2 | 1 | 14,796 | 1 | 0 | 63,148 | 11 | 0 |
| Pre-Tax Profit/(Loss) | 4,885 | 871 | 178 | 14,796 | 2,418 | 163 | 63,148 | 6,371 | 101 |
| Loader Runs/Hour | | 4.33 | | | 4.34 | | | 4.34 | |
| Chips Returned/Loader Hour | | 8.34 | | | 8.33 | | | 8.48 | |

Completed

WH-CONF-002197

Centralia - MSB Summary Results

Northwest Hardwoods - Centralia

($000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | Budget | Variance | Volume | Budget | Variance | Volume | Budget | Variance |
| **Net Port Sales** | | | | | | | | | |
| Lumber - MBF | 3,837 | 3,919 | (82) | 7,756 | 8,099 | (343) | 21,989 | 20,940 | 1,049 |
| Poles - MBF | 3,513 | 391 | 294 | 5,589 | 1,364 | 225 | 8,364 | 4,671 | 293 |
| Shavings/Clean Chips | | (44) | (7) | | (90) | (5) | | (198) | (6) |
| **Net Jet Port Sales - MBF** | 4,871 | 3,866 | 1,005 | 13,345 | 7,369 | 5,976 | 31,345 | 25,413 | 5,932 |
| **Intra Division Sales** | | | | | | | | | |
| Sales - Kosmo | 0 | (0) | 0 | 0 | (4) | 0 | 264 | 124 | 140 |
| Sales - CDC | 44 | 22 | 22 | 90 | 42 | 48 | 222 | 360 | (138) |
| Sales - Olympia | 0 | (0) | 0 | 19 | 21 | (2) | 6 | 10 | (4) |
| Sales - Tacoma | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Salem Woodyard | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Bangkok Woodyard | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Midway | 0 | (0) | 0 | 19 | 31 | (12) | 24 | 39 | (15) |
| Sales - Thorndill | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lin Trans. to WWS Wash. Lan. | 0 | (0) | 0 | 0 | (0) | 0 | 540 | 551 | (11) |
| Lin Trans. to WWS Ore. Lan. | 211 | 222 | (11) | 211 | 222 | (11) | 6 | (0) | 6 |
| **Total Lumber Sales - MBF** | 255 | 21 | 234 | 36 | 34 | 2 | 1,018 | 1,191 | (173) |
| | 4,295 | 3,913 | 382 | 13,920 | 7,886 | 6,034 | 34,139 | 28,749 | 5,390 |
| **Log Yard Sales** | | | | | | | | | |
| Jet Port - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | 2 | (2) |
| Wigen - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| **Log Transfers** | | | | | | | | | |
| WWW WA - MBF | 0 | (0) | 0 | 461 | 191 | 270 | 882 | 418 | 464 |
| WWW OR - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| **Total Log Sales - MBF** | 0 | (0) | 0 | 461 | 191 | 270 | 882 | 420 | 462 |
| **Chip Sales - Jet Port - BDT** | 1,490 | 726 | 764 | 4,318 | 4,571 | (253) | 21,210 | 3,279 | 17,931 |
| Freight - Jet Port | | (268) | 268 | | (822) | 822 | | (658) | 658 |
| **Chip Sales - Wigen - BDT** | 1,263 | 1,116 | 147 | 3,703 | 4,116 | (413) | 13,442 | 7,221 | 6,221 |
| Freight - Wigen | | (142) | 142 | | (421) | 421 | | (726) | 726 |
| **Total Chip Sales - BDT** | 2,753 | 1,432 | 1,321 | 8,021 | 7,443 | 578 | 34,652 | 9,115 | 25,537 |
| **By-Products** | 1,397 | 41 | 1,356 | 1,869 | 356 | 1,513 | 21,783 | 424 | 21,359 |
| Freight - By-Products | | (13) | 13 | | (40) | 40 | | (171) | 171 |
| **Other Services** | | (0) | 0 | | (0) | 0 | | 0 | 0 |
| **Total Forest Resources - MBF** | 4,295 | 3,961 | 334 | 13,920 | 9,353 | 4,567 | 56,139 | 28,996 | 27,143 |
| **Log Inventory - Logs** | 3,831 | 3,871 | (40) | 3,849 | 3,972 | (123) | 3,849 | 3,366 | 483 |
| Purchased Logs - Jet Port | 1,837 | 959 | 878 | 4,854 | 2,211 | 2,643 | 16,974 | 4,379 | 12,595 |
| Purchased Logs - Wigen | 1,807 | 966 | 841 | 3,667 | 1,772 | 1,895 | 14,247 | 6,897 | 7,350 |
| To Transformed In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - WWW WA | 302 | 277 | 25 | 1,279 | 810 | 469 | 1,279 | 2,855 | (1,576) |
| Logs Transferred In - WWW OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **Raw Material Available** | 8,076 | 6,743 | 1,333 | 13,721 | 8,772 | 4,949 | 46,117 | 19,610 | 26,507 |
| Sawmill Conversion - MBF | 3,231 | 3,209 | 22 | 8,627 | 4,312 | 4,315 | 24,836 | 17,687 | 7,149 |
| Sawmill Conversion - Software | 3,871 | | 3,871 | 9,794 | | 9,794 | 31,761 | | 31,761 |
| Jet Port Sales | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - WWW WA | 0 | 0 | 0 | 46 | 114 | (68) | 992 | 418 | 574 |
| Logs Transferred Out - WWW OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (3,903) | (3,274) | (629) | (3,903) | (3,314) | (589) | (3,903) | (3,314) | (589) |
| Timber Consumption | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **Total For Mill Cost or Loss** | 3,979 | 3,209 | 771 | 15,164 | 4,911 | 10,253 | 53,824 | 15,194 | 38,630 |

WY-CONF-00369

Centralia - Mill Summary Results

Northwest Hardwoods - Centralia

(2001)

| December 1998 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | 2001 | Average | Volume | 2001 | Average | Volume | 2001 | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers New York, Inc. | 752 | 259 | 1,000 | 995 | 337 | 341 | 2,823 | 2,199 | 1,024 |
| Lumber Transfers Iowa City, Inc. | 0 | 2 | 695 | 28 | 10 | 344 | 43 | 23 | 539 |
| Custom Services | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Outside Inventory Cost | 781 | 312 | 1,000 | 1,023 | 379 | 372 | 2,866 | 2,222 | 1,041 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 2,021 | 342 | 169 | 10,677 | 1,254 | 117 | 34,859 | 4,250 | 122 |
| Maintenance Labor | | 99 | 50 | | 287 | 25 | | 1,130 | 31 |
| Payroll Loading | | 104 | 53 | | 314 | 27 | | 1,791 | 50 |
| Operating Supplies | | 83 | 42 | | 490 | 42 | | 743 | 21 |
| Maintenance Supplies | | 0 | 84 | | 1,011 | 88 | | 786 | 22 |
| Electric Use | | 31 | 16 | | 49 | 4 | | 258 | 7 |
| Electricity/Oil/Gas | | 67 | 33 | | 123 | 11 | | 324 | 9 |
| Rent | | 30 | 15 | | 30 | 3 | | 120 | 3 |
| Outside Services | | 31 | 16 | | 101 | 9 | | 290 | 8 |
| Outside Services - Drying | | 9 | 5 | | 11 | 1 | | 35 | 1 |
| Fees and Licenses | | 14 | 7 | | 23 | 2 | | 41 | 1 |
| Miscellaneous Expenses | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Miscellaneous | | 1 | 0 | | 4 | 0 | | 11 | 0 |
| Total Variable Costs | 2,021 | 847 | 433 | 13,677 | 3,877 | 340 | 34,859 | 10,907 | 304 |
| Depreciation | 4,919 | 96 | 49 | 13,229 | 289 | 24 | 34,128 | 1,258 | 35 |
| Taxes | | 16 | 8 | | 49 | 4 | | 142 | 4 |
| Other | | 118 | 60 | | 373 | 33 | | 1,477 | 41 |
| Period Costs | 4,919 | 230 | 117 | 13,229 | 710 | 61 | 34,128 | 2,877 | 80 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - NRV | 7,671 | 7,160 | 675 | 6,835 | 6,433 | 663 | 3,853 | 2,639 | 1,000 |
| Ending Inventory Lumber - NRV | (7,671) | (5,121) | (995) | (7,671) | (5,121) | (995) | (7,671) | (5,121) | (995) |
| Total Cost of Sales | 4,391 | 3,549 | 1,000 | 12,479 | 7,862 | 1,000 | 34,128 | 24,634 | 1,000 |
| Gross Profit Contribution | 4,391 | 771 | 217 | 12,479 | 2,761 | 351 | 34,128 | 8,141 | 1,000 |
| Depreciation | 4,823 | 0 | 0 | 13,229 | 0 | 0 | 34,128 | 0 | 0 |
| Taxes | | 12 | 3 | | 42 | 3 | | 149 | 4 |
| Other | | 0 | 0 | | 2 | 0 | | 6 | 0 |
| Subtotal - Lev. G&A | 4,823 | 12 | 3 | 13,229 | 45 | 3 | 34,128 | 155 | 4 |
| Selling Expense Allocation | 4,391 | 221 | 63 | 12,479 | 649 | 82 | 34,128 | 2,162 | 63 |
| G&A Expense Allocation | | 23 | 7 | | 91 | 7 | | 292 | 9 |
| Total SG&A Expense | 4,391 | 456 | 130 | 12,479 | 694 | 56 | 34,128 | 2,610 | 76 |
| Misc Rent/Lease | 4,391 | 4 | 1 | 12,479 | 2 | 0 | 34,128 | 4 | 0 |
| Other Rent/Lease | 4,391 | 11 | 3 | 12,479 | 31 | 2 | 34,128 | 11 | 0 |
| Pre-Tax Profit/(Loss) | 4,391 | 271 | 77 | 12,479 | 955 | 77 | 34,128 | 5,488 | 161 |
| Lumber Turnover/Loop | | 1.33 | | | 1.48 | | | 1.41 | |
| Chips Turnover/Lumber NRV | | 0.01 | | | 0.01 | | | 0.01 | |

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W1-CONF-00379

Centralia - Mill Summary Results

Northwest Hardwoods - Centralia

($CDN)

| December 1999 | Month | | | Quarter-to-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $/MBF | Average | Volume | $/MBF | Average | Volume | $/MBF | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 3,401 | 2,948 | 867 | 9,662 | 7,791 | 806 | 41,164 | 32,531 | 790 |
| Pallet - MBF | 1,330 | 314 | 236 | 4,393 | 1,242 | 283 | 28,968 | 8,267 | 285 |
| Discounts/Claims | | (18) | (0) | | (52) | (0) | | (313) | (0) |
| Net 3rd Party Sales - MBF | 4,731 | 3,244 | 685 | 14,054 | 8,981 | 639 | 62,132 | 39,485 | 635 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Reman | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CSC | 30 | 23 | 775 | 160 | 111 | 691 | 876 | 617 | 705 |
| Sales - Chem Treat | 13 | 21 | 1,614 | 69 | 97 | 1,413 | 206 | 284 | 1,382 |
| Sales - Intl.Hardbry Warehouse | 9 | (0) | 0 | 34 | (0) | (1,000) | 102 | 164 | 1,615 |
| Lbr Trans. to WWH Allwood Loc. | 28 | 22 | 1,118 | 78 | 64 | 1,017 | 78 | 64 | 1,119 |
| Lbr Trans. to WWH Bristol Loc. | 113 | 43 | 382 | 113 | 43 | 382 | 113 | 43 | 382 |
| Lbr Trans. to WWH Wash.Loc. | 84 | 118 | 1,413 | 648 | 913 | 1,403 | 3,125 | 3,378 | 1,048 |
| Lbr Trans. to WWH Chr. Loc. | 10 | 9 | 1,884 | 322 | 145 | 849 | 326 | 631 | 1,848 |
| Total Lumber Sales - MBF | 4,995 | 3,179 | 646 | 15,483 | 9,837 | 649 | 66,977 | 42,599 | 634 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 2 | 3 | 2,472 | 2 | 3 | 2,695 | 2 | 5 | 2,472 |
| Waste - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| WWH WA - MBF | 22 | 3 | 142 | 22 | 3 | 142 | 332 | 121 | 364 |
| WWH OR - MBF | 72 | 61 | 844 | 231 | 102 | 440 | 532 | 247 | 462 |
| Total Log Swap - MBF | 108 | 72 | 665 | 260 | 111 | 428 | 1,064 | 489 | 459 |
| Chip Sales - 3rd Party - BDT | 1,222 | 313 | 430 | 14,360 | 1,877 | 131 | 23,634 | 3,358 | 142 |
| Freight - 3rd Party | | (99) | (0.0) | | (140) | (0.0) | | (340) | (0.0) |
| Chip Sales - Weyco - BDT | 282 | 39 | 94 | 1,098 | 172 | 94 | 22,251 | 2,240 | 101 |
| Freight - Weyco | | (7) | (0.0) | | (10) | (0.0) | | (220) | (0.0) |
| Total Chip Sales - BDT | 1,477 | 251 | 170 | 15,115 | 1,844 | 122 | 58,991 | 4,777 | 81 |
| By-Products | 2,417 | 36 | 15 | 3,839 | 154 | 40 | 30,330 | 462 | 15 |
| Freight - By-Products | | (54) | (0.0) | | (64) | (0.0) | | (223) | (0.0) |
| Other Services | | 30 | 0 | | 30 | 0 | | 30 | 0 |
| Total Sales Revenue - MBF | 4,731 | 3,244 | 343 | 15,448 | 1,960 | 127 | 64,957 | 43,557 | 670 |
| Beg. Inventory - Logs | 4,278 | 3,399 | 699 | 4,833 | 3,963 | 820 | 3,444 | 2,824 | 820 |
| Purchased Logs - 3rd Party | 1,113 | 414 | 372 | 4,274 | 3,219 | 753 | 28,864 | 13,230 | 458 |
| Other Handling Costs | | 11 | 11 | | 63 | 15 | | 292 | 10 |
| Purchased Logs - Weyco | 1,330 | 912 | 686 | 3,349 | 1,832 | 547 | 13,392 | 6,198 | 463 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Tfr Transferred In | 0 | 0 | 0 | 114 | 38 | 331 | 902 | 472 | 523 |
| Logs Transferred In - WWH WA | 28 | 18 | 644 | 992 | 319 | 321 | 2,813 | 1,090 | 387 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Logs Transferred In - WWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Available | 7,175 | 4,804 | 670 | 14,877 | 9,432 | 634 | 49,181 | 23,661 | 481 |
| Sawmill Conversion - MBF | 4,860 | 3,437 | 707 | 13,953 | 8,962 | 642 | 47,754 | 31,133 | 652 |
| Sawmill Conversion - Scribner | 2,992 | | 688 | 10,132 | | 689 | 44,277 | | 672 |
| 3rd Party Sales | 2 | 3 | 2,472 | 2 | 3 | 2,695 | 2 | 5 | 2,472 |
| Logs Transferred Out - WWH WA | 22 | 3 | 142 | 22 | 3 | 142 | 332 | 121 | 364 |
| Logs Transferred Out - WWH OR | 72 | 61 | 844 | 231 | 102 | 440 | 532 | 247 | 462 |
| Ending Inventory - Logs | (4,164) | (2,883) | 693 | (4,164) | (2,883) | 693 | (4,164) | (2,883) | 693 |
| Timber Consumption | 0 | 3 | 0 | 0 | 41 | 0 | 0 | 74 | 0 |
| Total Vol. $/LC Cost to Log | 5,412 | 3,788 | 687 | 10,477 | 6,124 | 585 | 43,672 | 28,598 | 655 |

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WH-CCDM-20043

Centralia - Mill Summary Results

Northwest Hardwoods - Centralia

($000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Weyh, Loc. | 307 | 227 | 1,395 | 819 | 761 | 1,842 | 3,819 | 3,868 | 999 |
| Freight from Weyh. Loc. | | 0 | 2 | | 2 | 4 | | 2 | 2 |
| Lumber Transfers from Chn. Loc. | 0 | 0 | 0 | 1 | 3 | 226 | 14 | 231 | 1,326 |
| Freight from Chn. Loc. | | 0 | 0 | | 0 | 0 | | 1 | 18 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Outside Acquisition Lbr | 307 | 227 | 1,397 | 821 | 766 | 1,941 | 3,833 | 3,878 | 777 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 4,842 | 363 | 92 | 13,722 | 1,221 | 89 | 61,214 | 5,542 | 91 |
| Maintenance Labor | | 186 | 28 | | 338 | 25 | | 1,326 | 22 |
| Payroll Labeling | | 217 | 54 | | 519 | 40 | | 2,311 | 39 |
| Operating Supplies | | 64 | 16 | | 201 | 63 | | 726 | 12 |
| Maintenance Supplies | | 45 | 10 | | 126 | 31 | | 382 | 6 |
| Natural Gas | | 28 | 7 | | 64 | 5 | | 263 | 4 |
| Electricity/Utilities | | 45 | 12 | | 143 | 38 | | 643 | 10 |
| Rent | | 8 | 2 | | 21 | 1 | | 90 | 1 |
| Outside Services | | 11 | 4 | | 36 | 3 | | 244 | 3 |
| Outside Services - Drying | 0 | 0 | 0 | 0 | 0 | 0 | 4,233 | 34 | 44 |
| Fee on Lumber | | 1 | 0 | | 3 | 0 | | 43 | 1 |
| Steelhead Expense | | 0 | 0 | | (1) | (1) | | (13) | (0) |
| Miscellaneous | | 11 | 3 | | 14 | 3 | | 129 | 2 |
| Total Variable Costs | 4,842 | 982 | 213 | 13,722 | 2,861 | 208 | 67,234 | 11,682 | 180 |
| Depreciation | 4,773 | 182 | 31 | 17,464 | 330 | 23 | 66,727 | 1,214 | 18 |
| Taxes | | 17 | 4 | | 43 | 3 | | 178 | 3 |
| Other | | 116 | 24 | | 230 | 17 | | 1,434 | 22 |
| Period Costs | 4,773 | 314 | 66 | 17,464 | 743 | 43 | 66,727 | 2,826 | 42 |
| Red Dots Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 5,222 | 4,194 | 779 | 4,728 | 4,191 | 781 | 7,411 | 5,621 | 692 |
| Ending Inventory Lumber - MBF | (5,481) | (4,313) | 787 | (5,700) | (4,344) | 777 | (5,481) | (4,313) | 787 |
| Total Cost of Sales | 4,773 | 3,234 | 677 | 15,492 | 3,672 | 536 | 66,153 | 10,181 | 599 |
| Gross Profit Contribution | 4,773 | 662 | 86 | 15,492 | 1,869 | 480 | 66,577 | 3,466 | 111 |
| Depreciation | 4,773 | 0 | 0 | 17,464 | 0 | 0 | 66,727 | 0 | 0 |
| Taxes | | 17 | 3 | | 53 | 3 | | 219 | 3 |
| Other | | 0 | 0 | | 1 | 0 | | 0 | 0 |
| Subtotal - Lbr, G&A | 4,773 | 17 | 3 | 17,464 | 54 | 3 | 66,727 | 223 | 3 |
| Sibley Expense Allocation | 4,773 | 642 | 34 | 17,464 | 1,788 | 31 | 66,727 | 2,307 | 34 |
| G&A Expense Allocation | | 23 | 1 | | 83 | 1 | | 308 | 5 |
| Total SG&A Expenses | 4,773 | 322 | 43 | 17,464 | 1,841 | 43 | 66,727 | 2,529 | 43 |
| Non Ord(Exp) | 4,773 | 4 | 1 | 17,464 | 0 | 0 | 66,727 | 59 | 1 |
| Other Ord(Exp) | 4,773 | 0 | 1 | 17,464 | 23 | 1 | 66,727 | 55 | 0 |
| Pre-Tax Profit/(Loss) | 4,773 | 332 | 44 | 17,464 | 1,993 | 43 | 66,727 | 1,776 | 18 |
| Lumber Recovery/Log | | 4.77 | | | 4.77 | | | 4.48 | |
| Chip Recovery/Lumber MBF | | 0.83 | | | 0.81 | | | 0.83 | |

WY-CCMF-00148

EXHIBIT 482 P. 22

Cladrails - Mill Summary Results

Northwest Hardwoods - Cascadia

('0000)

October 2580

| | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | [illegible] | Average | Volume | [illegible] | Average | Volume | [illegible] | Average |
| Sold P... – Sales | | | | | | | | | |
| [illegible] | 2,900 | 2,647 | 913 | 3,466 | 4,340 | 894 | 3,466 | 4,340 | 894 |
| [illegible] | 2,210 | 648 | 293 | 2,461 | 1,499 | 609 | 4,883 | 1,950 | 399 |
| [illegible] | | (23) | (0) | | (43) | (0) | | (43) | (0) |
| [illegible] | 5,110 | 3,272 | 640 | 5,927 | 5,796 | 978 | 8,349 | 6,247 | 748 |
| [illegible] – [illegible] Sales | | | | | | | | | |
| [illegible] | 0 | (9) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| [illegible] | 43 | 41 | 1,054 | 113 | 118 | 1,049 | 113 | 118 | 1,049 |
| [illegible] – [illegible] to Tolleson | 15 | 11 | 1,000 | 31 | 43 | 1,358 | 31 | 43 | 1,358 |
| [illegible] – [illegible] Hardwoods | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| [illegible] – [illegible] to [illegible] Alderwood Lan. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| [illegible] – [illegible] to [illegible] Boulevard Lan. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| [illegible] – [illegible] to [illegible] Wood, Lan. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| [illegible] – [illegible] to [illegible] Dog, Lan. | 342 | 370 | 1,080 | 369 | 400 | 1,084 | 369 | 400 | 1,084 |
| [illegible] – [illegible] to [illegible] Dog, Lan. | 69 | 71 | 1,030 | 114 | 118 | 1,039 | 114 | 118 | 1,039 |
| Total [illegible] Sales - [illegible] | 5,499 | 3,496 | 636 | 10,555 | 6,459 | 612 | 10,755 | 6,759 | 628 |
| Log [illegible] – Drop | | | | | | | | | |
| [illegible] – [illegible] | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| [illegible] – [illegible] | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log [illegible] – [illegible] | | | | | | | | | |
| [illegible] – [illegible] – [illegible] | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| [illegible] – [illegible] – [illegible] | 0 | (0) | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total [illegible] Sales - [illegible] | 0 | (0) | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ch – [illegible] – [illegible] Peeler - [illegible] | 1,014 | 108 | 107 | 1,166 | 124 | 107 | 1,166 | 124 | 107 |
| [illegible] – [illegible] Peeler | | (21) | (106) | | (71) | (107) | | (71) | (107) |
| [illegible] – [illegible] – [illegible] | 1,062 | 170 | 160 | 2,347 | 311 | 133 | 2,347 | 311 | 133 |
| [illegible] – [illegible] | | (29) | (106) | | (39) | (106) | | (39) | (106) |
| [illegible] – [illegible] Sales - [illegible] | 2,077 | 227 | 109 | 3,513 | 324 | 92 | 3,513 | 324 | 92 |
| [illegible] – [illegible] | 2,063 | 41 | 20 | 6,832 | 93 | 14 | 6,832 | 93 | 14 |
| [illegible] – [illegible] – [illegible] Peeler | | (13) | (20) | | (79) | (12) | | (79) | (12) |
| [illegible] – [illegible] | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Peeler [illegible] – [illegible] - [illegible] | 2,063 | 28 | 14 | 13,345 | 14 | 1 | 13,345 | 14 | 1 |
| Log [illegible] – Logs | | | | | | | | | |
| [illegible] – [illegible] – [illegible] | 1,796 | 2,149 | 1,197 | 2,964 | 2,754 | 929 | 2,964 | 2,754 | 929 |
| [illegible] – [illegible] – [illegible] | 2,169 | 1,201 | 553 | 4,448 | 2,676 | 602 | 4,448 | 2,676 | 602 |
| [illegible] – [illegible] – [illegible] | | 4 | 4 | | 23 | 6 | | 23 | 6 |
| [illegible] – [illegible] – [illegible] | 664 | 456 | 686 | 2,349 | 1,548 | 659 | 2,349 | 1,548 | 659 |
| [illegible] – [illegible] – [illegible] | | 2 | 4 | | 11 | 4 | | 11 | 4 |
| [illegible] – [illegible] – [illegible] | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| [illegible] – [illegible] – [illegible] | 96 | 364 | 473 | 1,852 | 121 | 65 | 1,852 | 121 | 65 |
| [illegible] – [illegible] – [illegible] | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| [illegible] – [illegible] – [illegible] | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| [illegible] – [illegible] – [illegible] | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| [illegible] – [illegible] – [illegible] | 5,787 | 4,138 | 715 | 11,473 | 6,952 | 606 | 11,473 | 6,952 | 606 |
| [illegible] – [illegible] – [illegible] | 2,256 | 1,823 | 808 | 11,316 | 4,152 | 367 | 11,316 | 4,152 | 367 |
| [illegible] – [illegible] – [illegible] | 2,433 | | 362 | 7,399 | | 756 | 7,399 | | 756 |
| [illegible] – [illegible] | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| [illegible] – [illegible] – [illegible] | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| [illegible] – [illegible] – [illegible] | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| [illegible] – [illegible] – [illegible] | | | | | | | | | |
| [illegible] – [illegible] – [illegible] | 11,476 | 7,961 | 694 | 41,556 | 17,104 | 412 | 41,556 | 17,104 | 412 |
| [illegible] – [illegible] – [illegible] | 2,438 | 1,923 | 789 | 7,482 | 4,924 | 658 | 7,482 | 4,924 | 658 |

Cascadia

WY-CORP-402021

EXHIBIT 482 P. 23

Centralia - Mill Summary Results
Northwest Hardwoods - Centralia
(5000)

EXHIBIT 482 P. 24

## Centralia - Mill Summary Results

### Northwest Hardwoods - Centralia

($000)

| December 2001 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 1/8/2002 16:50 | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 2,028 | 1,655,994 | 817 | 7,423 | 5,973,607 | 805 | 32,430 | 27,135,554 | 837 |
| Pallet - MBF | 1,545 | 371,209 | 241 | 5,377 | 1,319,994 | 245 | 23,807 | 5,883,817 | 246 |
| Discounts/Claims | | (72,644) | (4) | | (52,279) | (4) | | (233,420) | (4) |
| Net 3rd Party Sales - MBF | 3,573 | 2,016,559 | 564 | 12,800 | 7,241,333 | 566 | 56,237 | 31,786,351 | 565 |
| Intra Division Sales | | | | | | | | | |
| Sales - Raxton | 0 | (3,861) | 0 | 0 | (5,000) | 0 | 0 | (7,800) | 0 |
| Sales - CSC | 19 | 17,296 | 916 | 118 | 121,957 | 1,034 | 348 | 570,457 | 1,641 |
| Sales - Okawa/Taiwan | 37 | 50,855 | 1,375 | 56 | 74,052 | 1,330 | 229 | 289,522 | 1,213 |
| Sales - Indiana/Bldg Warehouse | 0 | 0.000 | 0 | 18 | 24,989 | 1,356 | 109 | 167,657 | 1,536 |
| Lbr Trans. to NWH Midwest Loc. | 0 | (9,000) | 0 | 0 | (9,000) | 0 | 38 | 37,209 | 969 |
| Lbr Trans. to NWH Reload Loc. | 0 | (0,000) | 0 | 0 | (0,000) | 0 | 0 | (0,000) | 0 |
| Lbr Trans. to NWH Wash. Loc. | 86 | 152,210 | 1,783 | 513 | 699,878 | 1,365 | 3,683 | 3,784,109 | 1,201 |
| Lbr Trans. to NWH Ore. Loc. | 131 | 139,955 | 1,061 | 412 | 487,886 | 1,184 | 1,259 | 1,500,498 | 1,211 |
| Total Lumber Sales - MBF | 3,846 | 2,377,172 | 618 | 13,916 | 8,660,915 | 622 | 61,593 | 39,067,903 | 634 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0,000) | 0 | 23 | 6,961 | 283 | 230 | 113,950 | 543 |
| Weyco - MBF | 0 | (0,000) | 0 | 0 | (0,000) | 0 | 0 | (0,000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0,000) | 0 | 866 | 397,003 | 458 | 1,575 | 730,572 | 464 |
| NWH OR - MBF | 32 | 20,097 | 586 | 100 | 38,703 | 388 | 191 | 77,734 | 407 |
| Total Log Sales - MBF | 32 | 32,097 | 586 | 987 | 441,866 | 448 | 1,976 | 922,236 | 467 |
| Chip Sales - 3rd Party - BDT | 2,075 | 213,594 | 80 | 9,691 | 775,645 | 80 | 38,513 | 3,473,383 | 90 |
| Freight - 3rd Party | | (39,252) | (15) | | (151,342) | (16) | | (548,950) | (14) |
| Chip Sales - Weyco - BDT | 0 | (0,000) | 0 | 20 | 1,394 | 70 | 4,375 | 375,474 | 86 |
| Freight - Weyco | | (0,000) | 0 | | (0,169) | (8) | | (43,548) | (10) |
| Total Chip Sales - BDT | 2,075 | 134,741 | 65 | 9,715 | 625,529 | 64 | 42,888 | 3,256,359 | 76 |
| By-Products | 2,037 | 36,281 | 18 | 7,177 | 122,890 | 17 | 30,219 | 513,205 | 17 |
| Freight - By-Products | | (3,847) | (2) | | (28,666) | (4) | | (122,265) | (4) |
| Other Services | | (0,000) | 0 | | (0,000) | 0 | | (0,000) | 0 |
| Total Sales Revenue - MBF | 3,946 | 2,691,845 | 677 | 13,916 | 9,632,433 | 706 | 61,593 | 43,638,338 | 708 |
| Beg. Inventory - Logs | 2,345 | 1,185,803 | 505 | 3,378 | 1,597,105 | 499 | 2,994 | 1,703,995 | 569 |
| Purchased Logs - 3rd Party | 581 | 290,261 | 500 | 2,431 | 1,687,802 | 693 | 17,888 | 9,489,825 | 531 |
| Other Handling Costs | | 11,768 | 20 | | 38,969 | 11 | | 169,090 | 9 |
| Purchased Logs - Weyco | 1,344 | 691,518 | 515 | 3,845 | 1,944,230 | 505 | 13,823 | 7,851,682 | 495 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 39,698 | 3 |
| Log Transferred In | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred In - NWH WA | 660 | 177,041 | 268 | 1,070 | 334,005 | 368 | 4,983 | 1,357,103 | 383 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Logs Transferred In - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Raw Materials Available | 4,731 | 2,358,410 | 498 | 11,570 | 5,662,161 | 489 | 43,318 | 21,913,495 | 505 |
| Sawmill Conversion - MBF | 3,571 | 1,144,088 | 320 | 12,064 | 4,224,477 | 350 | 57,963 | 18,891,965 | 326 |
| Sawmill Conversion - Softwar | 2,200 | | 501 | 8,591 | | 491 | 30,543 | | 511 |
| 3rd Party Sales | 0 | 0.000 | 0 | 23 | 7,113 | 309 | 210 | 116,399 | 554 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 866 | 397,322 | 459 | 1,575 | 732,237 | 465 |
| Logs Transferred Out - NWH OR | 32 | 20,097 | 586 | 100 | 38,704 | 388 | 191 | 77,670 | 411 |
| Ending Inventory - Logs | (2,427) | (1,194,305) | 492 | (2,480) | (1,194,305) | 482 | (2,630) | (1,194,305) | 454 |
| Total Net Mill Cost to Loc. | 2,333 | 1,164,195 | 499 | 9,178 | 4,467,856 | 487 | 38,319 | 19,819,100 | 517 |

EXHIBIT 482 P. 25

## Centralia - Mill Summary Results

### Northwest Hardwoods - Centralia

($000)

| December 2001 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Wash. Loc. | 100 | 116.039 | 1,355 | 250 | 284.955 | 1,138 | 3,105 | 2,950.901 | 950 |
| Freight from Wash. Loc. | | 0.267 | 3 | | 0.675 | 3 | | 6.133 | 2 |
| Lumber Transfers from Ore. Loc. | 0 | 0.000 | 0 | 55 | 83.604 | 1,520 | 208 | 278.284 | 1,340 |
| Freight from Ore. Loc. | | 0.134 | 0 | | 0.934 | 17 | | 3.667 | 18 |
| Custom Services | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total Outside Purchases Lbr | 100 | 116.440 | 1,165 | 305 | 370.169 | 1,213 | 3,313 | 3,238.975 | 978 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,370 | 295.423 | 83 | 12,964 | 1,068.277 | 82 | 57,963 | 4,348.046 | 82 |
| Maintenance Labor | | 66.750 | 19 | | 230.215 | 18 | | 1,084.066 | 19 |
| Payroll Loading | | 249.382 | 70 | | 729.838 | 56 | | 2,677.878 | 46 |
| Operating Supplies | | 31.888 | 9 | | 96.522 | 7 | | 482.736 | 8 |
| Maintenance Supplies | | 8.476 | 2 | | 85.649 | 7 | | 389.980 | 7 |
| Natural Gas | | 47.382 | 13 | | 126.649 | 10 | | 610.182 | 11 |
| Electricity/Utilities | | 50.754 | 14 | | 155.429 | 12 | | 575.432 | 10 |
| Rent | | 7.394 | 2 | | 26.426 | 2 | | 108.078 | 2 |
| Outside Services | | 24.552 | 7 | | 66.545 | 5 | | 238.500 | 4 |
| Outside Services - Drying | 2,402 | 0.000 | 0 | 4,687 | 0.000 | 0 | 4,687 | 0.000 | 0 |
| Per m Lumber | | 2.216 | 1 | | 4.107 | 0 | | 48.389 | 1 |
| Distributed Expenses | | 0.552 | 0 | | 2.171 | 0 | | 3.447 | 0 |
| Miscellaneous | | 9.603 | 3 | | 25.702 | 2 | | 102.971 | 2 |
| Total Variable Costs | 3,370 | 793.712 | 222 | 12,964 | 3,688.549 | 281 | 57,963 | 11,071.435 | 191 |
| Depreciation | 3,846 | 90.319 | 23 | 13,916 | 298.202 | 21 | 61,593 | 1,209.551 | 20 |
| Taxes | | 0.006 | 2 | | 25.129 | 2 | | 131.034 | 2 |
| Other | | 74.388 | 19 | | 301.197 | 22 | | 1,249.313 | 20 |
| Period Costs | 3,846 | 172.793 | 45 | 13,916 | 630.686 | 45 | 61,593 | 2,589.898 | 42 |
| Bad Debt Expense | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Beg. Inventory Lumber - MBF | 4,832 | 3,621.712 | 792 | 5,124 | 4,130.778 | 806 | 4,868 | 4,841.755 | 995 |
| Ending Inventory Lumber - MBF | (4,448) | (3,524.000) | 792 | (4,448) | (3,524.000) | 792 | (4,448) | (3,524.000) | 792 |
| Total Cost of Sales | 3,846 | 3,344.926 | 870 | 13,916 | 4,703.913 | 435 | 61,593 | 38,836.837 | 648 |
| Gross Profit/ Contribution | 3,846 | 252.971 | 67 | 13,916 | 1,118.479 | 80 | 61,593 | 5,601.581 | 91 |
| Depreciation | 3,846 | 0.000 | 0 | 13,916 | 0.000 | 0 | 61,593 | 0.000 | 0 |
| Taxes | | 11.930 | 3 | | 43.163 | 3 | | 198.664 | 3 |
| Other | | 4.672 | 1 | | 5.794 | 0 | | 5.821 | 0 |
| Subtotal - Loc. G&A | 3,846 | 16.602 | 4 | 13,916 | 48.957 | 4 | 61,593 | 204.486 | 3 |
| Selling Expense Allocation | 3,841 | 0.000 | 0 | 13,916 | 0.000 | 0 | 61,593 | 0.000 | 0 |
| G&A Expense Allocation | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expenses | 3,846 | 16.602 | 4 | 13,916 | 48.957 | 4 | 61,593 | 204.486 | 3 |
| Misc Rev/(Exp) | 3,846 | 0.142 | 0 | 13,916 | 2.079 | 0 | 61,593 | 2.322 | 0 |
| Other Rev/(Exp) | 3,846 | (0.758) | (0) | 13,916 | (7.349) | (1) | 61,593 | (26.989) | (0) |
| Pre-Tax Profit/(Loss) | 3,846 | 248.813 | 65 | 13,916 | 1,064.861 | 76 | 61,593 | 5,372.348 | 87 |
| Lumber Recovery/Log | | 1.57 | | | 1.68 | | | 1.57 | |
| Chips Recovery/Lumber MBF | | 0.75 | | | 0.75 | | | 0.74 | |
| Timber Profit/Loss | | 0.000 | | | 0.000 | | | 0.000 | |
| Results | | 248.813 | | | 1,064.861 | | | 5,372.348 | |
| Difference | | (0.000) | | | 0.000 | | | (0.000) | |

EXHIBIT 482 P. 26



Con_ntiaard

## Arlington - Mill Summary Results

### Northwest Hardwoods - Arlington

($000)

| December 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 3,043 | 2,877 | 946 | 12,043 | 11,752 | 976 | 49,027 | 47,384 | 967 |
| Pallet - MBF | 1,339 | 228 | 234 | 4,213 | 1,070 | 254 | 18,178 | 4,825 | 265 |
| Discounts/Claims/Freight | | (17) | (4) | | (57) | (3) | | (198) | (3) |
| Net 3rd Party Sales - MBF | 4,369 | 3,088 | 732 | 16,256 | 12,765 | 785 | 67,196 | 52,012 | 780 |
| Intra Division Sales | | | | | | | | | |
| Sales - Reman | 131 | 75 | 573 | 131 | 75 | 573 | 736 | 392 | 534 |
| Sales - CSC | 7 | 5 | 719 | 43 | 42 | 963 | 137 | 137 | 998 |
| Sales - Chewa | 13 | 23 | 1,795 | 133 | 171 | 1,289 | 767 | 914 | 1,192 |
| Sales - Taiwan | 0 | (0) | 0 | 13 | 14 | 1,101 | 70 | 73 | 1,038 |
| Sales - Indiana Warehouse | 0 | (0) | 0 | 13 | 26 | 1,966 | 138 | 182 | 1,646 |
| Sales - Titusville | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Midwest | 0 | (0) | 0 | 44 | 39 | 893 | 44 | 39 | 893 |
| Lbr Trans. to NWH Wash. Loc. | 515 | 525 | 1,019 | 1,004 | 931 | 947 | 7,444 | 7,071 | 950 |
| Lbr Trans. to NWH Ore. Loc | 0 | (0) | 0 | 2 | 1 | 283 | 346 | 337 | 1,030 |
| Total Lumber Sales - MBF | 5,041 | 3,824 | 759 | 17,654 | 14,068 | 798 | 75,766 | 60,596 | 773 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | 1 | 179 | 11 | 2 | 203 | 53 | 49 | 884 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 414 | 223 | 538 | 639 | 317 | 504 | 2,046 | 1,079 | 527 |
| NWH OR - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 414 | 224 | 543 | 649 | 319 | 499 | 2,101 | 1,127 | 537 |
| Chip Sales - 3rd Party - BDT | 3,678 | 327 | 89 | 7,682 | 659 | 86 | 39,439 | 3,502 | 89 |
| Chip Sales - Weyco - BDT | 5,366 | 492 | 92 | 22,531 | 2,067 | 92 | 77,933 | 7,144 | 92 |
| Total Chip Sales - BDT | 9,044 | 819 | 91 | 29,953 | 2,726 | 91 | 117,372 | 10,645 | 91 |
| By-Products | 1,646 | 7 | 4 | 5,261 | 27 | 5 | 34,058 | 184 | 5 |
| Other Services | 0 | (0) | 0 | 0 | (0) | 0 | 0 | 4 | 0 |
| Total Sales Revenue - MBF | 5,041 | 4,878 | 968 | 17,654 | 17,140 | 971 | 75,766 | 68,673 | 934 |
| Beg. Inventory - Logs | 4,933 | 1,748 | 354 | 5,534 | 1,933 | 349 | 10,727 | 4,887 | 456 |
| Purchased Logs - 3rd Party | 2,743 | 1,632 | 436 | 11,202 | 5,669 | 399 | 55,810 | 29,333 | 363 |
| Purchased Logs - Weyco | 103 | 50 | 493 | 267 | 111 | 419 | 2,830 | 996 | 352 |
| The Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - NWH WA | 1,721 | 934 | 539 | 1,777 | 942 | 536 | 3,972 | 1,494 | 488 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Raw Materials Available | 19,510 | 4,364 | 415 | 21,780 | 8,654 | 398 | 71,647 | 27,554 | 385 |
| Sawmill Conversion - MBF | 3,919 | 1,804 | 460 | 14,039 | 5,999 | 426 | 59,483 | 24,118 | 406 |
| Sawmill Conversion - Scribner | 4,082 | 1,804 | 422 | 15,505 | 5,997 | 387 | 63,956 | 24,118 | 377 |
| 3rd Party Sales | 0 | 4 | 537 | 11 | 6 | 518 | 53 | 24 | 436 |
| Logs Transferred Out - NWH WA | 414 | 222 | 538 | 639 | 317 | 504 | 2,043 | 1,079 | 527 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (3,617) | (2,334) | 645 | (3,617) | (2,334) | 645 | (3,617) | (2,334) | 645 |
| Timber Consumed/Old | 0 | 0 | 0 | 0 | 1 | 0 | 0 | (12) | 0 |
| Total Net RM Cost to Loc. | 4,894 | 2,030 | 415 | 16,145 | 6,331 | 392 | 66,834 | 25,188 | 380 |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 121 | 60 | 500 |
| Lumber Transfers from Wash. Loc | 781 | 719 | 920 | 3,309 | 3,064 | 926 | 13,934 | 12,402 | 890 |
| Lumber Transfers from Ore. Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 78 | 77 | 993 |
| Custom Services | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 3 | 0 |
| Total Outside Incoming Lbr | 781 | 719 | 920 | 3,309 | 3,077 | 929 | 14,093 | 12,537 | 890 |

EXHIBIT 482 P. 27

WY-CONF-00127

## Arlington - Mill Summary Results

### Northwest Hardwoods - Arlington

($000)

| December 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,919 | 367 | 94 | 14,019 | 1,347 | 96 | 59,400 | 5,751 | 97 |
| Maintenance Labor | | 95 | 24 | | 307 | 22 | | 1,242 | 21 |
| Payroll Loading | | (19) | (5) | | 431 | 31 | | 2,416 | 41 |
| Operating Supplies | | 61 | 15 | | 232 | 17 | | 1,018 | 17 |
| Maintenance Supplies | | 75 | 18 | | 200 | 14 | | 980 | 17 |
| Natural Gas | | 11 | 3 | | 24 | 2 | | 104 | 2 |
| Electricity/Utilities | | 59 | 15 | | 173 | 12 | | 706 | 12 |
| Rent | | 8 | 2 | | 30 | 3 | | 124 | 2 |
| Outside Services | | 47 | 12 | | 189 | 13 | | 657 | 11 |
| Outside Services - Drying | | 71 | 18 | | 164 | 12 | | 567 | 10 |
| Fit on Lumber | | 1 | 0 | | 6 | 0 | | 37 | 1 |
| Fit on Chips/By-Prod | | 67 | 17 | | 223 | 22 | | 1,250 | 21 |
| Miscellaneous | | 0 | 0 | | 3 | 0 | | 9 | 0 |
| Total Variable Costs | 3,919 | 844 | 216 | 14,019 | 3,429 | 245 | 59,400 | 14,855 | 250 |
| Depreciation | 5,041 | 193 | 21 | 17,654 | 364 | 21 | 73,766 | 1,256 | 17 |
| Taxes | | 8 | 2 | | 27 | 2 | | 111 | 1 |
| Other | | 132 | 26 | | 393 | 22 | | 1,417 | 19 |
| Period Costs | 5,041 | 346 | 49 | 17,654 | 784 | 44 | 73,766 | 2,784 | 38 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 6,058 | 3,934 | 649 | 6,055 | 4,084 | 674 | 5,834 | 3,095 | 633 |
| Ending Inventory Lumber - MBF | (5,716) | (3,900) | 682 | (5,716) | (3,900) | 682 | (5,716) | (3,900) | 682 |
| Total Cost of Sales | 5,041 | 3,874 | 769 | 17,654 | 13,725 | 777 | 73,766 | 55,179 | 748 |
| Gross Profit Contribution | 5,041 | 1,084 | 199 | 17,654 | 3,435 | 195 | 73,766 | 13,699 | 186 |
| Depreciation | 5,041 | 0 | 0 | 17,654 | 0 | 0 | 73,766 | 0 | 0 |
| Taxes | | 17 | 3 | | 67 | 4 | | 283 | 4 |
| Other | | 1 | 0 | | 2 | 0 | | 9 | 0 |
| Subtotal - Loc. G&A | 5,041 | 17 | 3 | 17,654 | 69 | 4 | 73,766 | 293 | 4 |
| Selling Expense Allocation | 5,041 | 36 | 7 | 17,654 | 422 | 24 | 73,766 | 2,496 | 34 |
| G&A Expense Allocation | | 23 | 5 | | 75 | 4 | | 273 | 4 |
| Total SG&A Expense | 5,041 | 78 | 16 | 17,654 | 567 | 32 | 73,766 | 3,062 | 42 |
| Misc Rev/(Exp) | 5,041 | 1 | 0 | 17,654 | 7 | 0 | 73,766 | 37 | 0 |
| Other Rev/(Exp) | 5,041 | (0) | 0 | 17,654 | 3 | 0 | 73,766 | (37) | (0) |
| Pre-Tax Profit/(Loss) | 5,041 | 924 | 184 | 17,654 | 2,879 | 163 | 73,766 | 10,633 | 144 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 0.87 | 0.90 | 0.93 |
| Chips Recovery/Lumber MBF | 2.75 | 2.51 | 2.29 |

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EXHIBIT 482 P. 28

WY-CONF-00129

Arlington - Mill Summary Results

Northwest Hardwoods - Arlington

($000)

| December 1998 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 2,371 | 1,519 | 809 | 8,716 | 6,983 | 783 | 34,679 | 33,856 | 911 |
| Poles - MBF | 1,391 | 348 | 250 | 4,233 | 1,032 | 249 | 18,604 | 4,637 | 249 |
| Discounts Claims/Freight | | (12) | (4) | | (44) | (3) | | (187) | (3) |
| Net 3rd Party Sales - MBF | 3,763 | 2,255 | 599 | 12,949 | 7,947 | 609 | 53,283 | 36,551 | 661 |
| Inter Division Sales | | | | | | | | | |
| Sales - Renton | 0 | (0) | 0 | 0 | (0) | 0 | 321 | 277 | 322 |
| Sales - CDC | 43 | 28 | 681 | 105 | 70 | 663 | 291 | 196 | 697 |
| Sales - Chehalis | 91 | 97 | 1,067 | 254 | 278 | 1,114 | 566 | 671 | 1,188 |
| Sales - Tacoma | 18 | 11 | 633 | 55 | 35 | 633 | 32 | 25 | 778 |
| Sales - Kalkin Warehouse | 0 | (0) | 0 | 0 | (0) | 0 | 133 | 177 | 1,325 |
| Sales - Ketchum Warehouse | 33 | 36 | 1,076 | 158 | 169 | 1,076 | 998 | 279 | 1,613 |
| Sales - Midway | 0 | (0) | 0 | 0 | (0) | 0 | 20 | 19 | 938 |
| Sales - Vancouver | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Wash. Loc. | 131 | 129 | 1,042 | 441 | 433 | 996 | 3,673 | 3,825 | 1,041 |
| Lbr Trans. to NWH Ore. Loc. | 3 | 3 | 1,156 | 3 | 3 | 1,156 | 241 | 333 | 963 |
| Total Lumber Sales - MBF | 4,132 | 2,658 | 643 | 14,188 | 9,838 | 661 | 60,541 | 43,251 | 692 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 41 | 3 | 83 | 42 | 4 | 89 | 223 | 66 | 297 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0) | 0 | 943 | 443 | 477 | 1,311 | 838 | 636 |
| NWH OR - MBF | 0 | (0) | 0 | 242 | 103 | 433 | 242 | 103 | 433 |
| Total Log Sales - MBF | 41 | 3 | 83 | 1,249 | 554 | 445 | 2,176 | 1,010 | 464 |
| Chip Sales - 3rd Party - BDT | 4,233 | 383 | 85 | 8,096 | 718 | 93 | 16,083 | 1,584 | 98 |
| Freight - 3rd Party | | (17) | (4) | | (76) | (9) | | (162) | (10) |
| Chip Sales - Weyco - BDT | 988 | 87 | 88 | 12,886 | 1,131 | 88 | 90,169 | 8,156 | 90 |
| Freight - Weyco | | (14) | (14) | | (204) | (17) | | (1,219) | (13) |
| Total Chip Sales - BDT | 5,220 | 441 | 84 | 21,182 | 1,621 | 77 | 106,254 | 8,391 | 79 |
| By-Product Sales | 1,569 | 6 | 4 | 5,109 | 24 | 4 | 24,680 | 104 | 4 |
| Freight - By-Product | | (9) | 0 | | (9) | 0 | | (9) | 0 |
| Other Services | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Total Sales Revenue - MBF | 4,833 | 3,110 | 649 | 14,188 | 11,340 | 799 | 60,541 | 51,756 | 849 |
| Beg. Inventory - Logs | 3,277 | 1,076 | 324 | 3,907 | 1,228 | 341 | 3,647 | 2,334 | 633 |
| Purchased Logs - 3rd Party | 3,491 | 1,338 | 383 | 12,616 | 4,620 | 361 | 53,996 | 20,134 | 373 |
| Purchased Logs - Weyco | 86 | 22 | 413 | 123 | 43 | 359 | 1,697 | 572 | 343 |
| Tbr Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 188 | 53 | 477 |
| Logs Transferred In - NWH WA | 13 | 4 | 338 | 88 | 28 | 313 | 1,214 | 501 | 413 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Raw Materials Available | 6,889 | 2,441 | 354 | 16,936 | 6,221 | 367 | 61,430 | 23,904 | 389 |
| Lineal Conversion - MBF | 2,067 | 1,054 | 366 | 11,972 | 4,279 | 358 | 53,178 | 20,225 | 406 |
| Sawmill Conversion - Softwood | 1,821 | | 376 | 11,661 | | 367 | 50,227 | | 379 |
| 3rd Party Sales | 41 | 0 | 283 | 43 | 13 | 283 | 223 | 57 | 254 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 943 | 443 | 470 | 1,311 | 838 | 636 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 242 | 103 | 433 | 242 | 103 | 433 |
| Ending Inventory - Logs | (4,827) | (1,379) | 343 | (4,827) | (1,379) | 343 | (4,827) | (1,379) | 343 |
| Timber Company Mbf | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 1 | 0 |
| Total Net Mbf Cost to Loc. | 2,963 | 1,064 | 773 | 12,910 | 4,845 | 375 | 58,482 | 22,224 | 382 |

All Million

EXHIBIT 482 P. 29

WY-CONF-00103

## Arlington - Mill Summary Results

### Northwest Hardwoods - Arlington

($000)

| December 1998 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 239 | 242 | 1,057 | 386 | 433 | 1,095 | 8,134 | 7,167 | 930 |
| Lumber Transfers from Ore. Loc. | 3 | 3 | 1,152 | 3 | 3 | 1,113 | 30 | 33 | 1,119 |
| Custom Services | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Outside Incoming Lbr | 231 | 245 | 1,058 | 399 | 436 | 1,094 | 8,164 | 7,682 | 931 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,847 | 328 | 108 | 11,972 | 1,230 | 103 | 53,178 | 5,225 | 100 |
| Maintenance Labor | | 88 | 29 | | 288 | 24 | | 1,223 | 23 |
| Payroll Loading | | 118 | 39 | | 334 | 28 | | 2,000 | 38 |
| Operating Supplies | | 47 | 15 | | 168 | 14 | | 764 | 14 |
| Maintenance Supplies | | 90 | 30 | | 216 | 18 | | 898 | 17 |
| Natural Gas | | 64 | 14 | | 79 | 7 | | 182 | 3 |
| Electricity/Utilities | | 56 | 18 | | 147 | 12 | | 633 | 12 |
| Rent | | 14 | 5 | | 29 | 3 | | 125 | 2 |
| Outside Services | | 12 | 4 | | 59 | 5 | | 387 | 7 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 143 | 3 |
| Fee on Lumber | | 6 | 2 | | 27 | 2 | | 90 | 2 |
| Distributed Expenses | | 0 | 0 | | 18 | 2 | | 81 | 2 |
| Miscellaneous | | 0 | 0 | | 4 | 0 | | 17 | 0 |
| Total Variable Costs | 3,847 | 804 | 264 | 11,972 | 2,621 | 219 | 53,178 | 11,889 | 224 |
| Depreciation | 4,152 | 113 | 27 | 14,108 | 365 | 26 | 60,941 | 1,434 | 25 |
| Taxes | | 2 | 0 | | 21 | 2 | | 128 | 2 |
| Other | | 96 | 23 | | 348 | 25 | | 1,450 | 24 |
| Period Costs | 4,152 | 210 | 51 | 14,108 | 735 | 52 | 60,941 | 2,982 | 49 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 7,822 | 5,802 | 715 | 7,876 | 5,641 | 716 | 5,716 | 3,900 | 682 |
| Ending Inventory Lumber - MBF | (6,142) | (4,650) | 757 | (6,142) | (4,650) | 757 | (6,142) | (4,650) | 757 |
| Total Cost of Sales | 4,152 | 3,095 | 649 | 14,108 | 3,629 | 683 | 60,941 | 44,050 | 722 |
| Gross Profit Contribution | 4,152 | 415 | 100 | 14,108 | 1,618 | 114 | 60,941 | 2,787 | 126 |
| Depreciation | 4,152 | 0 | 0 | 14,108 | 0 | 0 | 60,941 | 0 | 0 |
| Taxes | | 12 | 3 | | 46 | 3 | | 210 | 3 |
| Other | | 1 | 0 | | 3 | 0 | | 20 | 0 |
| Subtotal - Loc. G&A | 4,152 | 13 | 3 | 14,108 | 47 | 3 | 60,941 | 229 | 4 |
| Selling Expense Allocation | 4,152 | 241 | 83 | 14,108 | 689 | 48 | 60,941 | 2,266 | 37 |
| G&A Expense Allocation | | 23 | 8 | | 81 | 6 | | 392 | 3 |
| Total SG&A Expense | 4,152 | 392 | 94 | 14,108 | 610 | 57 | 60,941 | 2,786 | 46 |
| Misc Rev/(Exp) | 4,152 | 2 | 0 | 14,108 | 6 | 0 | 60,941 | 24 | 0 |
| Other Rev/(Exp) | 4,152 | (12) | (3) | 14,108 | (33) | (2) | 60,941 | (34) | (1) |
| Pre-Tax Profit/(Loss) | 4,152 | 12 | 3 | 14,108 | 772 | 57 | 60,941 | 4,899 | 82 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 1.88 | 1.83 | 0.95 |
| Chips Recovery/Lumber MBF | 2.14 | 2.83 | 2.35 |

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EXHIBIT 482 P. 30

WY-CONF-00104

Arlington - Mill Summary Results

Northwest Hardwoods - Arlington

($000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 2,491 | 2,221 | 892 | 8,233 | 7,485 | 909 | 33,787 | 28,711 | 850 |
| Pallet - MBF | 1,312 | 382 | 291 | 4,858 | 1,188 | 245 | 19,695 | 4,833 | 245 |
| Discounts/Claims | | (9) | (7) | | (18) | (2) | | (139) | (1) |
| Net 3rd Party Sales - MBF | 3,723 | 2,603 | 700 | 13,238 | 8,615 | 651 | 53,482 | 33,385 | 624 |
| Intra Division Sales | | | | | | | | | |
| Sales - Rainier | 0 | (1) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| Sales - CSC | 31 | 37 | 1,200 | 55 | 58 | 1,058 | 295 | 280 | 950 |
| Sales - Chavo/Taiwan | 29 | 28 | 955 | 37 | 61 | 1,659 | 427 | 510 | 1,195 |
| Sales - Wellbilt Warehouse | 19 | 27 | 1,402 | 54 | 80 | 1,482 | 168 | 253 | 1,507 |
| Lbr Trans. to NWH Midwest Lbr. | 0 | (0) | 0 | 0 | (0) | 0 | 20 | 18 | 902 |
| Lbr Trans. to NWH Rebsel Lbr. | 0 | (0) | 0 | 0 | (0) | 0 | 80 | 53 | 667 |
| Lbr Trans. to NWH Wash. Lbr. | 333 | 343 | 1,031 | 583 | 612 | 1,044 | 2,206 | 2,373 | 1,075 |
| Lbr Trans. to NWH Ore. Lbr. | 0 | (0) | 0 | 11 | 14 | 1,295 | 37 | 41 | 1,109 |
| Total Lumber Sales - MBF | 4,225 | 2,837 | 722 | 13,981 | 9,489 | 672 | 56,718 | 36,876 | 650 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 2 | 2 | 1,232 | 17 | 6 | 373 | 243 | 28 | 110 |
| Weyco - MBF | 0 | (1) | 0 | 0 | (2) | 0 | 0 | (9) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0) | 0 | 990 | 532 | 538 | 2,895 | 1,539 | 532 |
| NWH OR - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 2 | 2 | 1,232 | 1,007 | 528 | 524 | 3,138 | 1,567 | 499 |
| Chip Sales - 3rd Party - BDT | 2,250 | (0) | 0 | 2,304 | (0) | 0 | 14,925 | 1,260 | 85 |
| Freight - 3rd Party | | (14) | (6) | | (14) | (6) | | (192) | (13) |
| Chip Sales - Weyco - BDT | 5,322 | 448 | 84 | 22,184 | 1,951 | 88 | 88,826 | 7,429 | 84 |
| Freight - Weyco | | (73) | (14) | | (317) | (14) | | (1,489) | (17) |
| Total Chip Sales - BDT | 7,572 | 358 | 75 | 25,488 | 1,616 | 71 | 103,749 | 7,487 | 72 |
| By-Products Sales | 1,861 | 12 | 7 | 5,671 | 42 | 7 | 23,976 | 181 | 7 |
| Freight - By-Products | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Other Services | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Total Sales Revenue - MBF | 4,025 | 3,181 | 790 | 13,981 | 10,885 | 844 | 56,718 | 44,815 | 811 |
| Beg. Inventory - Logs | 4,874 | 2,313 | 499 | 3,464 | 2,709 | 496 | 4,827 | 3,279 | 542 |
| Purchased Logs - 3rd Party | 3,274 | 1,853 | 566 | 12,661 | 5,078 | 401 | 53,512 | 21,643 | 404 |
| Other Handling Costs | | 138 | 42 | | 310 | 24 | | 825 | 15 |
| Purchased Logs - Weyco | 4 | 2 | 427 | 66 | 33 | 529 | 1,987 | 793 | 396 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Tfr Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - NWH WA | 4 | 2 | 419 | 72 | 34 | 482 | 1,969 | 847 | 430 |
| Other Handling Costs | | 0 | 44 | | 3 | 43 | | 13 | 7 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Available | 7,958 | 3,035 | 469 | 18,264 | 8,183 | 447 | 61,899 | 28,099 | 454 |
| Sawmill Conversion - MBF | 3,987 | 1,862 | 462 | 13,597 | 5,848 | 430 | 54,881 | 22,110 | 403 |
| Sawmill Conversion - Surfaces | 3,344 | | 463 | 13,486 | | 434 | 54,937 | | 402 |
| 3rd Party Sales | 2 | 0 | 239 | 17 | 4 | 223 | 243 | 53 | 220 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 990 | 522 | 528 | 2,901 | 1,539 | 530 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (3,992) | (1,992) | 499 | (3,992) | (1,992) | 499 | (3,992) | (1,992) | 499 |
| Timber Conveyed/Sold | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Net Mill Cost of Log | 3,946 | 1,843 | 465 | 14,472 | 6,376 | 441 | 58,109 | 25,705 | 442 |

EXHIBIT 482 P. 31

WY-CONF-00075

## Arlington - Mill Summary Results

### Northwest Hardwoods - Arlington

($000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 232 | 213 | 920 | 646 | 627 | 971 | 2,531 | 2,530 | 1,000 |
| Freight from Wash. Loc. | | 0 | 2 | | 2 | 3 | | 12 | 5 |
| Lumber Transfers from Ore. Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 14 | 21 | 1,476 |
| Freight from Ore. Loc. | | 0 | 0 | | 0 | 0 | | 1 | 39 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 1 | 0 |
| Total Outside Incoming Lbr | 232 | 214 | 922 | 646 | 629 | 974 | 2,545 | 2,569 | 1,009 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,987 | 374 | 94 | 13,397 | 1,271 | 95 | 54,881 | 5,155 | 94 |
| Maintenance Labor | | 80 | 20 | | 274 | 20 | | 1,217 | 22 |
| Payroll Loading | | 253 | 63 | | 669 | 50 | | 2,314 | 42 |
| Operating Supplies | | 11 | 10 | | 188 | 14 | | 771 | 14 |
| Maintenance Supplies | | 61 | 15 | | 164 | 12 | | 705 | 13 |
| Natural Gas | | 21 | 5 | | 53 | 4 | | 209 | 4 |
| Electricity/Utilities | | 57 | 14 | | 163 | 12 | | 640 | 12 |
| Rent | | 0 | 2 | | 22 | 2 | | 124 | 2 |
| Outside Services | | 38 | 10 | | 96 | 7 | | 295 | 5 |
| Outside Services - Drying | 283 | 38 | 79 | 1,039 | 78 | 75 | 3,413 | 289 | 85 |
| Fit on Lumber | | 16 | 4 | | 52 | 4 | | 130 | 2 |
| Distributed Expenses | | 14 | 4 | | 31 | 2 | | 45 | 1 |
| Miscellaneous | | 8 | 2 | | 21 | 2 | | 40 | 1 |
| Total Variable Costs | 3,987 | 1,031 | 259 | 13,397 | 3,019 | 230 | 54,881 | 11,924 | 217 |
| Depreciation | 4,025 | 116 | 29 | 13,981 | 351 | 25 | 56,718 | 1,420 | 25 |
| Taxes | | 25 | 6 | | 84 | 6 | | 212 | 4 |
| Other | | 87 | 22 | | 277 | 20 | | 1,141 | 20 |
| Period Costs | 4,025 | 228 | 57 | 13,981 | 712 | 51 | 56,718 | 2,774 | 49 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 6,618 | 5,271 | 796 | 6,369 | 4,836 | 715 | 6,142 | 4,630 | 757 |
| Ending Inventory Lumber - MBF | (6,812) | (5,251) | 771 | (6,812) | (5,251) | 771 | (6,812) | (5,251) | 771 |
| Total Cost of Sales | 4,025 | 3,326 | 829 | 13,981 | 10,382 | 743 | 56,718 | 40,369 | 712 |
| Gross Profit Contribution | 4,025 | 166 | 41 | 13,981 | 1,421 | 102 | 56,718 | 5,646 | 100 |
| Depreciation | 4,025 | 0 | 0 | 13,981 | 0 | 0 | 56,718 | 0 | 0 |
| Taxes | | 13 | 3 | | 43 | 3 | | 106 | 3 |
| Other | | 1 | 0 | | 2 | 0 | | 9 | 0 |
| Subtotal - Loc. G&A | 4,025 | 14 | 3 | 13,981 | 45 | 3 | 56,718 | 195 | 3 |
| Selling Expense Allocation | 4,025 | 135 | 34 | 13,981 | 481 | 34 | 56,718 | 1,937 | 34 |
| G&A Expense Allocation | | 25 | 6 | | 80 | 6 | | 308 | 5 |
| Total SG&A Expense | 4,025 | 174 | 43 | 13,981 | 605 | 43 | 56,718 | 2,440 | 43 |
| Misc Rev(Exp) | 4,025 | (1) | (0) | 13,981 | 2 | 0 | 56,718 | 16 | 0 |
| Other Rev(Exp) | 4,025 | (12) | (3) | 13,981 | (41) | (3) | 56,718 | (146) | (3) |
| Pre-Tax Profit(Loss) | 4,025 | (21) | (5) | 13,981 | 777 | 56 | 56,718 | 3,077 | 54 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 1.01 | 0.99 | 1.00 |
| Chips Recovery/Lumber MBF | 1.90 | 1.90 | 1.80 |

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## Arlington - Mill Summary Results

### Northwest Hardwoods - Arlington

($000)

| December 2008 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 4,627 | 2,291 | 534 | 9,573 | 4,883 | 544 | 36,296 | 20,931 | 634 |
| Pallet - MBF | 1,826 | 485 | 249 | 3,908 | 1,297 | 248 | 21,849 | 5,119 | 241 |
| Closeout Claims | | (29) | (5) | | (80) | (6) | | (122) | (3) |
| Net 3rd Party Sales - MBF | 6,548 | 3,577 | 682 | 14,680 | 9,293 | 633 | 57,966 | 35,928 | 638 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Kamps | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CSC | 91 | 78 | 1,054 | 134 | 135 | 1,009 | 422 | 389 | 922 |
| Sales - Olympic Timber | 49 | 61 | 1,236 | 91 | 120 | 1,311 | 372 | 498 | 1,339 |
| Sales - Intl Body Warehouse | 5 | (0) | 0 | 0 | (0) | 0 | 183 | 262 | 1,428 |
| Lbr Trans. to NWH Alderwood Lac. | 0 | (0) | 0 | 20 | 21 | 1,053 | 55 | 54 | 1,019 |
| Lbr Trans. to NWH Aldwd Lac. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Wash. Lac. | 118 | 141 | 1,196 | 328 | 389 | 1,186 | 2,012 | 2,368 | 1,177 |
| Lbr Trans. to NWH Ore. Lac. | 0 | (0) | 0 | 0 | (0) | 0 | 44 | 45 | 1,017 |
| Total Lumber Sales - MBF | 5,476 | 3,841 | 701 | 15,257 | 9,952 | 652 | 60,998 | 39,434 | 646 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 1 | 0 | 371 | 18 | 7 | 403 | 650 | 25 | 683 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 4 | 3 | 694 | 315 | 443 | 697 | 4,364 | 2,582 | 691 |
| NWH OR - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 5 | 3 | 610 | 333 | 187 | 647 | 4,215 | 2,590 | 680 |
| Chip Sales - 3rd Party - BDT | 3,649 | 259 | 80 | 2,996 | 241 | 90 | 22,638 | 2,023 | 91 |
| Freight - 3rd Party | | (168) | (54) | | (168) | (56) | | (196) | (9) |
| Chip Sales - Weyco - BDT | 2,592 | 187 | 84 | 17,711 | 1,506 | 93 | 38,210 | 4,993 | 84 |
| Freight - Weyco | | (53) | (19) | | (274) | (15) | | (230) | (14) |
| Total Chip Sales - BDT | 6,241 | 471 | 76 | 20,416 | 1,558 | 75 | 90,251 | 6,809 | 75 |
| By-Products Sales | 1,020 | 11 | 3 | 5,130 | 36 | 7 | 20,163 | 152 | 8 |
| Freight - By-Products | | (0) | 0 | - | (0) | 0 | | (0) | 0 |
| Other Services | | 40 | 0 | | (0) | 0 | | (0) | 0 |
| Total Sales Revenue - $000 | 5,476 | 4,216 | 770 | 15,257 | 11,687 | 766 | 60,998 | 48,985 | 803 |
| Beg. Inventory - Logs | 4,442 | 2,316 | 521 | 3,441 | 1,811 | 526 | 3,792 | 1,792 | 473 |
| Purchased Logs - 3rd Party | 4,997 | 2,297 | 460 | 14,029 | 8,312 | 593 | 54,918 | 23,830 | 434 |
| Other Handling Costs | | 122 | 24 | | 344 | 24 | | 1,374 | 25 |
| Purchased Logs - Weyco | 11 | 7 | 620 | 332 | 194 | 584 | 2,269 | 1,201 | 529 |
| Other Handling Costs | | 9 | 0 | | 0 | 0 | | 0 | 0 |
| Tfr Transferred in | 0 | 0 | 0 | 0 | 0 | 0 | 374 | 69 | 185 |
| Logs Transferred in - NWH WA | 3 | 0 | 24 | 229 | 126 | 229 | 1,068 | 1,023 | 958 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 4 |
| Logs Transferred in - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Available | 9,447 | 4,819 | 510 | 18,041 | 9,129 | 506 | 62,469 | 28,795 | 461 |
| Sawmill Conversion - MBF | 3,784 | 1,775 | 469 | 12,213 | 6,180 | 506 | 54,323 | 28,033 | 516 |
| Sawmill Conversion - Scribner | 3,642 | | 487 | 12,548 | | 493 | 52,384 | | 536 |
| 3rd Party Sales | 1 | 1 | 559 | 19 | 9 | 463 | 831 | 26 | 241 |
| Logs Transferred Out - NWH WA | 4 | 3 | 694 | 333 | 163 | 669 | 4,364 | 2,582 | 691 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (3,778) | (2,161) | 572 | (3,778) | (2,161) | 572 | (3,778) | (2,161) | 572 |
| Total Vol 820 Cost to Lac | 2,668 | 1,779 | 667 | 11,870 | 6,348 | 535 | 50,599 | 26,932 | 532 |

Lumber produced

EXHIBIT 482 P. 33

WY-CONF-00052

Arlington - Mill Summary Results

Northwest Hardwoods - Arlington

($000)

| December 2000 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | [illegible] | 0 | 386 | 349 | 905 |
| Lumber Transfers from Wash. Loc. | 505 | 494 | 979 | 2,613 | 1,937 | 741 | 5,389 | 4,630 | 859 |
| Freight from Wash. Loc. | | 1 | 1 | | 3 | 1 | | 10 | 2 |
| Lumber Transfers from Ore. Loc. | 34 | 32 | 1,331 | 50 | 55 | 1,096 | 50 | 55 | 1,096 |
| Freight from Ore. Loc. | | 0 | 0 | | 1 | 13 | | 1 | 13 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Outside Incoming Lbr | 529 | 527 | 996 | 2,663 | 2,044 | 767 | 5,825 | 5,045 | 866 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,784 | 331 | 98 | 13,215 | 1,284 | 97 | 54,325 | 5,234 | 96 |
| Maintenance Labor | | 98 | 24 | | 304 | 23 | | 1,338 | 25 |
| Payroll Loading | | 394 | 83 | | 785 | 59 | | 2,483 | 46 |
| Operating Supplies | | 61 | 16 | | 193 | 15 | | 771 | 14 |
| Maintenance Supplies | | 47 | 12 | | 165 | 13 | | 668 | 12 |
| Natural Gas | | 17 | 12 | | 101 | 8 | | 285 | 5 |
| Electricity/Utilities | | 80 | 16 | | 155 | 12 | | 652 | 12 |
| Rent | | 10 | 3 | | 26 | 2 | | 104 | 2 |
| Outside Services | | 16 | 4 | | 55 | 4 | | 244 | 4 |
| Outside Services - Drying | 0 | 0 | 0 | 0 | 0 | 0 | 2,290 | 117 | 51 |
| Fit on Lumber | | 5 | 1 | | 10 | 1 | | 97 | 2 |
| Distributed Expenses | | (9) | (2) | | (17) | (1) | | 30 | 1 |
| Miscellaneous | | 10 | 3 | | 31 | 2 | | 81 | 1 |
| Total Variable Costs | 3,784 | 1,023 | 270 | 13,215 | 3,093 | 234 | 54,325 | 12,804 | 121 |
| Depreciation | 5,476 | 129 | 24 | 15,257 | 361 | 24 | 60,998 | 1,376 | 23 |
| Taxes | | 15 | 3 | | 43 | 3 | | 142 | 2 |
| Other | | 112 | 24 | | 355 | 23 | | 1,260 | 21 |
| Period Costs | 5,476 | 177 | 50 | 15,257 | 759 | 50 | 60,998 | 2,778 | 46 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 7,127 | 5,600 | 798 | 5,342 | 4,253 | 796 | 6,812 | 5,251 | 771 |
| Ending Inventory Lumber - MBF | (5,964) | (5,178) | 868 | (5,964) | (5,178) | 868 | (5,964) | (5,178) | 868 |
| Total Cost of Sales | 5,476 | 4,115 | 751 | 15,257 | 11,339 | 735 | 60,998 | 45,832 | 751 |
| Gross Profit Contribution | 5,476 | 312 | 39 | 15,257 | 382 | 25 | 60,998 | 3,153 | 52 |
| Depreciation | 5,476 | 0 | 0 | 15,257 | 0 | 0 | 60,998 | 0 | 0 |
| Taxes | | 17 | 3 | | 47 | 3 | | 193 | 3 |
| Other | | 0 | 0 | | 1 | 0 | | 7 | 0 |
| Nonrental - Loc. G&A | 5,476 | 18 | 3 | 15,257 | 48 | 3 | 60,998 | 281 | 3 |
| Selling Expense Allocation | 5,476 | 86 | 16 | 15,257 | 241 | 16 | 60,998 | 963 | 16 |
| G&A Expense Allocation | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total SG&A Expense | 5,476 | 104 | 19 | 15,257 | 289 | 19 | 60,998 | 1,164 | 19 |
| Misc Rent/Expl | 5,476 | 1 | 0 | 15,257 | 7 | 0 | 60,998 | 13 | 0 |
| Other Rent/Expl | 5,476 | (6) | (1) | 15,257 | (37) | (2) | 60,998 | (145) | (2) |
| Pre-Tax Profit/(Loss) | 5,476 | 103 | 19 | 15,257 | 63 | 4 | 60,998 | 1,857 | 30 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 1.83 | 1.83 | 1.84 |
| Chips Recovery/Lumber MBF | 1.65 | 1.54 | 1.66 |

Art_collision

EXHIBIT 482 P. 34

WY-CONF-00056

## Arlington - Mill Summary Results

### Northwest Hardwoods - Arlington

($000)

| December 2001 | 1 Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 1/8/2002 16:23 | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 3,612 | 2,974,634 | 572 | 9,621 | 8,369,432 | 864 | 35,649 | 30,195,970 | 847 |
| Pulp - MBF | 1,864 | 237,738 | 223 | 4,545 | 1,030,694 | 231 | 11,572 | 4,490,488 | 233 |
| Domestic/Claims | | (22,457) | (7) | | (64,590) | (7) | | (184,638) | (5) |
| Net 3rd Party Sales - MBF | 4,476 | 3,189,956 | 713 | 14,166 | 9,295,536 | 656 | 54,511 | 34,499,542 | 633 |
| Inter Division Sales | | | | | | | | | |
| Sales - Rexam | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - CEC | 0 | 0.000 | 0 | 110 | 109,917 | 998 | 524 | 514,795 | 983 |
| Sales - Chiwis/Taiwan | 18 | 12,239 | 679 | 72 | 44,399 | 1,236 | 326 | 436,661 | 1,341 |
| Sales - Intl/Italy Warehouse | 18 | 27,906 | 1,544 | 72 | 98,987 | 1,383 | 181 | 241,579 | 1,328 |
| Lbr Trans. to NWH Midwest Loc. | 7 | 6,383 | 988 | 23 | 22,036 | 1,002 | 56 | 53,258 | 961 |
| Lbr Trans. to NWH Roland Loc. | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Wash. Loc. | 186 | 98,997 | 534 | 250 | 274,066 | 1,097 | 1,690 | 1,969,991 | 1,166 |
| Lbr Trans. to NWH Ore. Loc. | 5 | 4,134 | 827 | 5 | 4,134 | 827 | 44 | 97,331 | 1,079 |
| Total Lumber Sales - MBF | 4,630 | 3,339,680 | 721 | 14,753 | 9,888,764 | 671 | 57,321 | 37,763,468 | 659 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 87 | (1.697) | (0) | 246 | 13,473 | 55 | 393 | 40,661 | 103 |
| Weyco - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 1,493 | 843,543 | 580 | 5,148 | 3,200,352 | 622 |
| NWH OR - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Total Log Sales - MBF | 87 | (0.697) | (8) | 1,701 | 857,021 | 504 | 5,583 | 3,241,054 | 581 |
| Chip Sales - 3rd Party - BDT | 7 | 0.497 | 76 | 457 | 37,457 | 82 | 15,495 | 1,119,465 | 72 |
| Freight - 3rd Party | | (0.000) | 0 | | 3,250 | 7 | | (79,190) | (6) |
| Chip Sales - Weyco - BDT | 3,387 | 255,167 | 75 | 11,825 | 890,752 | 75 | 42,843 | 3,439,120 | 80 |
| Freight - Weyco | | (40.942) | (12) | | (141,913) | (12) | | (361,324) | (17) |
| Total Chip Sales - BDT | 3,394 | 214,723 | 63 | 12,281 | 789,545 | 64 | 58,337 | 3,917,871 | 70 |
| By-Products Sales | 1,803 | 8,736 | 5 | 3,324 | 26,793 | 8 | 14,903 | 121,639 | 8 |
| Freight - By-Products | | (3.500) | 0 | | (9.500) | 0 | | (8.000) | 0 |
| Other Services | | 4,468 | 0 | | (18,173) | 0 | | (78,173) | 0 |
| Total Sales Revenue - MBF | 4,630 | 3,566,828 | 770 | 14,753 | 11,543,916 | 783 | 57,321 | 45,035,830 | 786 |
| Beg. Inventory - Logs | 3,216 | 1,757,788 | 547 | 4,634 | 2,329,569 | 503 | 5,779 | 2,868,912 | 496 |
| Purchased Logs - 3rd Party | 2,210 | 1,000,015 | 456 | 9,239 | 4,186,908 | 472 | 40,424 | 18,979,617 | 470 |
| Other Handling Costs | | 83,932 | 39 | | 394,040 | 43 | | 1,776,917 | 39 |
| Purchased Logs - Weyco | 34 | 17,073 | 501 | 144 | 72,468 | 510 | 841 | 427,070 | 508 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Tfr Transferred In | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred In - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 2,039 | 1,001,377 | 494 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Logs Transferred In - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Raw Materials Available | 5,460 | 2,858,549 | 523 | 14,047 | 7,162,985 | 510 | 49,083 | 24,851,993 | 506 |
| Sawmill Conversion - MBF | 3,809 | 1,405,897 | 369 | 12,899 | 4,829,829 | 377 | 52,082 | 20,131,472 | 387 |
| Sawmill Conversion - Softwo | 2,753 | | 511 | 9,736 | | 497 | 40,957 | | 492 |
| 3rd Party Sales | 87 | 27,305 | 314 | 246 | 73,267 | 306 | 393 | 104,768 | 295 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 1,493 | 843,543 | 580 | 5,148 | 3,200,352 | 622 |
| Logs Transferred Out - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Ending Inventory - Logs | (3,830) | (1,413,342) | 369 | (3,830) | (1,413,342) | 369 | (3,830) | (1,413,342) | 369 |
| Total Net Mill Cost to Loc. | 2,848 | 1,433,387 | 505 | 11,477 | 5,748,643 | 501 | 46,448 | 23,436,539 | 504 |

All_mbburd

## Arlington - Mill Summary Results

Northwest Hardwoods - Arlington

($000)

| December 2001 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $ Average | Volume | $000's | $ Average | Volume | $000's | $ Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Wash. Loc. | 399 | 407.947 | 1,024 | 1,382 | 1,374.688 | 1,056 | 7,314 | 6,657.094 | 910 |
| Freight from Wash. Loc. | | 0.677 | 2 | | 2.811 | 2 | | 23.481 | 3 |
| Lumber Transfers from Ore. Loc. | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 18 | 12.795 | 701 |
| Freight from Ore. Loc. | | 0.000 | 0 | | 0.000 | 0 | | 0.637 | 35 |
| Custom Services | | 0.000 | 0 | | (234.173) | 0 | | (234.173) | 0 |
| Total Outside Incoming Lbr | 399 | 408.624 | 1,025 | 1,382 | 1,143.325 | 828 | 7,332 | 6,461.834 | 881 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,809 | 335.444 | 88 | 12,809 | 1,148.381 | 90 | 52,082 | 4,702.490 | 90 |
| Maintenance Labor | | 80.202 | 21 | | 267.296 | 21 | | 1,056.192 | 20 |
| Payroll Loading | | 258.377 | 68 | | 824.894 | 64 | | 2,712.766 | 52 |
| Operating Supplies | | 48.318 | 13 | | 155.971 | 12 | | 637.143 | 12 |
| Maintenance Supplies | | 43.023 | 11 | | 136.414 | 10 | | 482.546 | 9 |
| Natural Gas | | 62.932 | 17 | | 152.547 | 12 | | 495.016 | 9 |
| Electricity/Utilities | | 81.005 | 21 | | 215.617 | 17 | | 802.085 | 15 |
| Rent | | 0.577 | 3 | | 28.241 | 2 | | 117.637 | 2 |
| Outside Services | | 7.612 | 2 | | 39.533 | 3 | | 158.864 | 3 |
| Outside Services - Drying | 0 | 1.120 | 0 | 0 | 1.120 | 0 | 947 | 50.970 | 93 |
| Fr on Lumber | | 4.360 | 1 | | 18.785 | 1 | | 73.814 | 1 |
| Distributed Expenses | | 0.000 | 0 | | 60.639 | 5 | | (13.179) | (0) |
| Miscellaneous | | 9.168 | 2 | | 30.814 | 2 | | 128.662 | 2 |
| Total Variable Costs | 3,809 | 943.333 | 247 | 12,809 | 3,070.951 | 240 | 52,082 | 11,454.168 | 221 |
| Depreciation | 4,630 | 95.832 | 21 | 14,703 | 320.905 | 22 | 57,321 | 1,350.666 | 24 |
| Taxes | | 17.820 | 4 | | 51.515 | 4 | | 190.360 | 3 |
| Other | | 90.872 | 20 | | 307.228 | 21 | | 1,243.428 | 22 |
| Period Costs | 4,630 | 203.724 | 44 | 14,703 | 683.198 | 47 | 57,321 | 2,784.454 | 49 |
| Bad Debt Expense | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Beg. Inventory Lumber - MBF | 8,342 | 6,831.173 | 819 | 8,528 | 7,003.579 | 821 | 5,964 | 5,178.127 | 868 |
| Ending Inventory Lumber - MBF | (7,774) | (6,183.916) | 795 | (7,774) | (6,183.916) | 795 | (7,774) | (6,183.916) | 795 |
| Total Cost of Sales | 4,630 | 3,655.146 | 790 | 14,703 | 11,549.591 | 786 | 57,321 | 47,161.217 | 787 |
| Gross Profit Contribution | 4,630 | (68.310) | (15) | 14,703 | (5.677) | (0) | 57,321 | 1,864.920 | 33 |
| Depreciation | 4,630 | 0.000 | 0 | 14,703 | 0.000 | 0 | 57,321 | 0.000 | 0 |
| Taxes | | 13.914 | 3 | | 48.339 | 3 | | 186.483 | 3 |
| Other | | 0.000 | 0 | | 0.055 | 0 | | 0.155 | 0 |
| Subtotal - Loc. G&A | 4,630 | 15.914 | 3 | 14,703 | 48.394 | 3 | 57,321 | 186.582 | 3 |
| Selling Expense Allocation | 4,630 | 0.000 | 0 | 14,703 | 0.000 | 0 | 57,321 | 0.000 | 0 |
| G&A Expense Allocation | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 4,630 | 15.914 | 3 | 14,703 | 48.394 | 3 | 57,321 | 186.582 | 3 |
| Misc Rev/(Exp) | 4,630 | 1.944 | 0 | 14,703 | 4.107 | 0 | 57,321 | 8.277 | 0 |
| Other Rev/(Exp) | 4,630 | (11.742) | (3) | 14,703 | (57.263) | (4) | 57,321 | (180.089) | (3) |
| Pre-Tax Profit/(Loss) | 4,630 | (94.047) | (20) | 14,703 | (103.218) | (7) | 57,321 | 1,506.293 | 26 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Log | 1.31 | 1.32 | 1.27 |
| Chips Recovery/Lumber MBF | 0.89 | 0.96 | 1.09 |
| Timber Profit/Loss | (0.909) | (0.909) | (0.830) |
| Results Profit | (94.047) | (103.218) | 1,506.163 |
| Difference | (0.000) | (0.000) | (0.000) |

Not reviewed

EXHIBIT 482 P. 36

Logoss - Mill Summary Results

Northwest Hardwoods - Logoss

($000)

| December - 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | 1997 | 1996 | Volume | 1997 | 1996 | Volume | 1997 | 1996 |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 3,871 | 2,377 | 333 | 19,882 | 9,217 | 914 | 41,243 | 16,271 | 871 |
| Poles - MBF | 1,871 | 421 | 278 | 7,336 | 1,771 | 291 | 32,773 | 3,744 | 342 |
| Pulpwood/Chips/Fuelwood | | (17) | (2) | | (67) | (2) | | (218) | (2) |
| Net 3rd Party Sales - MBF | 4,729 | 2,781 | 610 | 13,277 | 10,127 | 913 | 63,032 | 19,871 | 1,211 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Boise | 887 | 42 | 2,014 | 859 | 42 | 1,914 | 843 | 206 | 1,017 |
| Sales - CSC | 23 | 9 | 478 | 23 | 73 | 948 | 972 | 424 | 942 |
| Sales - Others | 13 | 11 | 0.1 | 43 | 11 | 0.1 | 229 | 241 | 1,247 |
| Sales - Tolmie | 0 | 28 | 0 | 0 | 28 | 0 | 0 | 49 | 0 |
| Sales - Willis Wardlaw | 27 | 43 | 1,204 | 74 | 99 | 1,233 | 43 | 119 | 1,260 |
| Sales - Woodcraft Sawmill | 0 | 69 | 0 | 49 | 23 | 980 | 981 | 981 | 1,011 |
| Lin Trans. to WWW Wholesale | 43 | 11 | 1,271 | 413 | 234 | 1,778 | 1,027 | 1,869 | 761 |
| Lin Trans. to WWW Chr. Co. | 0 | 42 | 0 | 0 | 80 | 0 | 0 | 49 | 0 |
| Total Lumber Sales - MBF | 4,769 | 2,945 | 4,971 | 14,819 | 11,344 | 6,851 | 68,951 | 21,469 | 6,448 |
| Log Trad Sales | | | | | | | | | |
| 3rd Party - MBF | 32 | 0 | 264 | 43 | 13 | 281 | 886 | 217 | 254 |
| Wagers - MBF | 0 | 11 | 0 | 0 | 98 | 0 | 0 | 89 | 0 |
| Log Transfers | | | | | | | | | |
| WWW WA - MBF | 0 | 49 | 0 | 0 | 89 | 0 | 949 | 247 | 178 |
| WWW OR - MBF | 0 | 81 | 0 | 0 | 49 | 0 | 0 | 84 | 0 |
| Total Log Sales - MBF | 32 | 0 | 264 | 43 | 13 | 281 | 1,835 | 554 | 432 |
| Chip Sales - 3rd Party - BDT | 3,941 | 302 | 0 | 10,837 | 1,643 | 96 | 46,978 | 4,038 | 92 |
| Chip Sales - Wood Source - BDT | 1,837 | 131 | 95 | 5,031 | 997 | 93 | 19,741 | 1,154 | 92 |
| Chip Sales - Woven - BDT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Chip Sales - BDT | 4,841 | 412 | 95 | 15,731 | 2,640 | 94 | 66,721 | 5,216 | 94 |
| Co-Products | 3,872 | 24 | 83 | 6,014 | 69 | 89 | 23,502 | 251 | 93 |
| Other Revenues | 0 | 49 | 0 | 0 | 89 | 0 | 0 | 49 | 0 |
| Total Sales Revenues - MBF | 4,569 | 3,451 | 715 | 14,128 | 12,677 | 784 | 68,531 | 22,049 | 712 |
| Log Inventory - Logs | 1,204 | 964 | 117 | 3,428 | 1,617 | 499 | 2,214 | 1,123 | 499 |
| Purchased Logs - 3rd Party | 1,814 | 984 | 184 | 4,643 | 2,243 | 392 | 21,498 | 10,392 | 484 |
| Purchased Logs - Wagers | 197 | 71 | 473 | 822 | 179 | 433 | 1,943 | 849 | 439 |
| Tim Transferred In - Fee | 382 | 114 | 333 | 324 | 123 | 333 | 219 | 72 | 329 |
| Tim Transferred In - Hamilton | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - WWW WA | 1,234 | 894 | 744 | 1,998 | 1,899 | 575 | 1,899 | 1,899 | 575 |
| Logs Transferred In - WWW OR | 412 | 303 | 347 | 1,249 | 913 | 372 | 11,629 | 1,461 | 794 |
| Raw Materials Available | 5,991 | 3,422 | 2.3 | 12,560 | 6,975 | 2.4 | 39,214 | 15,799 | 2.5 |
| Sawmill Conversion - MBF | 3,672 | 1,289 | 348 | 12,458 | 4,297 | 341 | 31,861 | 10,726 | 335 |
| Sawmill Conversion - Scribner | 2,228 | | 0.0 | 9,387 | | 0.0 | 26,478 | | 0.0 |
| 3rd Party Sales | 72 | 0 | 0.0 | 93 | 14 | 0.0 | 196 | 23 | 0.0 |
| Logs Transferred Out - WWW WA | 0 | 0 | 0 | 0 | 0 | 0 | 949 | 394 | 0.0 |
| Logs Transferred Out - WWW OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | 2,941 | 1,999 | 0.0 | (2,483) | (1,515) | 0.0 | (1,489) | (1,515) | 0.0 |
| Total Net Mill Consumption | 1,372 | 1,314 | 0.0 | 6,247 | 4,783 | 0.0 | 15,346 | 11,021 | 0.0 |
| Lumber Production | 0 | 0 | 0 | 0 | 0 | 0 | 29 | 0 | 1,877 |
| Lumber Transfers from Chr. Co. | 1,512 | 0.0 | 0.0 | 2,982 | 2,989 | 0.0 | 14,028 | 10,279 | 0.0 |
| Pulpgrd Lumber Trans. from Chr. | 0 | 29 | 0.0 | 0 | 97 | 0.0 | 0 | 233 | 0.0 |
| Lumber Transfers from Wash. Lin. | 98 | 0.0 | 0.0 | 227 | 224 | 0.0 | 2,449 | 2,433 | 0.0 |
| Custom Services (Outside Products) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Trucks Assessing Lin | 1,610 | 0.0 | 0.0 | 4,158 | 3,311 | 0.0 | 17,324 | 12,945 | 0.0 |
| Chip Prod. - Wood Revenues | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

WY CONF 03773

## Eugene - Mill Summary Results

### Northwest Hardwoods - Eugene

($000)

| December - 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,478 | 234 | 67 | 12,430 | 806 | 65 | 51,865 | 3,548 | 68 |
| Maintenance Labor | | 51 | 15 | | 176 | 14 | | 658 | 13 |
| Payroll Loading | | 51 | 15 | | 287 | 23 | | 1,778 | 33 |
| Temporary Services | | 2 | 1 | | 20 | 2 | | 31 | 1 |
| Operating Supplies | | 61 | 17 | | 148 | 12 | | 578 | 11 |
| Maintenance Supplies | | 59 | 17 | | 188 | 15 | | 566 | 11 |
| Natural Gas | | 44 | 13 | | 140 | 11 | | 512 | 10 |
| Electricity/Utilities | | 47 | 14 | | 136 | 11 | | 518 | 10 |
| Rent | | (1) | (0) | | 6 | 0 | | 9 | 0 |
| Outside Services | | 18 | 5 | | 51 | 4 | | 101 | 2 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 35 | 1 |
| Communications | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Fee on Chips/By-Prod | | 56 | 16 | | 175 | 14 | | 779 | 15 |
| Miscellaneous | | 0 | 0 | | 2 | 0 | | 6 | 0 |
| Total Variable Costs | 3,478 | 623 | 179 | 12,430 | 2,129 | 171 | 51,865 | 9,867 | 179 |
| Depreciation | 4,760 | (967) | (203) | 16,128 | (157) | (10) | 68,931 | 1,100 | 17 |
| Taxes | | 0 | 2 | | 34 | 2 | | 120 | 2 |
| Other | | 1,121 | 238 | | 822 | 51 | | 1,046 | 24 |
| Period Costs | 4,760 | 173 | 36 | 16,128 | 699 | 43 | 68,931 | 2,959 | 43 |
| Bad Debt Expense | 0 | (5) | 0 | 0 | (5) | 0 | 0 | (5) | 0 |
| Beg. Inventory Lumber - MBF | 7,984 | 5,217 | 660 | 7,293 | 5,281 | 720 | 7,595 | 5,333 | 706 |
| Ending Inventory Lumber - MBF | (7,844) | (5,475) | 698 | (7,844) | (5,475) | 698 | (7,844) | (5,475) | 698 |
| Total Cost of Sales | 4,760 | 2,853 | 599 | 16,128 | 10,752 | 667 | 68,931 | 44,950 | 652 |
| Gross Profit Contribution | 4,760 | 551 | 116 | 16,128 | 1,915 | 119 | 68,931 | 6,863 | 100 |
| Depreciation | 4,760 | 23 | 16 | 16,128 | 92 | 6 | 68,931 | 166 | 2 |
| Taxes | | 3 | 1 | | 0 | 0 | | 36 | 1 |
| Other | | 161 | 34 | | 227 | 14 | | 385 | 6 |
| Subtotal - Loc. G&A | 4,760 | 239 | 50 | 16,128 | 327 | 20 | 68,931 | 587 | 9 |
| G&A Expense Allocation | 4,760 | 0 | 0 | 16,128 | 0 | 0 | 68,931 | 0 | 0 |
| Selling Expense Allocation | | 14 | 3 | | 242 | 15 | | 1,625 | 24 |
| Total SG&A Expense | 4,760 | 253 | 53 | 16,128 | 570 | 35 | 68,931 | 2,212 | 32 |
| Misc Rev/(Exp) | 4,760 | 7 | 0 | 16,128 | 2 | 0 | 68,931 | 2 | 0 |
| Other Rev/(Exp) | 4,760 | 86 | 18 | 16,128 | 83 | 5 | 68,931 | 217 | 3 |
| Pre-Tax Profit/(Loss) | 4,760 | 304 | 81 | 16,128 | 1,443 | 89 | 68,931 | 4,876 | 71 |
| Lumber Recovery/Logs | | 1.54 | | | 1.51 | | | 1.53 | |
| Chips Recovery/Lumber MBF | | 0.80 | | | 0.87 | | | 0.90 | |

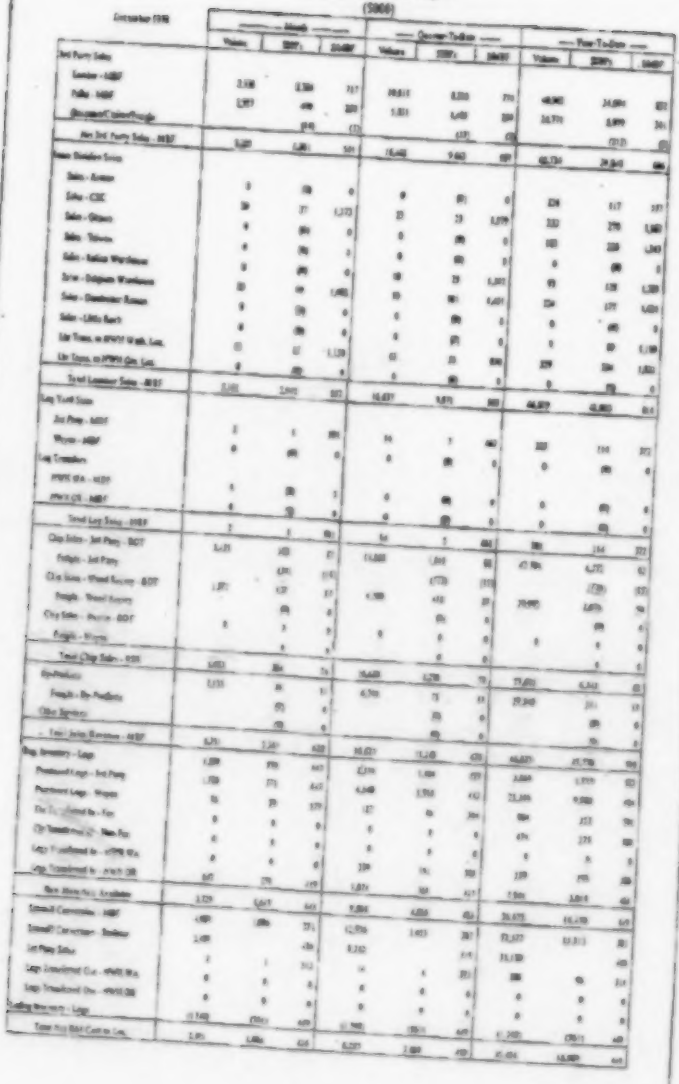
EXHIBIT 482 P. 38

WY-CONF-00775

Export - Mill Summary Results

Northwest Hardwoods - Export

($000)



## Eugene - Mill Summary Results

### Northwest Hardwoods - Eugene

($000)

| December 1998 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Gen. Loc. | 1,410 | 1,001 | 710 | 4,682 | 3,152 | 683 | 18,329 | 12,740 | 694 |
| Freight: Lumber Trans. from Gen. | 0 | 33 | 24 | 0 | 107 | 23 | 0 | 426 | 23 |
| Lumber Transfers from Wash. Loc. | 47 | 62 | 1,321 | 94 | 108 | 1,153 | 734 | 767 | 1,044 |
| Custom Services (Rebuild Freight) | 1,441 | 17 | 12 | 5,057 | 51 | 10 | 21,215 | 177 | 8 |
| Total Outside Incoming Lbr | 1,457 | 1,113 | 764 | 4,696 | 3,419 | 728 | 19,084 | 14,100 | 739 |
| Chip Costs - Wood Recovery | 1,577 | 136 | 86 | 4,780 | 414 | 87 | 29,992 | 2,677 | 89 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 4,089 | 296 | 74 | 12,936 | 943 | 73 | 52,527 | 3,794 | 72 |
| Maintenance Labor | | 48 | 12 | | 176 | 13 | | 785 | 13 |
| Payroll Loading | | 159 | 40 | | 372 | 29 | | 1,726 | 33 |
| Temporary Services | | 1 | 0 | | 1 | 0 | | 55 | 1 |
| Operating Supplies | | 78 | 19 | | 184 | 14 | | 686 | 13 |
| Maintenance Supplies | | 56 | 14 | | 184 | 14 | | 601 | 11 |
| Natural Gas | | 47 | 12 | | 111 | 9 | | 387 | 7 |
| Electricity/Utilities | | 47 | 12 | | 153 | 12 | | 564 | 11 |
| Rent | | 5 | 1 | | 16 | 1 | | 58 | 1 |
| Outside Services | | 11 | 3 | | 41 | 3 | | 175 | 3 |
| Outside Services - Drying | | 0 | 0 | | 5 | 0 | | 36 | 1 |
| Commissioners | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Distributed Expenses | | 0 | 0 | | 0 | 0 | | (0) | (0) |
| Miscellaneous | | 2 | 1 | | 9 | 1 | | 29 | 1 |
| Total Variable Costs | 4,089 | 749 | 187 | 12,936 | 2,193 | 170 | 52,527 | 8,796 | 167 |
| Depreciation | 5,351 | 89 | 17 | 16,637 | 309 | 19 | 66,829 | 1,239 | 20 |
| Amortization of Goodwill | | 34 | 6 | | 111 | 7 | | 443 | 7 |
| Taxes | | 11 | 2 | | 37 | 2 | | 143 | 2 |
| Other | | 105 | 20 | | 340 | 20 | | 1,391 | 21 |
| Period Costs | 5,351 | 239 | 45 | 16,637 | 997 | 48 | 66,829 | 3,314 | 50 |
| Red Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 12,391 | 9,873 | 732 | 11,534 | 8,770 | 760 | 7,844 | 5,475 | 698 |
| Ending Inventory Lumber - MBF | (12,445) | (9,433) | 758 | (12,445) | (9,433) | 758 | (12,445) | (9,433) | 758 |
| Total Cost of Sales | 5,351 | 2,545 | 554 | 16,637 | 9,620 | 578 | 66,829 | 40,348 | 611 |
| Gross Profit Contribution | 5,351 | 396 | 74 | 16,637 | 1,623 | 98 | 66,829 | 6,972 | 104 |
| Depreciation | 5,351 | 8 | 1 | 16,637 | 24 | 1 | 66,829 | 93 | 1 |
| Taxes | | 1 | 0 | | 1 | 0 | | 17 | 0 |
| Other | | 19 | 4 | | 58 | 3 | | 318 | 5 |
| Subtotal - Loc. G&A | 5,351 | 28 | 5 | 16,637 | 82 | 5 | 66,829 | 428 | 6 |
| G&A Expense Allocation | 5,351 | 0 | 0 | 16,637 | 0 | 0 | 66,829 | 0 | 0 |
| Selling Expense Allocation | | 371 | 69 | | 739 | 44 | | 2,364 | 35 |
| Total SG&A Expense | 5,351 | 390 | 74 | 16,637 | 822 | 49 | 66,829 | 2,798 | 42 |
| Misc Rent(Exp) | 5,351 | 136 | 25 | 16,637 | 137 | 8 | 66,829 | 140 | 2 |
| Other Rent(Exp) | 5,351 | (0) | (0) | 16,637 | 25 | 1 | 66,829 | 29 | 0 |
| Pre-Tax Profit(Loss) | 5,351 | 133 | 25 | 16,637 | 972 | 58 | 66,829 | 4,299 | 64 |
| Lumber Recovery/Logs | | 1.61 | | | 1.57 | | | 1.50 | |
| Chips Recovery/Lumber MBF | | 0.86 | | | 0.91 | | | 0.90 | |

EXHIBIT 482 P. 40

WY-CONF-00752

Eugene - Mill Summary Results

Northwest Hardwoods - Eugene

($000)

| December 199 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 4,353 | 2,320 | 779 | 11,201 | 10,330 | 923 | 51,134 | 47,801 | 935 |
| Pulp - MDF | 1,272 | 254 | 200 | 4,344 | 1,259 | 290 | 23,892 | 6,618 | 277 |
| Shipment/Claims | | (17) | (2) | | (72) | (2) | | (218) | (2) |
| Total 3rd Party Sales - MBF | 5,624 | 2,557 | 577 | 15,412 | 11,517 | 813 | 75,126 | 52,201 | 694 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Aurora | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CDC | 0 | (0) | 0 | 24 | 17 | 840 | 227 | 210 | 922 |
| Sales - Glenwood Springs | 32 | 119 | 3,715 | 132 | 466 | 3,536 | 432 | 1,591 | 3,685 |
| Sales - Medford, Wisconsin | 16 | 29 | 1,800 | 34 | 102 | 3,000 | 220 | 659 | 2,995 |
| Lbr Trans. to WWW Hillsboro, Lon. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | 2 | 650 |
| Lbr Trans. to WWW Oakland, Lon. | 0 | (0) | 0 | 250 | 115 | 460 | 644 | 296 | 459 |
| Lbr Trans. to WWW Wash, Lon. | 0 | 12 | 1,200 | 71 | 81 | 1,139 | 132 | 123 | 932 |
| Lbr Trans. to WWW Ore. Lon. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Lumber Sales - MBF | 4,177 | 2,771 | 664 | 16,023 | 12,298 | 837 | 76,309 | 54,954 | 661 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 3 | 1 | 307 | 11 | 6 | 551 | 179 | 46 | 261 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| WWW WA - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| WWW OR - MBF | 0 | (0) | 0 | 192 | 170 | 841 | 193 | 170 | 841 |
| Total Log Sales - MBF | 3 | 1 | 307 | 203 | 164 | 839 | 452 | 217 | 480 |
| Chip Sales - 3rd Party - BDT | 3,746 | 264 | 109 | 12,334 | 1,253 | 98 | 53,268 | 5,120 | 96 |
| Freight - 3rd Party | | (66) | (18) | | (337) | (27) | | (958) | (18) |
| Chip Sales - Wood Energy - BDT | 1,746 | 141 | 81 | 3,233 | 482 | 89 | 17,643 | 3,379 | 192 |
| Freight - Wood Energy | | (0) | 0 | | (1) | 0 | | (0) | 0 |
| Chip Sales - Weyco - BDT | 0 | (0) | 0 | 0 | (0) | 0 | 1,196 | 94 | 79 |
| Freight - Weyco | | (0) | 0 | | (0) | 0 | | (10) | (8) |
| Total Chip Sales - BDT | 5,592 | 430 | 77 | 15,567 | 1,877 | 84 | 72,106 | 8,584 | 119 |
| By-Product | 2,210 | 37 | 17 | 7,400 | 67 | 17 | 20,451 | 203 | 10 |
| Freight - By-Product | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Other Services | - | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Total Sales Revenue - MBF | 6,417 | 3,236 | 504 | 39,089 | 14,587 | 373 | 169,339 | 64,033 | 378 |
| Beg. Inventory - Logs | 3,260 | 1,332 | 411 | 5,434 | 2,189 | 404 | 3,242 | 1,161 | 358 |
| Purchased Logs - 3rd Party | 2,222 | 1,139 | 497 | 7,363 | 3,618 | 492 | 72,842 | 34,622 | 475 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Purchased Logs - Weyco | 30 | 12 | 394 | 102 | 38 | 374 | 3,213 | 899 | 280 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Lbr Transferred In - Fac | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lbr Transferred In - Glen Flo | 0 | 0 | 0 | 26 | 14 | 538 | 26 | 16 | 615 |
| Logs Transferred In - WWW WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Logs Transferred In - WWW OR | 695 | 251 | 361 | 1,818 | 912 | 502 | 5,827 | 4,825 | 828 |
| Other Handling Costs | | 0 | 0 | | 10 | 0 | | 129 | 22 |
| Raw Materials Available | 6,218 | 2,999 | 482 | 15,031 | 6,781 | 451 | 85,289 | 39,855 | 467 |
| Sawmill Conversion - MBF | 3,992 | 1,211 | 303 | 12,280 | 3,481 | 284 | 55,242 | 17,572 | 318 |
| Sawmill Conversion - Radiata | 1,992 | | 454 | 6,641 | | 454 | 28,972 | | 455 |
| 3rd Party Sales | 3 | 1 | 154 | 11 | 6 | 515 | 119 | 42 | 356 |
| Logs Transferred Out - WWW WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - WWW OR | 0 | 0 | 0 | 201 | 139 | 696 | 193 | 139 | 696 |
| Ending Inventory - Logs | (2,994) | (1,003) | 451 | (2,613) | (1,037) | 400 | (3,813) | (1,513) | 401 |
| Total Saw Mill Cost to Log | 3,013 | 1,210 | 402 | 9,278 | 2,550 | 275 | 20,776 | 6,140 | 295 |

OCF 295

WY-CONF-00727

Eugene - Mill Summary Results

Northwest Hardwoods - Eugene

($000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 200 | 184 | 885 | 532 | 513 | 964 | 1,796 | 1,333 | 965 |
| Freight from Wash. Loc. | | 0 | 2 | | 1 | 1 | | 3 | 2 |
| Lumber Transfers from Ore. Loc. | 1,360 | 894 | 653 | 4,238 | 2,918 | 673 | 18,016 | 11,901 | 661 |
| Freight from Ore. Loc. | | 31 | 24 | | 99 | 23 | | 417 | 23 |
| Custom Services (Bethel Freight) | 1,733 | 13 | 7 | 5,219 | 45 | 9 | 20,734 | 287 | 14 |
| Total Outside Incoming Lbr | 1,577 | 1,124 | 713 | 4,870 | 3,575 | 734 | 19,812 | 14,341 | 724 |
| Chip Cost - Wood Recovery | 1,766 | 146 | 83 | 5,735 | 476 | 82 | 27,610 | 2,303 | 83 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,955 | 294 | 74 | 13,709 | 998 | 73 | 58,843 | 4,325 | 74 |
| Maintenance Labor | | 57 | 14 | | 192 | 14 | | 743 | 13 |
| Payroll Loading | | 233 | 59 | | 689 | 44 | | 1,961 | 33 |
| Temporary Services | | 0 | 0 | | (0) | (0) | | 6 | 0 |
| Operating Supplies | | 63 | 16 | | 206 | 15 | | 830 | 14 |
| Maintenance Supplies | | 37 | 9 | | 185 | 13 | | 711 | 12 |
| Natural Gas | | 37 | 9 | | 117 | 9 | | 390 | 7 |
| Electricity/Utilities | | 55 | 14 | | 154 | 11 | | 585 | 10 |
| Rent | | 11 | 3 | | 28 | 2 | | 88 | 1 |
| Outside Services | | 19 | 5 | | 42 | 3 | | 141 | 2 |
| Outside Services - Drying | 0 | 0 | 0 | 0 | 0 | 0 | 4,066 | 394 | 5 |
| Communications | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Distributed Expenses | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Miscellaneous | | 7 | 2 | | 17 | 1 | | 60 | 1 |
| Total Variable Costs | 3,955 | 814 | 206 | 13,709 | 2,548 | 186 | 58,843 | 10,115 | 172 |
| Depreciation | 6,117 | 117 | 19 | 20,029 | 383 | 19 | 80,589 | 1,493 | 19 |
| Amortization of Goodwill | | 34 | 6 | | 111 | 6 | | 443 | 5 |
| Taxes | | 14 | 2 | | 40 | 2 | | 147 | 2 |
| Other | | 137 | 22 | | 429 | 21 | | 1,578 | 20 |
| Period Costs | 6,117 | 302 | 49 | 20,029 | 963 | 48 | 80,589 | 3,661 | 45 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 11,085 | 8,115 | 732 | 11,946 | 8,692 | 728 | 12,445 | 9,433 | 758 |
| Ending Inventory Lumber - MBF | (10,485) | (7,916) | 755 | (10,485) | (7,916) | 755 | (10,485) | (7,916) | 755 |
| Total Cost of Sales | 6,117 | 3,801 | 621 | 20,029 | 12,697 | 634 | 80,589 | 50,084 | 621 |
| Gross Profit Contribution | 6,117 | 406 | 66 | 20,029 | 1,800 | 90 | 80,589 | 6,890 | 85 |
| Depreciation | 6,117 | 0 | 0 | 20,029 | 0 | 0 | 80,589 | 0 | 0 |
| Taxes | | 2 | 0 | | 6 | 0 | | 27 | 0 |
| Other | | (0) | (0) | | (0) | (0) | | 13 | 1 |
| Subtotal - Loc. G&A | 6,117 | 2 | 0 | 20,029 | 5 | 0 | 80,589 | 137 | 2 |
| G&A Expense Allocation | 6,117 | 0 | 0 | 20,029 | 0 | 0 | 80,589 | 0 | 0 |
| Selling Expense Allocation | | 197 | 32 | | 641 | 32 | | 2,578 | 32 |
| Total SG&A Expense | 6,117 | 198 | 31 | 20,029 | 646 | 33 | 80,589 | 2,703 | 34 |
| Misc Rev/(Exp) | 6,117 | 8 | 1 | 20,029 | 12 | 1 | 80,589 | 17 | 0 |
| Other Rev/(Exp) | 6,117 | (2) | (0) | 20,029 | (5) | (0) | 80,589 | (12) | (0) |
| Pre-Tax Profit/(Loss) | 6,117 | 213 | 35 | 20,029 | 1,171 | 58 | 80,589 | 4,171 | 52 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 1.57 | 1.58 | 1.51 |
| Chips Recovery/Lumber MBF | 0.76 | 0.93 | 0.93 |

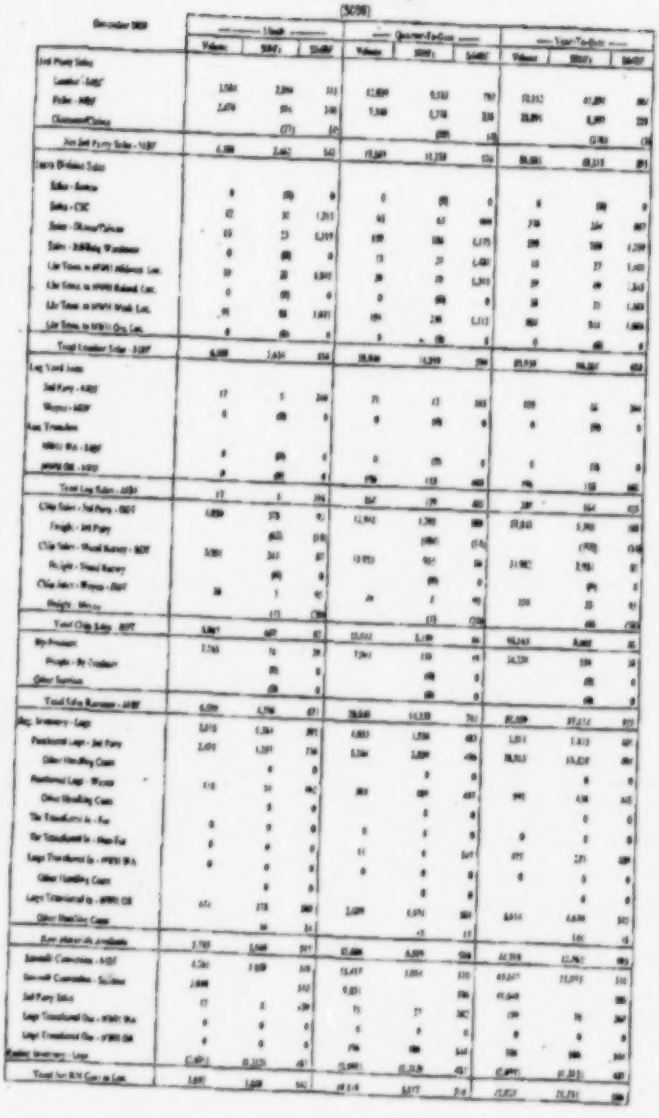
EXHIBIT 482 P. 42

WY-CONF-00728

Eugene - Mill Summary Results

Northwest Hardwoods - Eugene

($000)



## Eugene - Mill Summary Results

### Northwest Hardwoods - Eugene

($000)

| December 2005 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Wash. Loc. | 354 | 310 | 1,036 | 934 | 759 | 1,033 | 2,923 | 2,717 | 1,016 |
| Freight from Wash. Loc. | | 0 | 2 | | 0 | 1 | | 3 | 1 |
| Lumber Transfers fom Ore. Loc. | 1,242 | 724 | 961 | 3,955 | 2,518 | 693 | 13,399 | 10,449 | 673 |
| Freight from Ore. Loc. | | 30 | 24 | | 93 | 24 | | 371 | 24 |
| Custom Services (Broker Freight) | 1,833 | 14 | 10 | 4,371 | 61 | 13 | 18,684 | 264 | 14 |
| Total Operable Inventory Libr | 1,446 | 1,093 | 749 | 3,546 | 2,334 | 785 | 18,356 | 13,864 | 956 |
| Chip Costs - Wood Recovery | 3,581 | 342 | 86 | 11,055 | 965 | 86 | 34,582 | 2,955 | 84 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 4,765 | 313 | 66 | 13,407 | 1,003 | 66 | 63,649 | 4,386 | 69 |
| Maintenance Labor | | 60 | 13 | | 194 | 13 | | 803 | 13 |
| Payroll Loading | | 107 | 23 | | 338 | 23 | | 1,760 | 28 |
| Temporary Services | | 0 | 0 | | (0) | (0) | | 14 | 0 |
| Operating Supplies | | 52 | 11 | | 185 | 12 | | 832 | 13 |
| Maintenance Supplies | | 37 | 12 | | 160 | 10 | | 681 | 11 |
| Natural Gas | | 60 | 13 | | 208 | 13 | | 655 | 10 |
| Electricity/Utilities | | 43 | 9 | | 136 | 9 | | 533 | 8 |
| Rent | | 0 | 1 | | 17 | 1 | | 91 | 1 |
| Outside Services | | 11 | 3 | | 46 | 3 | | 173 | 3 |
| Outside Services - Drying | 0 | 0 | 0 | 0 | 0 | 0 | 2,914 | 181 | 2 |
| Communications | | 0 | 0 | | 0 | 0 | | 1 | 0 |
| Purchased Expenses | | 0 | 0 | | 0 | 0 | | 1 | 0 |
| Miscellaneous | | 0 | 1 | | 17 | 1 | | 67 | 1 |
| Total Variable Costs | 4,765 | 777 | 163 | 15,417 | 2,369 | 154 | 67,647 | 10,541 | 159 |
| Depreciation | 6,310 | 518 | 34 | 20,640 | 428 | 22 | 82,959 | 1,991 | 20 |
| Amortization of Goodwill | | 42 | 6 | | 129 | 6 | | 451 | 5 |
| Taxes | | 19 | 3 | | 53 | 3 | | 171 | 3 |
| Other | | 129 | 17 | | 491 | 25 | | 1,833 | 22 |
| Period Costs | 6,310 | 598 | 61 | 20,640 | 1,112 | 55 | 82,959 | 4,165 | 50 |
| Mill Idle Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Chg. Inventory Lumber - NET | 8,510 | 6,578 | 768 | 9,727 | 7,174 | 738 | 98,483 | 7,995 | 733 |
| Finished Inventory Lumber - 1/31 | (8,427) | (6,611) | 767 | (8,427) | (6,611) | 767 | (8,427) | (6,611) | 767 |
| Total Cost of Sales | 6,658 | 4,734 | 677 | 20,640 | 12,591 | 640 | 82,959 | 13,621 | 647 |
| Gross Profit Contribution | 6,550 | 223 | 34 | 20,640 | 1,276 | 64 | 82,959 | 3,951 | 64 |
| Depreciation | 6,550 | 0 | 0 | 20,640 | 0 | 0 | 82,959 | 0 | 0 |
| Taxes | | 1 | 0 | | 4 | 0 | | 22 | 0 |
| Other | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Indirect - Exc. G&A | 6,550 | 1 | 0 | 20,640 | 3 | 0 | 82,959 | 22 | 0 |
| G&A Expense Allocations | 6,550 | 0 | 0 | 20,640 | 0 | 0 | 82,959 | 0 | 0 |
| Million Expense Allocation | | 96 | 14 | | 282 | 13 | | 1,045 | 13 |
| Total SG&A Expense | 6,550 | 96 | 14 | 20,640 | 286 | 13 | 82,959 | 1,073 | 13 |
| Misc Non-E Exp | 6,550 | 0 | 0 | 20,640 | 1 | 0 | 82,959 | 40 | 0 |
| Other Non-E Exp | 6,550 | (1) | (0) | 20,640 | (7) | (0) | 82,959 | (20) | (0) |
| Pre-Tax Profit/(Loss) | 6,550 | 126 | 19 | 20,640 | 1,004 | 50 | 82,959 | 4,429 | 53 |
| Lumber Recovery/Log | | 0.57 | | | 0.56 | | | 0.53 | |
| Chip Recovery/Lumber & GP | | 0.06 | | | 0.01 | | | 0.01 | |

## Eugene - Mill Summary Results

### Northwest Hardwoods - Eugene

($000)

| December 2001<br>1/8/2002 16:31 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 4,626 | 3,414,332 | 738 | 91,330 | 8,932,608 | 778 | 45,505 | 38,987,398 | 839 |
| Pallet - MBF | 1,824 | 354,889 | 195 | 7,137 | 1,444,074 | 202 | 28,983 | 6,505,361 | 213 |
| Discounts/Claims | | (73,297) | (6) | | (73,846) | (6) | | (277,377) | (9) |
| Net 3rd Party Sales - MBF | 6,450 | 3,348,916 | 580 | 18,730 | 10,302,836 | 550 | 75,371 | 44,155,766 | 586 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Reman | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - CSC | 0 | (0.262) | 0 | 41 | 28.785 | 725 | 223 | 174.131 | 948 |
| Sales - Okawa/Taiwan | 37 | 75,496 | 1,375 | 148 | 193,827 | 1,307 | 519 | 679,154 | 1,332 |
| Sales - Ind/Mrtg Warehouse | 17 | 33,031 | 1,610 | 52 | 77,389 | 1,506 | 122 | 182,323 | 1,491 |
| Lbr Trans. to NWH Midwest, Loc. | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Roland, Loc. | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Wash, Loc. | 39 | 84,738 | 1,972 | 413 | 482,433 | 1,372 | 1,013 | 1,291,825 | 1,224 |
| Lbr Trans. to NWH Grv, Loc. | 0 | (0.960) | 0 | 0 | (0.000) | 0 | 3 | 4,868 | 1,465 |
| Total Lumber Sales - MBF | 6,598 | 3,924,787 | 595 | 19,374 | 11,066,531 | 572 | 77,254 | 46,526,847 | 602 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 66 | 11,399 | 187 | 188 | 32,667 | 170 | 594 | 125,042 | 210 |
| Weyco - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| NWH OR - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Total Log Sales - MBF | 66 | 11,399 | 187 | 188 | 32,667 | 170 | 594 | 125,042 | 210 |
| Chip Sales - 3rd Party - BDT | 4,483 | 324,864 | 72 | 14,573 | 1,056,742 | 73 | 68,026 | 4,965,061 | 73 |
| Freight - 3rd Party | | (65,622) | (15) | | (206,064) | (14) | | (777,851) | (11) |
| Chip Sales - Weed Reserv - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (3.045) | 0 |
| Freight - Weed Reserv | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Chip Sales - Weyco - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Freight - Weyco | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Chip Sales - BDT | 4,483 | 259,241 | 58 | 14,573 | 850,727 | 58 | 68,026 | 4,086,162 | 60 |
| By-Products | 2,496 | 40,832 | 17 | 8,016 | 127,933 | 16 | 33,933 | 648,521 | 19 |
| Freight - By-Products | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Other Services | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Sales Revenue - MBF | 6,598 | 4,236,058 | 642 | 19,374 | 12,077,260 | 624 | 77,254 | 51,373,772 | 665 |
| Beg. Inventory - Logs | 2,102 | 913,605 | 435 | 3,180 | 1,215,951 | 420 | 2,691 | 1,211,618 | 450 |
| Purchased Logs - 3rd Party | 2,403 | 1,061,066 | 439 | 7,234 | 3,112,596 | 430 | 32,735 | 14,613,600 | 446 |
| Other Handling Costs | | 0.000 | 0 | | 2,466 | 0 | | 8,061 | 0 |
| Purchased Logs - Weyco | 200 | 131,273 | 648 | 1,003 | 418,989 | 418 | 3,610 | 1,572,794 | 436 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.200 | 0 |
| Tfr Transferred In - Fee | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.200 | 0 |
| Tfr Transferred In - Non-Fee | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 453 | 254.021 | 563 |
| Logs Transferred In - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Logs Transferred In - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 1,819 | 1,179,678 | 564 |
| Other Handling Costs | | 42,582 | 0 | | 128,720 | 0 | | 273,328 | 75 |
| Raw Materials Available | 4,810 | 2,154,526 | 448 | 11,496 | 4,994,317 | 435 | 42,717 | 19,997,931 | 468 |
| Sawmill Conversion - MBF | 4,444 | 1,748,040 | 393 | 14,602 | 4,974,858 | 270 | 61,859 | 18,966,522 | 307 |
| Sawmill Conversion - Scribner | 2,823 | | 442 | 9,281 | | 433 | 40,195 | | 470 |
| 3rd Party Sales | 60 | 19,446 | 324 | 188 | 60,417 | 321 | 594 | 201,287 | 339 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.200 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.200 | 0 |
| Ending Inventory - Logs | (1,925) | (887,042) | 461 | (1,925) | (887,042) | 461 | (1,925) | (887,042) | 461 |
| Total Net RM Cost to Loc. | 3,841 | 1,267,484 | 330 | 9,571 | 4,111,275 | 430 | 45,791 | 19,125,889 | 418 |

EXHIBIT 482 P. 45

Eugene - Mill Summary Results

Northwest Hardwoods - Eugene

($000)

| December 2001 | Month | | | Quarter To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Wash. Loc. | 267 | 293.315 | 1,094 | 917 | 1,015.561 | 1,107 | 3,054 | 3,226.031 | 1,056 |
| Freight from Wash. Loc. | | 0.000 | 0 | | 0.453 | 0 | | 2.723 | 1 |
| Lumber Transfers fm Ore. Loc. | 291 | 204.223 | 699 | 2,417 | 1,573.434 | 651 | 14,344 | 9,349.346 | 652 |
| Freight from Ore. Loc | | 0.338 | 77 | | 67.864 | 28 | | 591.341 | 27 |
| Custom Services (Inbnd Freight) | 374 | 0.000 | 0 | 2,995 | 0.000 | 0 | 17,144 | 0.000 | 0 |
| Total Outside Incoming Llr | 519 | 503.716 | 985 | 3,334 | 2,662.352 | 798 | 17,418 | 13,569.048 | 779 |
| Chip Contr - Wood Recovery | 0 | 0.000 | 0 | 0 | 0.000 | 0 | (22) | (3.919) | 58 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 4,444 | 289.901 | 65 | 14,682 | 972.279 | 66 | 61,895 | 4,146.883 | 67 |
| Maintenance Labor | | 52.994 | 12 | | 180.662 | 12 | | 747.627 | 12 |
| Payroll Loading | | 132.339 | 30 | | 463.934 | 32 | | 1,886.626 | 30 |
| Temporary Services | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Operating Supplies | | 63.497 | 14 | | 191.361 | 13 | | 727.807 | 12 |
| Maintenance Supplies | | 17.089 | 4 | | 53.923 | 4 | | 464.951 | 8 |
| Natural Gas | | 49.544 | 11 | | 172.639 | 12 | | 678.443 | 11 |
| Electricity/Utilities | | 69.901 | 16 | | 167.822 | 11 | | 535.454 | 9 |
| Rent | | 13.879 | 3 | | 41.637 | 3 | | 128.138 | 2 |
| Outside Services | | 16.613 | 4 | | 37.046 | 3 | | 148.179 | 2 |
| Outside Services - Drying | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Freight on Lumber | | 8.960 | 2 | | 33.250 | 2 | | 192.880 | 3 |
| Distribution Expenses | | 0.000 | 0 | | 0.013 | 0 | | 0.042 | 0 |
| Miscellaneous | | 4.936 | 1 | | 13.630 | 1 | | 58.425 | 1 |
| Total Variable Costs | 4,444 | 720.257 | 162 | 14,682 | 2,345.541 | 160 | 61,895 | 9,714.460 | 157 |
| Depreciation | 4,368 | 131.980 | 23 | 19,374 | 430.226 | 22 | 77,294 | 1,668.639 | 22 |
| Amortization of Goodwill | | 34.022 | 5 | | 119.680 | 6 | | 442.870 | 6 |
| Taxes | | 13.207 | 2 | | 47.415 | 2 | | 214.702 | 3 |
| Other | | 135.264 | 29 | | 460.141 | 24 | | 1,992.893 | 26 |
| Period Costs | 4,368 | 313.493 | 48 | 19,374 | 1,058.932 | 55 | 77,294 | 4,218.996 | 55 |
| Bad Debt Expense | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Beg. Inventory Lumber - MBF | 11,796 | 8,059.865 | 683 | 11,554 | 8,164.677 | 707 | 8,632 | 6,611.321 | 767 |
| Ending Inventory Lumber - MBF | (10,117) | (6,947.188) | 687 | (10,117) | (6,947.188) | 687 | (10,117) | (6,947.188) | 687 |
| Total Cost of Sales | 6,538 | 3,919.426 | 594 | 19,374 | 11,599.518 | 599 | 77,294 | 44,269.980 | 599 |
| Gross Profit Contribution | 6,598 | 316.431 | 48 | 19,374 | 707.759 | 36 | 77,294 | 5,188.672 | 66 |
| Depreciation | 6,598 | 0.000 | 0 | 19,374 | 0.000 | 0 | 77,294 | 0.000 | 0 |
| Taxes | | 0.419 | 0 | | 0.930 | 0 | | 7.831 | 0 |
| Other | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Subtotal - Loc. G&A | 6,598 | 0.419 | 0 | 19,374 | 0.930 | 0 | 77,294 | 7.831 | 0 |
| G&A Expense Allocation | 6,598 | 0.000 | 0 | 19,374 | 0.000 | 0 | 77,294 | 0.000 | 0 |
| Selling Expense Allocation | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 6,598 | 0.419 | 0 | 19,374 | 0.930 | 0 | 77,294 | 7.831 | 0 |
| Misc Rev/(Exp) | 6,598 | 17.450 | 3 | 19,374 | 38.079 | 2 | 77,294 | 44.470 | 1 |
| Other Rev/(Exp) | 6,598 | (0.521) | (0) | 19,374 | (3.430) | (0) | 77,294 | (22.835) | (0) |
| Pre-Tax Profit/(Loss) | 6,598 | 332.941 | 50 | 19,374 | 734.486 | 38 | 77,294 | 5,122.299 | 66 |
| Lumber Recovery/Logs | | 1.57 | | | 1.56 | | | 1.56 | |
| Chips Recovery/Lumber MBF | | 1.01 | | | 0.99 | | | 0.97 | |
| Timber Pre - xx Scale | | 21.953 | | | 21.599 | | | 21.301 | |
| Total | | 354.899 | | | 758.376 | | | 5,143.801 | |
| G&S Total | | 354.899 | | | 758.376 | | | 5,143.801 | |
| Diff | | (0.000) | | | (0.000) | | | (0.000) | |

WY-CONF-01566

EXHIBIT 482 P. 46

Garibaldi - Mill Summary Results

Northwest Hardwoods - Garibaldi

($000)

| December - 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | 1997 | 1996 | Volume | 1997 | 1996 | Volume | 1997 | 1996 |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 0 | (5) | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Pulp - MBF | 833 | 393 | 345 | 2,881 | 497 | 342 | 9,864 | 1,488 | 342 |
| Miscellaneous/Cutoff adj to | | (2) | (3) | | (9) | (3) | | (24) | (3) |
| Flat 3rd Party Sales - MBF | 833 | 391 | 342 | 2,881 | 488 | 339 | 9,864 | 1,464 | 339 |
| Intra-Division Sales | | | | | | | | | |
| Sales - Bureau | 0 | (9) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| Sales - CEC | 0 | (5) | 0 | 0 | (5) | 0 | 0 | (5) | 0 |
| Sales - Chetco | 0 | (9) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| Sales - Tenino | 0 | (8) | 0 | 0 | (8) | 0 | 0 | (8) | 0 |
| Lbr Trans. to NWH Wash. Loc | 0 | (4) | 0 | 0 | (4) | 0 | 0 | (8) | 0 |
| Lbr Trans. to NWH Ore. Loc | 1,132 | 812 | 760 | 3,902 | 2,909 | 725 | 11,839 | 10,179 | 725 |
| Total Lumber Sales - MBF | 1,965 | 1,164 | 1,102 | 6,784 | 3,397 | 1,064 | 21,703 | 12,643 | 1,064 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | 0 | 0 | 1 | 0 | (99) | 41 | 0 | 798 |
| Weyco - MBF | 0 | (9) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (5) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| NWH OR - MBF | 0 | (9) | 0 | 0 | (9) | 0 | 0 | (9) | 0 |
| Sales - MBF | 0 | 0 | 0 | 1 | 0 | (99) | 41 | 0 | 798 |
| Chip Sales - 3rd Party - BDT | 2,402 | 766 | 0 | 8,333 | 872 | 0 | 28,833 | 3,728 | 0 |
| Chip Sales - Weyco - BDT | 0 | (2) | 0 | 0 | 1 | 96 | 331 | 77 | 96 |
| Total Chip Sales - BDT | 2,402 | 766 | 0 | 8,333 | 873 | 96 | 29,164 | 3,805 | 96 |
| By-Products | 1,331 | 1 | 0 | 4,202 | 16 | 0 | 11,000 | 120 | 0 |
| Total Sales Revenue - MBF | 3,733 | 1,931 | 1,102 | 6,784 | 4,287 | 1,064 | 32,000 | 16,178 | 1,064 |
| Beg. Inventory - Logs | 0 | 319 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Purchased Logs - 3rd Party | 1,014 | 0 | 0 | 4,331 | 2,291 | 0 | 14,084 | 7,633 | 0 |
| Purchased Logs - Weyco | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Per Transferred In - Fac | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Per Transferred In - Non-Fac | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Raw Materials Available | 1,014 | 319 | 0 | 4,331 | 2,291 | 0 | 14,084 | 7,633 | 0 |
| Sawmill Conversion - MBF | 1,965 | 1,164 | 1,102 | 6,784 | 3,397 | 1,064 | 21,703 | 12,643 | 1,064 |
| Sawmill Conversion - Residuals | 1,331 | | 0 | 4,202 | | 0 | 13,671 | | 0 |
| 3rd Party Sales | 0 | 0 | 0 | 1 | 0 | (99) | 41 | 0 | 798 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (319) | (319) | 0 | (319) | (319) | 0 | (319) | (319) | 0 |
| Total Net Mill Conversion Loss | 1,014 | 319 | 0 | 4,331 | 2,291 | 0 | 14,084 | 7,633 | 0 |
| Lumber Positions | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Custom Services (Sales/Receipts) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Sellable Inventory Lbr | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

WY-COMP-00284

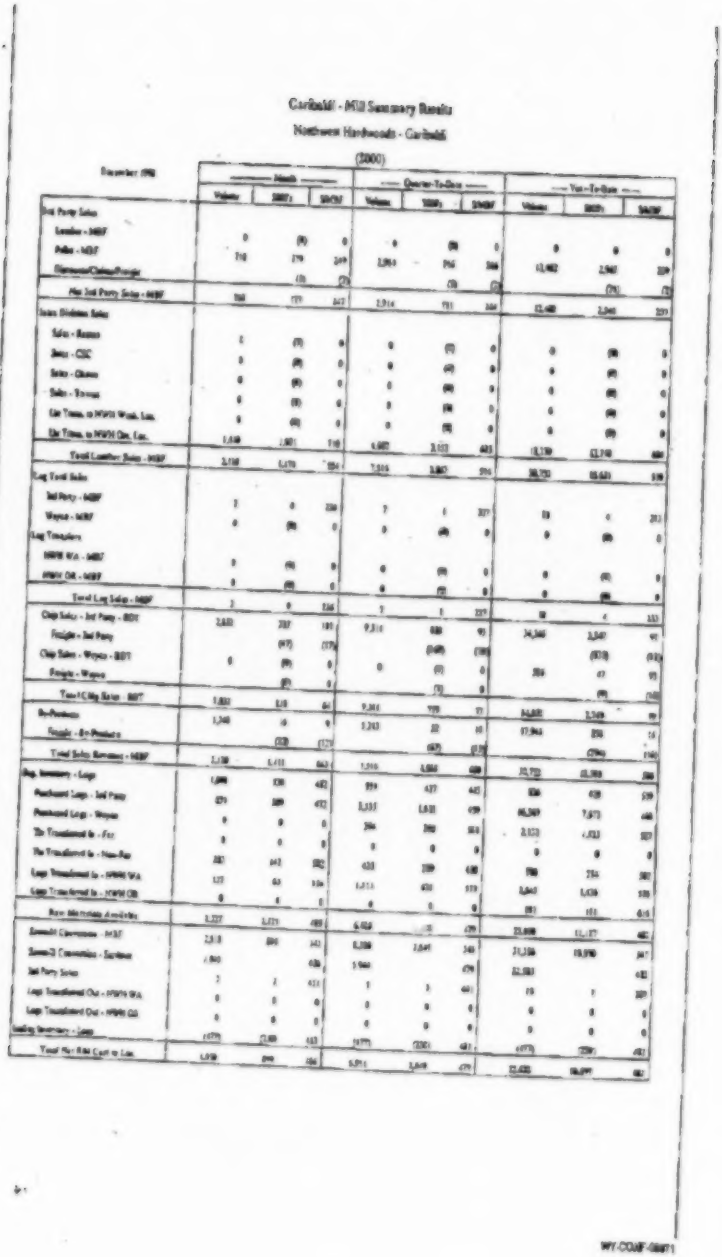
Garibaldi - Mill Summary Results

Northwest Hardwoods - Garibaldi

($000)

| | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Variable Costs | | | | | | | | | |
| Operating Labor | 1,944 | 83 | 43 | 4,810 | 200 | 41 | 24,977 | 1,199 | 48 |
| Maintenance Labor | | 23 | 12 | | 77 | 16 | | 322 | 13 |
| Payroll Loading | | 34 | 18 | | 130 | 27 | | 585 | 24 |
| Temporary Services | | 4 | 2 | | 12 | 2 | | 72 | 3 |
| Operating Supplies | | 24 | 12 | | 83 | 17 | | 224 | 9 |
| Maintenance Supplies | | 34 | 17 | | 138 | 29 | | 332 | 14 |
| Mineral Oil | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Electricity/Utilities | | 17 | 9 | | 56 | 12 | | 167 | 7 |
| Rent | | 3 | 2 | | 6 | 1 | | 33 | 1 |
| Outside Services | | 11 | 6 | | 11 | 2 | | 34 | 1 |
| Outside Services - Shipping | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Communications | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Fee on Chipping Prod | | 42 | 22 | | 206 | 43 | | 741 | 30 |
| Miscellaneous | | 0 | 0 | | 1 | 0 | | 11 | 1 |
| Total Variable Costs | 1,944 | 279 | 143 | 4,810 | 922 | 192 | 24,977 | 3,647 | 146 |
| Depreciation | 1,944 | 18 | 9 | 4,810 | 92 | 19 | 24,977 | 421 | 17 |
| Taxes | | 7 | 4 | | 11 | 2 | | 31 | 1 |
| Other | | 31 | 16 | | 131 | 27 | | 831 | 33 |
| Period Costs | 1,944 | 72 | 37 | 4,810 | 333 | 69 | 24,977 | 1,227 | 49 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - MBF | 757 | 61 | 31% | 531 | 39 | 8% | 948 | 73 | 0% |
| Ending Inventory Lumber - MBF | (569) | (70) | 31% | (569) | (70) | 8% | (569) | (70) | 0% |
| Total Cost of Sales | 1,944 | 1,116 | 574 | 4,794 | 3,019 | 630 | 24,956 | 13,997 | 561 |
| Gross Profit Contribution | 1,944 | 220 | 113 | 4,794 | 677 | 141 | 24,956 | 3,073 | 123 |
| Depreciation | 1,944 | 0 | 0 | 4,794 | 0 | 0 | 24,956 | 0 | 0 |
| Taxes | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Other | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Subtotal - Exc. G&A | 1,944 | 0 | 0 | 4,794 | 0 | 0 | 24,956 | 0 | 0 |
| Selling Expense | 1,944 | 0 | 0 | 4,794 | 0 | 0 | 24,956 | 0 | 0 |
| Selling Expense Allocation | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total SG&A Expense | 1,944 | 0 | 0 | 4,794 | 0 | 0 | 24,956 | 0 | 0 |
| Other Rent/(Exp) | 1,944 | 0 | 0 | 4,794 | 0 | 0 | 24,956 | 7 | 0 |
| Other Non-Mfg Exp | 1,944 | 1 | 1 | 4,794 | 1 | 0 | 24,956 | (28) | (1) |
| Pre-Tax Profit/(Loss) | 1,944 | 219 | 113 | 4,794 | 676 | 141 | 24,956 | 3,054 | 122 |
| Lumber Recovery/Log | | 1.22 | | | 1.14 | | | 1.25 | |
| Chip Recovery/Lumber MBF | | 6.13 | | | 5.29 | | | 5.15 | |

WY-CONF-00898



Carlsbild - Mill Summary Results

Northwest Hardwoods - Carlsbild

(2000)

| December 99 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $/MBF | $/MCF | Volume | $/MBF | $/MCF | Volume | $/MBF | $/MCF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | 0 | 0 |
| Pulp - MBF | 710 | 279 | 269 | 2,964 | 342 | 366 | 13,482 | 2,942 | 359 |
| Chipwood/Sales/Freight | | (3) | (29) | | (3) | (29) | | (29) | (29) |
| Mar 3rd Party Sales - MBF | 710 | 277 | 267 | 2,964 | 339 | 337 | 13,482 | 2,913 | 329 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Boise | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CSC | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Chetco | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Tenino | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Elk Trans. to NWH Wash. Log. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Elk Trans. to NWH Ore. Log. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Lumber Sales - MBF | 1,438 | 1,301 | 718 | 4,667 | 3,103 | 483 | 13,139 | 12,710 | 484 |
| Log Total Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Weyco - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| NWH OR - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | (0) | 0 |
| Chip Sales - 3rd Party - BDT | 2,833 | 207 | 103 | 9,314 | 188 | 93 | 34,340 | 2,547 | 93 |
| Freight - 3rd Party | | (47) | (23) | | (169) | (84) | | (833) | (83) |
| Chip Sales - Weyco - BDT | 0 | (0) | 0 | 0 | (0) | 0 | 356 | 47 | 93 |
| Freight - Weyco | | (0) | 0 | | (0) | 0 | | (6) | (16) |
| Total Chip Sales - BDT | 2,833 | 115 | 64 | 9,314 | 110 | 11 | 34,696 | 3,549 | 99 |
| By-Products | 1,248 | 0 | 0 | 3,263 | 22 | 15 | 17,964 | 256 | 14 |
| Freight - By-Products | | (23) | (17) | | (67) | (51) | | (294) | (16) |
| Total Sales Revenue - MBF | 2,138 | 1,111 | 662 | 7,930 | 3,064 | 488 | 72,772 | 15,369 | 386 |
| Beg. Inventory - Logs | 1,866 | 330 | 432 | 959 | 427 | 445 | 836 | 438 | 524 |
| Purchased Logs - 3rd Party | 871 | 389 | 432 | 3,331 | 1,031 | 459 | 46,249 | 7,973 | 466 |
| Purchased Logs - Weyco | 0 | 0 | 0 | 304 | 298 | 814 | 2,123 | 1,532 | 527 |
| Elk Transferred In - Ore | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Elk Transferred In - Non-Rep | 283 | 143 | 282 | 433 | 259 | 618 | 786 | 254 | 302 |
| Logs Transferred In - NWH WA | 127 | 63 | 126 | 1,211 | 431 | 119 | 3,843 | 1,436 | 378 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 181 | 101 | 616 |
| Raw Materials Available | 3,227 | 1,171 | 483 | 6,438 | 1,431 | 479 | 23,888 | 11,137 | 466 |
| Sawmill Conversion - MBF | 2,818 | 894 | 442 | 8,338 | 2,641 | 340 | 31,256 | 10,976 | 347 |
| Sawmill Conversion - Scribner | 2,860 | | 626 | 9,960 | | 479 | 32,583 | | 432 |
| 3rd Party Sales | 2 | 2 | 433 | 2 | 2 | 433 | 15 | 7 | 507 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (477) | (2,000) | 163 | (477) | (2,000) | 481 | (477) | (2,000) | 481 |
| Total Raw Mat Cost to Log | 5,203 | 894 | 384 | 9,823 | 2,643 | 479 | 32,396 | 10,977 | 482 |

WY/COMP/0001

Carlisle - Mill Sweepery Results

Northwest Hardwoods - Carlisle

($000)

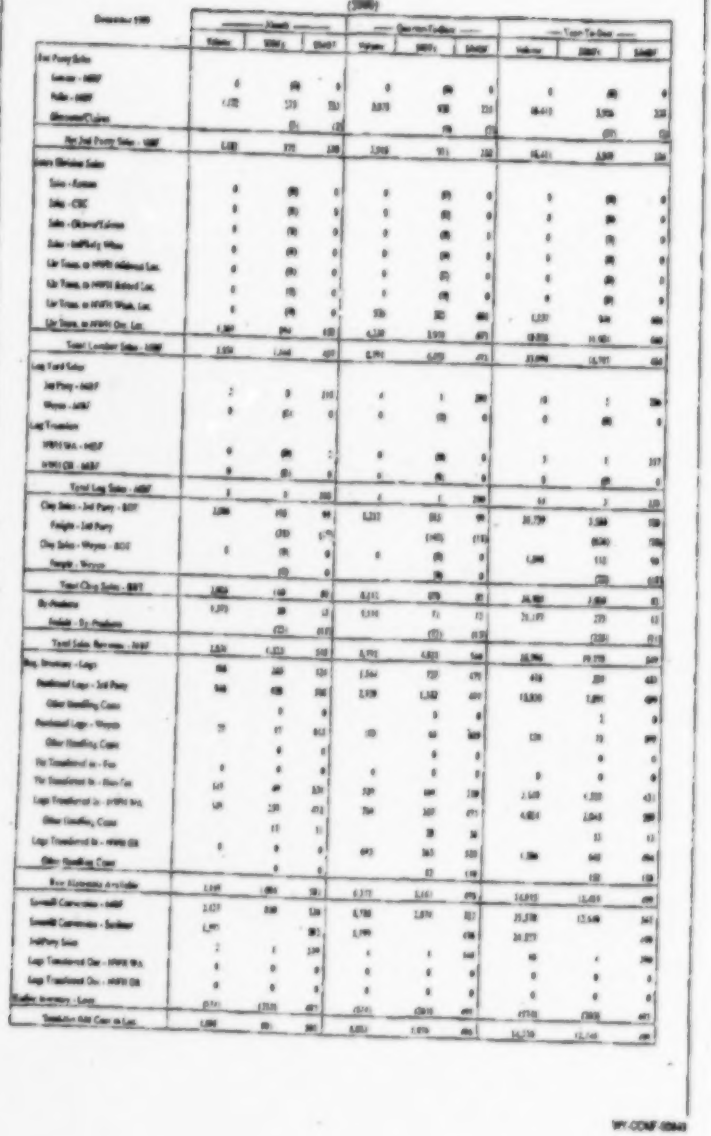
| | Month | | | Quarter-to-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Variance | 2008 | Average | Variance | 2008 | Average | Variance | 2008 | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from YPW WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from YPW OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Custom Sawmill (Bailey Freight) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Outside Sawmilling Use | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Variable Costs | | | | | | | 0 | 0 | 0 |
| Sawmill Labor | 3,618 | 453 | 91 | 8,369 | 226 | 39 | 31,336 | 1,209 | 43 |
| Millwright Labor | | 73 | 15 | | 90 | 15 | | 334 | 11 |
| Forklift Loading | | 47 | 10 | | 170 | 15 | | 391 | 19 |
| Sawmill Supplies | | 20 | 4 | | 30 | 6 | | 99 | 3 |
| Operating Supplies | | 32 | 7 | | 24 | 3 | | 102 | 3 |
| Maintenance Supplies | | 36 | 16 | | 66 | 18 | | 272 | 12 |
| Hazard Pay | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Electricity/Utilities | | 22 | 5 | | 36 | 4 | | 147 | 3 |
| Rent | | 1 | 1 | | 1 | 1 | | 22 | 1 |
| Outside Services | | 3 | 1 | | 6 | 1 | | 34 | 1 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Communications | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Employee Expenses | | 0 | 0 | | 0 | 0 | | 1 | 0 |
| Miscellaneous | | 1 | 1 | | 0 | 1 | | 24 | 1 |
| Total Variable Costs | 3,618 | 238 | 79 | 8,369 | 772 | 93 | 31,336 | 3,160 | 101 |
| Depreciation | 2,139 | 30 | 14 | 7,556 | 645 | 19 | 28,772 | 233 | 11 |
| Taxes | | 2 | 1 | | 18 | 1 | - | 31 | 1 |
| Other | | 41 | 19 | | 143 | 10 | | 633 | 20 |
| Period Costs | 2,139 | 81 | 39 | 7,556 | 797 | 29 | 28,772 | 1,331 | 43 |
| Net Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - AVG | 748 | 72 | 104 | 61 | 11 | 242 | 360 | 31 | 257 |
| Ending Inventory Lumber - AVG | (810) | (777) | 104 | (810) | (777) | 104 | (810) | (777) | 104 |
| Total Cost of Sales | 2,119 | 1,214 | 833 | 7,806 | 2,369 | 388 | 28,782 | 15,478 | 496 |
| Gross Profit Contribution | 2,119 | 777 | 139 | 7,556 | 899 | 488 | 28,782 | 1,888 | 484 |
| Depreciation | 2,139 | 0 | 0 | 7,556 | 0 | 0 | 28,772 | 0 | 0 |
| Taxes | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Other | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Edmond - Loc G&A | 2,139 | 0 | 0 | 7,556 | 0 | 0 | 28,772 | 0 | 0 |
| Selling Expenses | 2,119 | 0 | 0 | 7,556 | 0 | 0 | 28,772 | 0 | 0 |
| Selling Expense Allocation | | 176 | 84 | | 692 | 28 | | 668 | 23 |
| Total SG&A Expenses | 2,139 | 176 | 84 | 7,556 | 692 | 28 | 28,772 | 668 | 23 |
| Misc. Rent/Exp | 2,139 | 176 | 0 | 7,556 | 0 | 0 | 28,772 | 0 | 0 |
| Other Rent/Exp | 2,139 | 0 | 0 | 7,556 | 0 | 0 | 28,772 | 1 | 0 |
| Pre-Tax Profit/Loss | 2,139 | 601 | 84 | 7,556 | 207 | 27 | 28,772 | 1,219 | 42 |
| Lumber Recovery/Log | | 1.42 | | | 1.48 | | | 1.39 | |
| Chips Recovery/Lumber MBF | | 1.88 | | | 1.83 | | | 1.83 | |

WY-CONF-00872

Garfield - Mill Summary Recap

Northwest Hardwoods - Garfield

($000)



Confidential - MBI Summary Results

Northwest Hardwoods - Confidential

($000)

| | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Values | MBF | Average | Values | MBF | Average | Values | MBF | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from WWE Div. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from WWE Div. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Custom Services (Market Analysis) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Outside Company Lbr | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 3,427 | 89 | 39 | 9,769 | 259 | 38 | 32,979 | 1,294 | 26 |
| Maintenance Labor | | 34 | 14 | | 97 | 13 | | 383 | 15 |
| Payroll Taxes/Fringe | | 31 | 22 | | 82 | 18 | | 299 | 12 |
| Temporary Services | | 10 | 7 | | 43 | 7 | | 164 | 3 |
| Operating Supplies | | 23 | 9 | | 56 | 6 | | 201 | 3 |
| Maintenance Supplies | | 26 | 8 | | 68 | 7 | | 201 | 6 |
| Natural Gas | | 0 | 4 | | 0 | 0 | | 0 | 0 |
| Electricity/Utilities | | 43 | 9 | | 45 | 7 | | 166 | 3 |
| Rent | | 1 | 1 | | 4 | 0 | | 22 | 1 |
| Outside Services | | 3 | 0 | | 2 | 0 | | 41 | 0 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Customer Issues | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Environmental Expenses | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Miscellaneous | | 1 | 1 | | 0 | 0 | | 35 | 1 |
| Total Variable Costs | 3,427 | 320 | 104 | 9,769 | 659 | 99 | 32,979 | 3,131 | 94 |
| Depreciation | 2,331 | 41 | 18 | 6,993 | 142 | 17 | 26,986 | 557 | 16 |
| Taxes | | 2 | 1 | | 12 | 1 | | 43 | 1 |
| Other | | 44 | 19 | | 131 | 18 | | 541 | 15 |
| Period Costs | 2,331 | 91 | 37 | 6,993 | 285 | 31 | 26,986 | 1,171 | 32 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Org. Investment Expense - MBF | 308 | 116 | 226 | 433 | 93 | 224 | 833 | 231 | 206 |
| Global Inventory Expense - MBF | (617) | (116) | 257 | (1,233) | (186) | 297 | (833) | (186) | 297 |
| Total Cost of Sales | 5,551 | 1,177 | 469 | 15,962 | 4,047 | 457 | 58,994 | 14,759 | 420 |
| Gross Profit Contribution | 1,555 | 145 | 93 | 6,993 | 884 | 99 | 32,986 | 3,819 | 87 |
| Depreciation | 2,331 | 0 | 0 | 6,993 | 0 | 0 | 26,986 | 0 | 0 |
| Taxes | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Other | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Subtotal - Loc. Costs | 2,331 | 0 | 0 | 6,993 | 0 | 0 | 26,986 | 0 | 0 |
| Selling Expense | 1,556 | 0 | 0 | 6,993 | 0 | 0 | 32,986 | 0 | 0 |
| Selling Expense Allocation | | 31 | 17 | | 82 | 13 | | 477 | 13 |
| Total SG&A Expense | 1,555 | 31 | 17 | 6,993 | 82 | 13 | 32,986 | 477 | 13 |
| Misc. Rent/Exp | 1,555 | (0) | 0 | 6,993 | (0) | 0 | 32,986 | 1 | 0 |
| Other Rent/Exp | 1,555 | (0) | (0) | 6,993 | 1 | 0 | 32,986 | 1 | 0 |
| Pre-Tax Profit/Loss | 1,551 | 113 | 41 | 6,993 | 784 | 88 | 32,986 | 1,433 | 55 |
| Lumber Recovery/Loss | | 1.22 | | | 1.02 | | | 1.46 | |
| Chips Recovery/Lumber MBF | | 0.50 | | | 0.55 | | | 1.04 | |

WY CONF-00250

Carlsbild - Mill Summary Reports

Northwest Hardwoods - Carlsbild

($000)

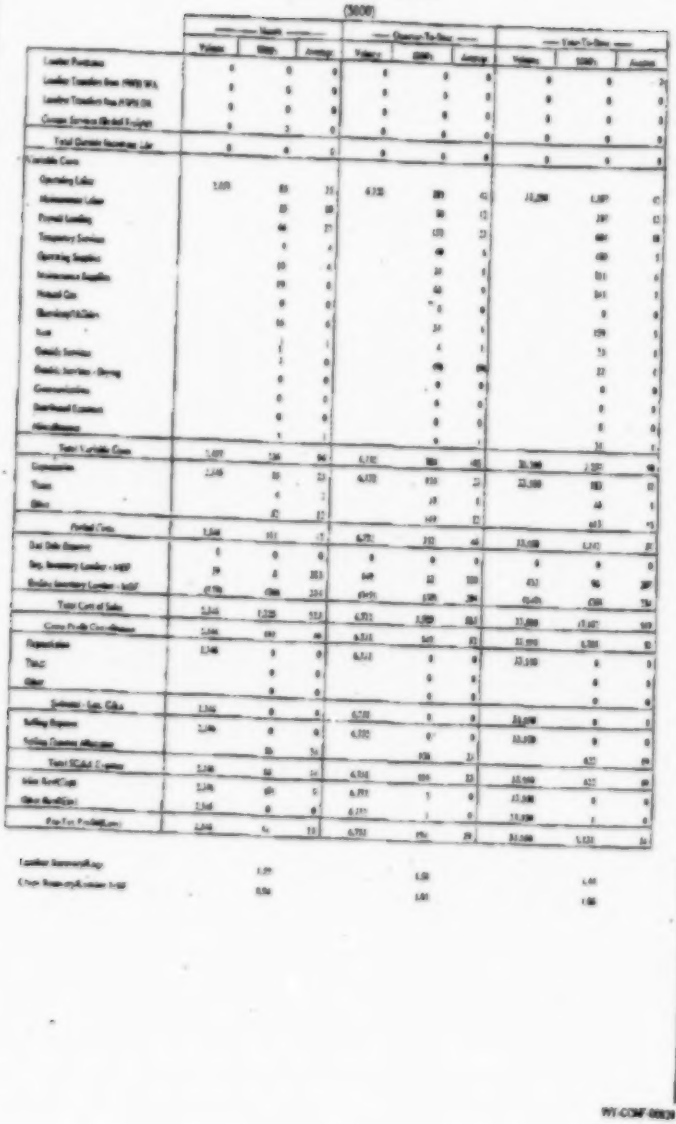
| December 1997 | Week | | | Quarter To Date | | | Year To Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | 1997's | 1996's | Volume | 1997's | 1996's | Volume | 1997's | 1996's |
| **Log Purchases** | | | | | | | | | |
| Loggers - NWH | 0 | 89 | 0 | 0 | 89 | 0 | 0 | 89 | 0 |
| Mills - NWH | 1,231 | 241 | 148 | 2,866 | 519 | 339 | 13,903 | 2,374 | 2,211 |
| Processing Claims | | (0) | (24) | | (0) | (24) | | (24) | (24) |
| Total Log Purchases - NWH | 1,366 | 330 | 124 | 3,096 | 708 | 315 | 15,406 | 2,439 | 2,211 |
| **Lumber Wholesale Sales** | | | | | | | | | |
| Sales - Russia | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CEC | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Channel Fabrics | 0 | 89 | 0 | 0 | 89 | 0 | 0 | 89 | 0 |
| Sales - Holiday Wood | 0 | 89 | 0 | 0 | 89 | 0 | 0 | 89 | 0 |
| Lbr Trans. to NWH Hubbard Lbr. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Buhler Lbr. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Wash. Lbr. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to NWH Ore. Lbr. | 1,747 | 570 | 441 | 3,801 | 1,119 | 441 | 13,721 | 4,140 | 671 |
| Total Lumber Sales - NWF | 1,366 | 1,118 | 0% | 4,102 | 3,256 | 0% | 14,000 | 11,000 | 0% |
| **Lbr Yard Sales** | | | | | | | | | |
| Hi Pony - NWF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Wayne - NWF | 0 | 89 | 0 | 0 | (0) | 0 | 0 | 89 | 0 |
| **Lbr Transfers** | | | | | | | | | |
| NWH WA - NWF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| NWH OR - NWF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - NWF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Chip Sales - Hi Pony - NWF | 1,231 | 174 | 0 | 4,276 | 649 | 0 | 16,967 | 3,149 | 0 |
| Freight - Hi Pony | | (74) | (74) | | (199) | (199) | | (199) | (199) |
| Chip Sales - Wayne - NWF | 0 | 89 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Freight - Wayne | | 0 | 0 | | (0) | (0) | | (0) | (0) |
| Total Chip Sales - NWF | 1,231 | 196 | 0 | 4,276 | 644 | 0 | 16,967 | 3,149 | 0 |
| By-Products | 1,231 | 0 | 0 | 4,276 | 44 | 0 | 16,967 | 311 | 0 |
| Freight - By-Products | | (0) | (0) | | (0) | (0) | | (0) | (0) |
| Total Sales Revenues - NWF | 1,231 | 1,317 | 0% | 4,276 | 3,944 | 0% | 16,967 | 14,311 | 0% |
| **Log Inventory - Logs** | | | | | | | | | |
| Hardwood Logs - Hi Pony | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Standing Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Hardwood Logs - Wayne | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Standing Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Lbr Transfers to - Ore. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lbr Transfers to - Hospitality | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred to - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Standing Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Logs Transferred to - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Standing Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Consumed | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Overhead Conversion - NWF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Direct Conversion - Volume | 0 | | 0 | 0 | | 0 | 0 | | 0 |
| Total Prod Costs | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Finished Inventory - Logs | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Net P&L Conversion Cost | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

WY-CONF-00133

Carlsbild - Mill Summary Results

Northwest Hardwoods - Carlsbild

($000)



Caribaldi - Mill Summary Results

Northwest Hardwoods - Caribaldi

($000)

| December 2002 | Month | | | Quarter To Date | | | Year To Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 1/8/2003 16:31 | Volume | $000's | $/MBF | Volume | $000's | $/MBF | Volume | $000's | $/MBF |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Pallet - MBF | 888 | 122.984 | 242 | 2,599 | 590.993 | 227 | 13,258 | 3,133.823 | 236 |
| Discounts/Claims | | (0.630) | (1) | | (4.729) | (2) | | (27.300) | (2) |
| Net 3rd Party Sales - MBF | 588 | 122.354 | 241 | 2,599 | 586.263 | 226 | 13,258 | 3,106.523 | 234 |
| Intra Division Sales | | | | | | | | | |
| Sales - Reman | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - CSC | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - Okawa/Taiwan | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - Ind/Bldg Wire | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Midwest Loc. | 0 | (0.000) | 0 | 6 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Roland Loc. | 0 | (0.000) | 0 | 9 | (0.000) | 0 | 0 | (0.000) | 0 |
| Lbr Trans. to NWH Wash. Loc. | 2 | (0.000) | 0 | 9 | (0.000) | 0 | 311 | 226.633 | 729 |
| Lbr Trans. to NWH Ore. Loc. | 293 | 204.223 | 697 | 2,417 | 1,378.476 | 633 | 14,344 | 9,948.346 | 694 |
| Total Lumber Sales - MBF | 880 | 326.578 | 434 | 5,016 | 2,164.742 | 432 | 27,913 | 13,281.547 | 476 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Weyco - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| NWH OR - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Total Log Sales - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Chip Sales - 3rd Party - BDT | 596 | 38.364 | 76 | 4,534 | 349.464 | 76 | 26,847 | 2,362.245 | 88 |
| Freight - 3rd Party | | (9.188) | (18) | | (81.128) | (17) | | (430.814) | (17) |
| Chip Sales - Weyco - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Freight - Weyco | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Chip Sales - BDT | 596 | 38.176 | 69 | 4,534 | 269.338 | 59 | 26,847 | 1,931.431 | 71 |
| By Products | 273 | 5.571 | 20 | 2,302 | 42.907 | 18 | 17,967 | 276.829 | 17 |
| Freight - By-Products | | (2.956) | (11) | | (42.126) | (16) | | (240.977) | (13) |
| Total Sales Revenue - MBF | 888 | 367.470 | 649 | 5,016 | 2,448.562 | 487 | 27,913 | 15,338.831 | 546 |
| Beg. Inventory - Logs | 0 | 0.000 | 0 | 710 | 325.493 | 464 | 631 | 354.643 | 562 |
| Purchased Logs - 3rd Party | 436 | 188.329 | 433 | 2,441 | 1,104.339 | 452 | 16,886 | 8,503.317 | 519 |
| Other Handling Costs | | 0.190 | 0 | | 1.639 | 1 | | 5.930 | 0 |
| Purchased Logs - Weyco | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Tfr Transferred In - For | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Tfr Transferred In - Non-For | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 80 | 39.583 | 495 |
| Logs Transferred In - NWH WA | 245 | 68.179 | 282 | 395 | 97.895 | 303 | 1,231 | 480.797 | 433 |
| Other Handling Costs | | 21.233 | 89 | | 26.634 | 91 | | 144.711 | 126 |
| Logs Transferred In - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Raw Materials Available | 675 | 277.402 | 411 | 3,446 | 1,558.193 | 459 | 18,829 | 9,527.704 | 514 |
| Sawmill Conversion - MBF | 505 | 137.582 | 272 | 4,520 | 1,410.372 | 287 | 27,989 | 9,387.884 | 335 |
| Sawmill Conversion - Sailtow | 373 | | 439 | 3,098 | | 455 | 18,184 | | 516 |
| 3rd Party Sales | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Ending Inventory - Logs | (247) | (139.826) | 403 | (247) | (139.826) | 403 | (247) | (139.826) | 403 |
| Total Net RM Cost to Loc. | 328 | 137.582 | 419 | 3,098 | 1,410.372 | 455 | 18,184 | 9,387.884 | 516 |

EXHIBIT 482 P. 55

## Garibaldi - Mill Summary Results

### Northwest Hardwoods - Garibaldi

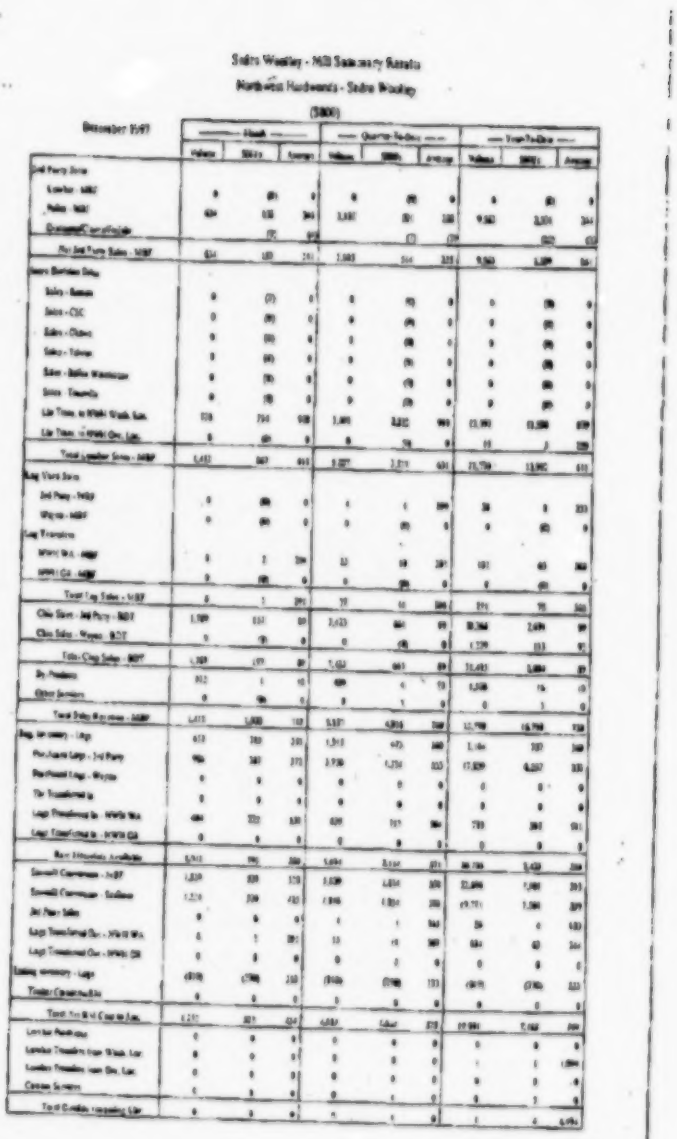
($000)

| | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from NWH GR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Custom Services (Basted Freight) | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.240 | 0 |
| Total Outside Incoming Lbr | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.240 | 0 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 505 | 31,494 | 62 | 4,920 | 228,364 | 46 | 27,988 | 1,200,254 | 43 |
| Maintenance Labor | | 11,935 | 24 | | 65,519 | 13 | | 352,478 | 13 |
| Payroll Loading | | 54,845 | 109 | | 183,307 | 37 | | 643,769 | 23 |
| Temporary Services | | 4,634 | 9 | | 21,479 | 4 | | 149,984 | 5 |
| Operating Supplies | | 9,986 | 20 | | 42,632 | 9 | | 254,658 | 9 |
| Maintenance Supplies | | 7,819 | 15 | | 67,152 | 14 | | 217,538 | 8 |
| Natural Gas | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Electricity/Utilities | | 11,498 | 23 | | 43,505 | 9 | | 163,070 | 6 |
| Rent | | 3,314 | 7 | | 10,222 | 2 | | 41,212 | 1 |
| Outside Services | | 1,093 | 2 | | 4,533 | 1 | | 41,848 | 1 |
| Outside Services - Drying | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Communications | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Distributed Expenses | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Miscellaneous | | 1,958 | 4 | | 7,121 | 1 | | 18,798 | 1 |
| Total Variable Costs | 505 | 138,576 | 274 | 4,920 | 673,853 | 137 | 27,988 | 3,188,338 | 111 |
| Depreciation | 800 | 42,499 | 53 | 5,016 | 138,393 | 28 | 27,913 | 584,653 | 21 |
| Taxes | | 2,148 | 3 | | 9,047 | 2 | | 46,100 | 2 |
| Other | | 57,341 | 72 | | 174,384 | 35 | | 621,144 | 22 |
| Period Costs | 800 | 102,988 | 127 | 5,016 | 321,824 | 64 | 27,913 | 1,251,899 | 45 |
| Bad Debt Expense | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Beg. Inventory Lumber - MBF | 517 | 128,405 | 248 | 221 | 65,741 | 305 | 149 | 30,442 | 204 |
| Ending Inventory Lumber - MBF | (221) | (46,946) | 217 | (221) | (46,946) | 212 | (221) | (46,946) | 212 |
| Total Cost of Sales | 800 | 499,605 | 575 | 5,016 | 2,424,844 | 483 | 27,913 | 13,731,858 | 492 |
| Gross Profit Contribution | 800 | (100,134) | (125) | 5,016 | 15,698 | 3 | 27,913 | 1,498,973 | 54 |
| Depreciation | 800 | 0.000 | 0 | 5,016 | 0.000 | 0 | 27,913 | 0.000 | 0 |
| Taxes | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Other | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Subtotal - Loc. G&A | 800 | 0.000 | 0 | 5,016 | 0.000 | 0 | 27,913 | 0.000 | 0 |
| Selling Expense | 800 | 0.000 | 0 | 5,016 | 0.000 | 0 | 27,913 | 0.000 | 0 |
| Selling Expense Allocation | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 800 | 0.000 | 0 | 5,016 | 0.000 | 0 | 27,913 | 0.000 | 0 |
| Misc Rev(Exp) | 800 | (0.000) | 0 | 5,016 | 0.395 | 0 | 27,913 | 0.973 | 0 |
| Other Rev(Exp) | 800 | (0.000) | 0 | 5,016 | (0.000) | 0 | 27,913 | 2.977 | 0 |
| Pre-Tax Profit(Loss) | 800 | (100,134) | (125) | 5,016 | 16,093 | 3 | 27,913 | 1,500,414 | 54 |

| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | 1.84 | 1.59 | 1.54 |
| Chips Recovery/Lumber MBF | 1.50 | 0.93 | 0.96 |
| Timber Pre - tax Profit | (0.000) | (0.000) | (0.303) |
| Total | (100,134) | 16,093 | 1,492,111 |
| rumbo profit | (100,134) | 16,093 | 1,492,111 |
| difference | 0.000 | 0.000 | (0.000) |

EXHIBIT 482 P. 56

WY-CONF-01542



Sales Weekly - Mill Stationery Results

Northwest Hardwoods - Sales Display

($000)

| December 1997 | Week | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | Sales | Average | Volume | Sales | Average | Volume | Sales | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Poles - MBF | 434 | 153 | 344 | 1,102 | 351 | 318 | 9,562 | 3,331 | 344 |
| Chemical Formulation | | (2) | (2) | | (7) | (7) | | (32) | (3) |
| Total 3rd Party Sales - MBF | 434 | 151 | 341 | 1,102 | 344 | 312 | 9,562 | 3,299 | 345 |
| Inter-Entities Sales | | | | | | | | | |
| Sales - Boise | 0 | (1) | 0 | 0 | (1) | 0 | 0 | (9) | 0 |
| Sales - CSC | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Chinook | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Tolmie | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Idaho Wallboard | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Towards | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lin Trans. in White Work. Loc. | 116 | 114 | 100 | 1,102 | 1,102 | 100 | 11,102 | 11,102 | 100 |
| Lin Trans. in White Chi. Loc. | 0 | (0) | 0 | 0 | (0) | 0 | 11 | 7 | 100 |
| Total Lumber Sales - MBF | 1,432 | 867 | 605 | 2,207 | 1,211 | 549 | 21,776 | 13,907 | 639 |
| Log Value Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0) | 0 | 0 | (0) | 100 | 36 | 0 | 333 |
| White - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| White W.L. - MBF | 0 | 2 | 200 | 11 | 10 | 200 | 101 | 60 | 300 |
| White Ch. - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 0 | 1 | 200 | 11 | 11 | 200 | 101 | 70 | 300 |
| Chip Sales - 3rd Party - BDT | 1,109 | 111 | 10 | 2,422 | 242 | 10 | 10,364 | 2,074 | 10 |
| Chip Sales - Wagon - BDT | 0 | (0) | 0 | 0 | (0) | 0 | 1,729 | 173 | 10 |
| Total Chip Sales - BDT | 1,109 | 111 | 10 | 2,422 | 242 | 10 | 12,093 | 2,248 | 19 |
| By Products | 812 | 1 | 10 | 809 | 6 | 10 | 1,008 | 76 | 10 |
| Other Services | 0 | (0) | 0 | 0 | 1 | 0 | 0 | 1 | 0 |
| Total Sales Revenue - MBF | 1,433 | 1,000 | 700 | 5,537 | 4,016 | 726 | 12,798 | 16,798 | 726 |
| Log Inventory - Log | 613 | 200 | 326 | 1,310 | 472 | 360 | 2,164 | 707 | 326 |
| Purchased Logs - 3rd Party | 906 | 347 | 383 | 2,936 | 1,124 | 383 | 17,829 | 6,257 | 351 |
| Purchased Logs - White | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Tie Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - White Wa | 484 | 222 | 459 | 439 | 151 | 344 | 733 | 262 | 357 |
| Logs Transferred In - White Ch | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Raw Materials Available | 1,913 | 769 | 402 | 5,684 | 2,147 | 377 | 20,726 | 7,227 | 349 |
| Sawmill Conversion - MBF | 1,839 | 839 | 456 | 5,839 | 2,654 | 455 | 22,696 | 7,980 | 352 |
| Sawmill Conversion - Sullivan | 1,214 | 559 | 460 | 3,896 | 1,804 | 463 | 19,771 | 7,384 | 373 |
| 3rd Party Sales | 0 | 0 | 0 | 1 | 1 | 564 | 26 | 6 | 231 |
| Logs Transferred Out - White Wa | 0 | 1 | 200 | 11 | 10 | 909 | 101 | 60 | 594 |
| Logs Transferred Out - White Ch | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | (613) | (200) | 326 | (1,310) | (472) | 360 | (2,164) | (707) | 326 |
| Timber Consumed In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Tie & Kit Consume Sales | 1,231 | 321 | 261 | 4,581 | 1,641 | 358 | 17,991 | 7,142 | 397 |
| Lumber Purchases | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from White Loc | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lumber Transfers from Chi. Loc | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 1,000 |
| Canvas Screens | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Combo remaining Lbr | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

WY-CONF-01100

Sedro Woolley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

($000)

| October 1997 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Variable Costs | | | | | | | | | |
| Operating Labor | 5,510 | 161 | 29 | 5,429 | 159 | 29 | 32,694 | 1,153 | 35 |
| Maintenance Labor | | 72 | 14 | | 172 | 32 | | 709 | 22 |
| Payroll Loading | | (9) | (2) | | 162 | 30 | | 997 | 30 |
| Operating Supplies | | 14 | 3 | | 68 | 13 | | 226 | 7 |
| Maintenance Supplies | | 30 | 5 | | 63 | 12 | | 232 | 7 |
| Natural Gas | | 23 | 4 | | 51 | 9 | | 123 | 4 |
| Electricity/Utilities | | 59 | 11 | | 85 | 16 | | 338 | 10 |
| Rent | | 5 | 1 | | 12 | 2 | | 47 | 1 |
| Outside Services | | 5 | 1 | | 35 | 6 | | 125 | 4 |
| Outside Services - Drying | | (28) | (5) | | 1 | 0 | | 196 | 6 |
| Front Loader | | 12 | 2 | | 49 | 9 | | 229 | 7 |
| Fuel Chips/By-Prod | | 59 | 11 | | 69 | 13 | | 206 | 6 |
| Miscellaneous | | 4 | 1 | | (7) | (1) | | (13) | (0) |
| Total Variable Costs | 5,510 | 508 | 92 | 5,429 | 1,256 | 231 | 32,694 | 5,963 | 182 |
| Depreciation | 5,612 | 51 | 10 | 5,287 | 164 | 31 | 32,730 | 965 | 29 |
| Taxes | | (31) | (6) | | (82) | (15) | | 9 | 0 |
| Other | | 27 | 5 | | 114 | 22 | | 326 | 10 |
| Period Costs | 5,612 | 73 | 13 | 5,287 | 196 | 37 | 32,730 | 1,301 | 40 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Proj. Inventory Loaded - MBF | 1,851 | 732 | 395 | 1,859 | 735 | 395 | 11,291 | 872 | 633 |
| Ending Inventory Loaded - MBF | (1,738) | (687) | (395) | (1,220) | (482) | (395) | (11,123) | (4,397) | (395) |
| Total Cost of Sales | 5,625 | 626 | 111 | 5,926 | 1,451 | 245 | 32,898 | 5,839 | 178 |
| Gross Profit Contribution | 5,612 | 324 | 58 | 5,287 | 654 | 124 | 32,898 | 3,758 | 114 |
| Depreciation | 5,612 | 0 | 0 | 5,287 | 0 | 0 | 32,730 | 0 | 0 |
| Taxes | | 2 | 0 | | 5 | 1 | | 22 | 1 |
| Other | | 0 | 0 | | 0 | 0 | | 3 | 0 |
| Indirect Lan. G&A | 5,612 | 2 | 0 | 5,287 | 5 | 1 | 32,730 | 25 | 1 |
| Selling Expense Allocation | 5,612 | 0 | 0 | 5,287 | 0 | 0 | 32,730 | 0 | 0 |
| G&A Expense Allocation | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total SG&A Expense | 5,612 | 2 | 0 | 5,287 | 5 | 1 | 32,730 | 25 | 1 |
| After Tax Adjustments | 5,612 | (0) | 0 | 5,287 | 1 | 0 | 32,730 | 4 | 0 |
| Other Non-Operating | 5,612 | 1 | 0 | 5,287 | (13) | (2) | 32,730 | (20) | (1) |
| Pre-Tax Profit/(Loss) | 5,612 | 320 | 57 | 5,287 | 635 | 120 | 32,730 | 3,690 | 113 |
| Lumber Recovery/Log | | 0.76 | | | 1.12 | | | 0.83 | |
| Chips Recovery/Lumber MBF | | 0.95 | | | 1.37 | | | 1.09 | |

WY-CONF-01101

EXHIBIT 482 P. 58

Sedro Woolley - Mill Summary Reports

Northwest Hardwoods - Sedro Woolley

($000)

| December 1995 | Week | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,312 | 910 | 694 | 3,266 | 2,268 | 694 | 4,732 | 3,281 | 693 |
| Poles - MBF | 671 | 161 | 240 | 2,303 | 557 | 242 | 9,302 | 2,276 | 245 |
| Chemicals/Chips/Fuels | | (7) | (7) | | (23) | (7) | | (76) | (7) |
| Pre 3rd Party Sales - MBF | 1,984 | 1,064 | 536 | 5,569 | 2,801 | 503 | 14,034 | 5,481 | 391 |
| Inter-Division Sales | | | | | | | | | |
| Sales - Arcata | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - CDC | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Chowa | 0 | (0) | 0 | 0 | (0) | 0 | 60 | 72 | 1,204 |
| Sales - Eelura | 13 | 13 | 988 | 13 | 13 | 988 | 13 | 13 | 988 |
| Sales - Eelura Warehouse | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Eelglass Warehouse | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Holdrege | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Sales - Klamath | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Trans. to NWH Wash. Loc. | 211 | 150 | 1,023 | 437 | 444 | 1,017 | 1,961 | 1,984 | 988 |
| Log Trans. to NWH Ore. Loc. | 0 | (0) | 0 | 0 | 0 | 1,221 | 0 | 0 | 1,221 |
| Total Lumber Sales - MBF | 2,107 | 1,194 | 567 | 6,019 | 3,259 | 538 | 17,141 | 7,552 | 441 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 32 | 8 | 252 |
| Veneer - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| NWH Wa. - MBF | 11 | 4 | 333 | 32 | 11 | 333 | 261 | 68 | 256 |
| NWH Or. - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 11 | 4 | 333 | 32 | 11 | 333 | 293 | 76 | 261 |
| Chip Sales - 3rd Party - BDT | 3,940 | 118 | 30 | 6,343 | 177 | 28 | 28,703 | 2,474 | 87 |
| Freight - 3rd Party | | (12) | (0) | | (14) | (0) | | (168) | (0) |
| Chip Sales - Weyco - BDT | 0 | 0 | 0 | 0 | 0 | 0 | 442 | 19 | 43 |
| Freight - Weyco | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Total Chip Sales - BDT | 3,940 | 106 | 27 | 6,343 | 177 | 28 | 29,145 | 2,325 | 79 |
| By-Products | 216 | 1 | 5 | 1,000 | 1 | 1 | 4,823 | 23 | 5 |
| Freight - By-Products | | (0) | 0 | | (0) | (0) | | (1) | (0) |
| Other Services | | (0) | 0 | | (2) | 0 | | (2) | 0 |
| Total Sales Revenue - MBF | 2,147 | 1,283 | 598 | 6,938 | 4,105 | 592 | 22,249 | 13,889 | 624 |
| Log Inventory - Logs | 854 | 506 | 592 | 488 | 288 | 591 | 818 | 538 | 658 |
| Purchased Logs - 3rd Party | 3,996 | 960 | 240 | 3,964 | 1,063 | 268 | 13,849 | 3,903 | 282 |
| Purchased Logs - Weyco | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Tib Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - NWH Wa. | 0 | 0 | 0 | 1,442 | 644 | 447 | 2,172 | 1,037 | 477 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Materials Available | 5,170 | 1,466 | 283 | 6,135 | 1,996 | 326 | 20,843 | 5,564 | 267 |
| Sawmill Consumption - MBF | 1,729 | 347 | 201 | 3,631 | 1,026 | 283 | 14,791 | 3,889 | 263 |
| Sawmill Conversion - Lumber | 1,367 | | 791 | 4,987 | | 813 | 19,732 | | 799 |
| 3rd Party Sales | 0 | 0 | 0 | 0 | 0 | 0 | 79 | 21 | 263 |
| Logs Transferred Out - NWH Wa. | 11 | 4 | 333 | 32 | 11 | 333 | 261 | 68 | 255 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | 1,063 | (242) | 227 | (311) | (780) | 250 | (811) | (1,963) | 242 |
| Market Consumption | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Net Mill Consumption | 4,169 | 106 | 25 | 4,339 | 1,026 | 236 | 19,312 | 1,943 | 101 |

Sed_mill.wb4

WY-COMF-01879

Sacro Wantley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

($000)

| December 1993 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Production | 138 | 37 | 641 | 138 | 37 | 641 | 138 | 37 | 641 |
| Lumber Transfers from Wash. Ops. | 38 | 47 | 1,316 | 38 | 110 | 1,322 | 433 | 488 | 942 |
| Lumber Transfers from Ore. Ops. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Custom Services | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Outside Processing Lbr | 134 | 125 | 933 | 134 | 202 | 902 | 561 | 497 | 859 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 1,731 | 181 | 697 | 3,681 | 886 | 881 | 21,201 | 2,457 | 781 |
| Maintenance Labor | | 56 | 32 | | 179 | 72 | | 713 | 39 |
| Payroll Loading | | 44 | 26 | | 145 | 26 | | 563 | 26 |
| Operating Supplies | | 99 | 24 | | 254 | 18 | | 788 | 14 |
| Maintenance Supplies | | 29 | 18 | | 91 | 13 | | 269 | 13 |
| Natural Gas | | 30 | 16 | | 83 | 12 | | 256 | 13 |
| Electricity/Utilities | | 43 | 30 | | 165 | 28 | | 468 | 23 |
| Rent | | 3 | 3 | | 9 | 3 | | 48 | 3 |
| Outside Services | | 12 | 7 | | 29 | 5 | | 103 | 5 |
| Outside Services - Drying | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Private Haulers | | 0 | 0 | | 3 | 1 | | 44 | 4 |
| Miscellaneous Expenses | | 0 | 0 | | (20) | (10) | | (82) | (24) |
| Miscellaneous | | 6 | 4 | | 12 | 3 | | 28 | 3 |
| Total Variable Costs | 1,731 | 456 | 177 | 3,681 | 1,354 | 733 | 24,391 | 5,642 | 555 |
| Depreciation | 2,167 | 69 | 32 | 6,898 | 197 | 32 | 22,341 | 833 | 38 |
| Taxes | | (91) | (70) | | 6 | 1 | | 33 | 1 |
| Other | | 31 | 29 | | 69 | 10 | | 277 | 25 |
| Period Costs | 2,167 | 111 | 51 | 6,898 | 281 | 41 | 22,341 | 1,448 | 65 |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inv. Lumber - MBF | 4,828 | 2,148 | 707 | 3,929 | 2,587 | 731 | 2,139 | 872 | 408 |
| Ending Inventory Lumber - MBF | (5,758) | (2,811) | 811 | (5,758) | (3,811) | 811 | (5,758) | (3,811) | 811 |
| Total Cost of Sales | 5,167 | 5,412 | 838 | 5,950 | 5,673 | 681 | 23,261 | 23,134 | 999 |
| Gross Profit Contribution | 2,245 | 432 | 32 | 6,898 | 645 | 897 | 22,341 | 2,569 | 115 |
| Depreciation | 2,167 | 0 | 0 | 6,898 | 0 | 0 | 22,341 | 0 | 0 |
| Taxes | | 0 | 0 | | 19 | 3 | | 66 | 3 |
| Other | | 0 | 0 | | 3 | 0 | | 9 | 0 |
| Interest - Lbr, G&A | 2,167 | 0 | 0 | 6,898 | 19 | 3 | 22,341 | 66 | 3 |
| Selling, Division Allocation | 2,167 | 140 | 65 | 6,898 | 226 | 36 | 22,341 | 781 | 35 |
| G&A Expense Allocation | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total SG&A Expense | 2,167 | 140 | 65 | 6,898 | 246 | 36 | 22,341 | 856 | 38 |
| Misc Income/Exp | 2,167 | 1 | 1 | 6,898 | 4 | 1 | 22,341 | 6 | 0 |
| Other Fixed Exp | 2,167 | (3) | (1) | 6,898 | (3) | (0) | 22,341 | 7 | 0 |
| Pre-Tax Profit/(Loss) | 2,167 | 293 | 134 | 6,898 | 398 | 58 | 22,341 | 1,887 | 84 |
| Lumber Recovery/Log | | 4.36 | | | 4.19 | | | 4.23 | |
| Gross Revenue/Lumber MBF | | 0.16 | | | 1.99 | | | 1.18 | |

WY-CORP-01827

Sedro Woolley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

(1000)

| December 1999 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | [illegible] | Average | Volume | [illegible] | Average | Volume | [illegible] | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,570 | 1,176 | 749 | 4,053 | 3,648 | 897 | 13,990 | 14,617 | 914 |
| Paltz - MBF | 1,660 | 228 | 138 | 2,842 | 714 | 251 | 10,729 | 2,511 | 234 |
| Discount/Cr-Mo | | (3) | (2) | | (10) | (3) | | (29) | (2) |
| Tot 3rd Party Sales - MBF | 3,230 | 1,401 | 433 | 7,895 | 4,337 | 549 | 24,719 | 17,099 | 692 |
| Sedro-Woolley Sales | | | | | | | | | |
| Sales - Scrap | 0 | (6) | 0 | 0 | (8) | 0 | 0 | (8) | 0 |
| Sales - CSC | 0 | (6) | 0 | 0 | 4 | 387 | 0 | 27 | 899 |
| Sales - Shavel/Lumps | 71 | 56 | 1,291 | 182 | 126 | 1,229 | 160 | 607 | 1,331 |
| Sales - SWDaily Warehouse | 0 | (0) | 0 | 23** | 16 | 1,439 | 168 | 256 | 1,679 |
| Lbr Trans. to WWH Midwest Lse. | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Lbr Trans. to WWH Retail Lse. | 0 | (0) | 0 | 0 | (0) | 0 | 15 | 7 | 382 |
| Lbr Trans. to WWH Wash. Lse. | 270 | 272 | 1,004 | 842 | 802 | 898 | 2,228 | 2,132 | 946 |
| Lbr Trans. to WWH Ore. Lse. | 0 | 126 | 0 | 0 | 31 | 1,399 | 47 | 36 | 772 |
| Total Lumber Sales - MBF | 2,004 | 1,375 | 699 | 8,982 | 5,110 | 647 | 29,339 | 20,130 | 697 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | 1 | 0 |
| Wrapped - MBF | 0 | 22 | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Log Transfers | | | | | | | | | |
| WWW WA - MBF | 4 | 2 | 437 | 22 | 14 | 661 | 448 | 295 | 624 |
| WWW OR - MBF | 0 | (0) | 0 | 0 | (0) | 0 | 0 | (0) | 0 |
| Total Log Sales - MBF | 4 | 2 | 437 | 22 | 14 | 661 | 448 | 296 | 437 |
| Chip Sales - 3rd Party - BDT | 2,220 | 194 | 88 | 8,899 | 939 | 11 | 35,241 | 2,334 | 91 |
| Tongue - 3rd Party | | (19) | (11) | | (66) | (10) | | (222) | (7) |
| Chip Sales - Wrapped - BDT | 0 | (0) | 0 | 914 | 77 | 91 | 2,669 | 226 | 84 |
| Transfer - Wrapped | | (0) | 0 | | (22) | (10) | | (62) | (14) |
| Total Chip Sales - BDT | 2,220 | 210 | 94 | 9,813 | 977 | 94 | 37,910 | 2,296 | 70 |
| By-Products | 1,810 | 2 | 2 | 2,334 | 13 | 6 | 12,377 | 12 | 1 |
| Fudge - By-Products | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Other Services | | (0) | 0 | | (0) | 0 | | (0) | 0 |
| Total Sales Revenue - MBF | 3,234 | 1,363 | 562 | 7,982 | 5,726 | 706 | 29,734 | 22,640 | 760 |
| Reg. secondary - Logs | 782 | 369 | 472 | 782 | 366 | 467 | 831 | 382 | 459 |
| Purchased Logs - 3rd Party | 1,393 | 687 | 493 | 4,313 | 2,214 | 513 | 19,426 | 8,680 | 447 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 102 | 5 |
| Purchased Logs - Wrapped | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Log Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - WWW WA | 0 | 0 | 0 | 992 | 537 | 541 | 2,991 | 1,539 | 515 |
| Other Handling Costs | | 0 | 0 | | 93 | 93 | | 178 | 60 |
| Logs Transferred In - WWW OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials Available | 2,261 | 1,055 | 468 | 6,099 | 3,145 | 516 | 23,182 | 10,679 | 461 |
| Sawmill Conversion - MBF | 2,041 | 781 | 384 | 2,132 | 2,812 | 264 | 27,371 | 10,172 | 384 |
| Sawmill Conversion - Software | 1,651 | | 481 | 3,240 | | 498 | 27,356 | | 462 |
| 3rd Party Sales | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - WWW WA | 4 | 2 | 437 | 22 | 14 | 661 | 448 | 295 | 643 |
| Logs Transferred Out - WWW OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Finishing Inventory - Logs | (727) | (268) | 442 | (2,221) | (2,006) | 412 | (727) | (268) | 412 |
| Planer Consumed Lbr | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Lbr Rel Cost to Log | 1,931 | 781 | 404 | 5,713 | 2,845 | 498 | 27,448 | 10,199 | 461 |

[illegible]

VP-CLWF-01052

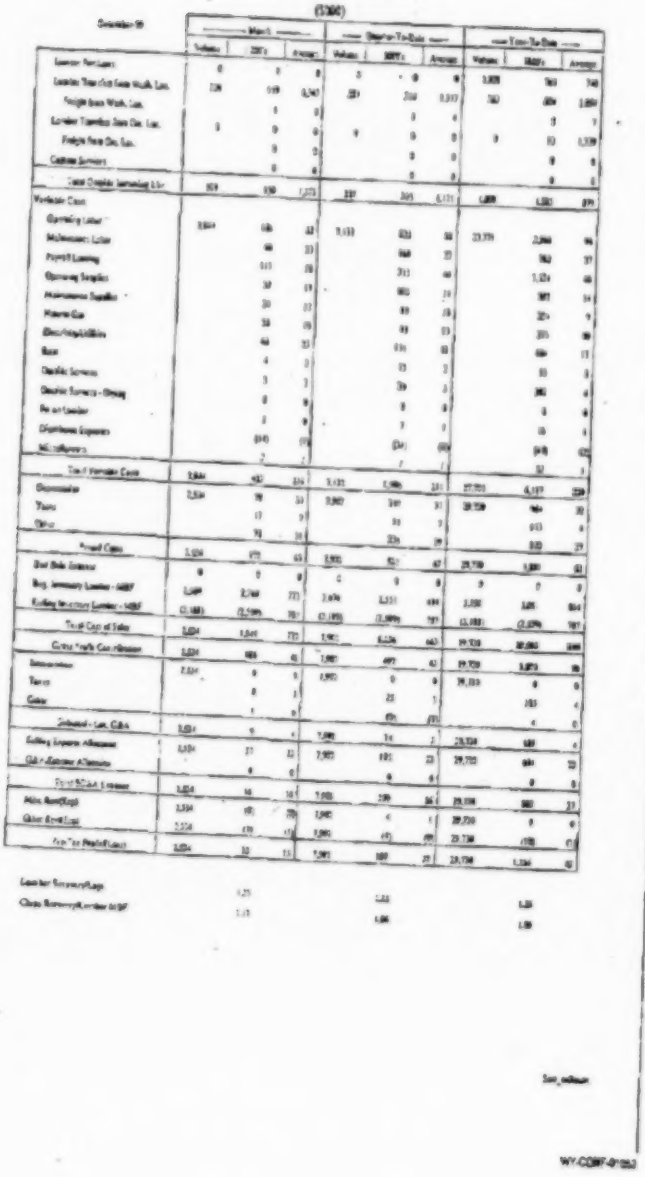
EXHIBIT 482 P. 61

Sedro Woolley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

($000)

| December 99 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Values | 2001's | Average | Values | 2001's | Average | Values | 2001's | Average |
| Lumber Sections | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] | [illegible] | [illegible] |
| Lumber Transfer Sales Wash. Lac. | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Freight Sales Wash. Lac. | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Lumber Transfer Sales Div. Lac. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | [illegible] |
| Freight Sales Div. Lac. | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Outside Sampling Lbr. | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Variable Costs | | | | | | | | | |
| Operating Labor | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Maintenance Labor | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Payroll Loading | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Operating Supplies | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Maintenance Supplies | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Material Gas | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Electricity/Utilities | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Rent | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Outside Services | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Outside Services - Drying | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Pre-on Lumber | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Distribution Expenses | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Miscellaneous | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Total Variable Costs | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Depreciation | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Taxes | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Other | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Fixed Costs | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Bad Debt Expense | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Reg. Inventory Lumber - MBF | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Ending Inventory Lumber - MBF | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Total Cost of Sales | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Gross Profit Contribution | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Interaction | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Taxes | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Other | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Subtotal - Lac. G&A | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Selling Expense Allocation | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| G&A-Retainer Allocation | | [illegible] | [illegible] | | [illegible] | [illegible] | | [illegible] | [illegible] |
| Total SG&A Expense | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Misc. Rent(Exp) | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Other Rent(Exp) | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Net Tax Profit/Loss | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |



| | | | |
|---|---|---|---|
| Lumber Recovery/Logs | [illegible] | [illegible] | [illegible] |
| Chips Recovery/Lumber MBF | [illegible] | [illegible] | [illegible] |

WY-CONF-01052

EXHIBIT 482 P. 62

Sedro Woolley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

($000)

| December 2011 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,548 | 1,411 | 911 | 4,646 | 4,238 | 912 | 17,529 | 15,978 | 911 |
| Alder - MBF | 1,139 | 978 | 858 | 3,313 | 2,849 | 860 | 13,225 | 11,353 | 858 |
| Miscellaneous Chlorox | | 28 | 0 | | (28) | 0 | | (276) | 0 |
| 3rd 3rd Party Sales - MBF | 2,687 | 2,417 | 900 | 7,959 | 6,959 | 874 | 30,754 | 27,055 | 880 |
| Harris Dividend Sales | | | | | | | | | |
| Sales - Aurora | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Sales - CSC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Sales - Olympia/Tacoma | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Sales - Sedro Woolley | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Elk Trans. to NWH Alderwood Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Elk Trans. to NWH Oakwood Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Elk Trans. to NWH Wash. Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Elk Trans. to NWH Ore. Loc. | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Lumber Sales - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Log Trade Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Weyco - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| NWH OR - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Log Sales - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Chip Sales - 3rd Party - BDT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Freight - 3rd Party | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Chip Sales - Weyco - BDT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Freight - Weyco | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Chip Sales - BDT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| By-Products | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Freight - By-Products | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Other Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Sales Revenue - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Log Inventory - Logs | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Purchased Logs - 3rd Party | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Purchased Logs - Weyco | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Elk Transferred In | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred In - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Logs Transferred In - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Handling Costs | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Raw Materials available | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Sawmill Conversion - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Remanufacturing Conversion - MBF | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 3rd Party Sales | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH WA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Logs Transferred Out - NWH OR | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Ending Inventory - Logs | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total Net $/M Cost to Log | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Sedro Woolley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

($000)

| December 2020 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0 | 0 | 0 | (7) | 0 | 330 | 601 | 363 |
| Lumber Transfers from Wash. Lor. | 372 | 345 | 891 | 1,166 | 867 | 988 | 2,400 | 1,267 | 956 |
| Freight from Wash. Lor. | | 2 | 11 | | 8 | 6 | | 15 | 7 |
| Lumber Transfers from Ore. Lor. | 4 | 6 | 1,453 | 12 | 66 | 1,771 | 35 | 61 | 1,722 |
| Freight from Ore. Lor. | | 0 | 108 | | 1 | 38 | | 2 | 70 |
| Custom Services | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total Chemicals Reporting Lbr | 378 | 354 | 937 | 1,178 | 991 | 799 | 1,597 | 2,756 | 913 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 1,639 | 761 | 79 | 2,350 | 731 | 87 | 22,687 | 2,009 | 89 |
| Maintenance Labor | | 43 | 18 | | 162 | 19 | | 636 | 28 |
| Payroll Loading | | 133 | 31 | | 331 | 40 | | 1,198 | 36 |
| Operating Supplies | | 26 | 10 | | 127 | 15 | | 462 | 66 |
| Maintenance Supplies | | 25 | 9 | | 99 | 9 | | 213 | 9 |
| Natural Gas | | 92 | 66 | | 84 | 10 | | 228 | 66 |
| Electricity/Utilities | | 35 | 14 | | 165 | 20 | | 512 | 15 |
| Rent | | 1 | 2 | | 11 | 2 | | 33 | 3 |
| Outside Services | | 7 | 2 | | 29 | 3 | | 102 | 4 |
| Outside Services - Styling | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Fresh Lumber | | 7 | 9 | | 2 | 0 | | 67 | 9 |
| Distributed Expenses | | 1 | 1 | | 11 | 1 | | (73) | (1) |
| Miscellaneous | | 1 | 1 | | 16 | 2 | | 33 | 7 |
| - Total Variable Costs | 2,017 | 1,135 | 563 | 4,893 | 1,768 | 361 | 23,687 | 5,332 | 998 |
| Depreciation | 1,042 | 81 | 78 | 2,063 | 243 | 118 | 25,077 | 946 | 38 |
| Taxes | | 12 | 6 | | 23 | 6 | | 102 | 5 |
| Other | | 16 | 21 | | 104 | 27 | | 402 | 39 |
| Period Costs | 1,042 | 109 | 105 | 2,063 | 369 | 179 | 25,077 | 1,451 | 58 |
| Bad Debt Provision | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Beg. Inventory Lumber - Mill | 4,957 | 3,123 | 630 | 3,644 | 2,186 | 600 | 2,143 | 1,389 | 648 |
| Ending Inventory Lumber - Mill | (3,961) | (1,870) | 472 | (3,961) | (1,870) | 472 | (3,961) | (1,870) | 472 |
| Total Cost of Sales | 3,042 | 2,398 | 788 | 5,745 | 4,434 | 772 | 25,571 | 24,948 | 976 |
| Gross Profit Contribution | 3,042 | 62 | 20 | 5,745 | 433 | 75 | 25,571 | 2,784 | 109 |
| Depreciation | 3,042 | 0 | 0 | 9,261 | 0 | 0 | 27,272 | 0 | 0 |
| Taxes | | 10 | 3 | | 23 | 3 | | 102 | 4 |
| Other | | 0 | 0 | | 6 | 0 | | 3 | 0 |
| Subtotal - Lor. C&A | 3,042 | 10 | 3 | 9,261 | 29 | 3 | 26,532 | 118 | 5 |
| Selling Expense Allocation | 3,042 | 41 | 13 | 9,261 | 120 | 13 | 25,572 | 478 | 19 |
| G&A Expense Allocation | | 0 | 0 | | 0 | 0 | | 0 | 0 |
| Total SG&A Expense | 3,042 | 52 | 17 | 9,261 | 149 | 16 | 26,532 | 596 | 22 |
| Misc Income/(Exp) | 3,042 | 1 | 0 | 9,261 | 4 | 0 | 26,532 | 17 | 0 |
| Other Income/(Exp) | 3,042 | (21) | (7) | 9,261 | (21) | (2) | 26,532 | (79) | (3) |
| Pre-Tax Profit/(Loss) | 3,042 | 31 | 9 | 9,261 | 271 | 29 | 26,532 | 1,043 | 39 |
| Lumber Recovery/Log | | 1.26 | | | 1.22 | | | 1.28 | |
| Other Income/Lumber Unit | | 0.01 | | | 0.01 | | | 0.01 | |

WY-COAF-01028

## Sedro Woolley - Mill Summary Results

### Northwest Hardwoods - Sedro Woolley

($000)

| December 2001 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| 1/8/2002 16:29 | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| 3rd Party Sales | | | | | | | | | |
| Lumber - MBF | 1,317 | 1,156,569 | 878 | 3,834 | 3,289,197 | 858 | 15,683 | 13,991,232 | 892 |
| Pallet - MBF | 717 | 140,175 | 196 | 2,736 | 548,267 | 200 | 12,380 | 2,641,798 | 213 |
| Discounts/Claims | | (3,600) | (2) | | (15,757) | (2) | | (82,470) | (5) |
| Net 3rd Party Sales - MBF | 2,034 | 1,293,142 | 636 | 6,590 | 3,741,807 | 568 | 28,063 | 16,550,559 | 590 |
| Intra Division Sales | | | | | | | | | |
| Sales - Nuteas | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Sales - CSC | 0 | (0.009) | 0 | 3 | (3.624) | (1,208) | 171 | 175,476 | 1,027 |
| Sales - Chewelah | 24 | 30,849 | 1,286 | 68 | 92,855 | 1,364 | 529 | 726,754 | 1,373 |
| Sales - Ind/Pkg Warehouse | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 37 | 57,425 | 1,566 |
| Lbr Trans. to NWH Midwest Loc. | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 39 | 41,551 | 1,076 |
| Lbr Trans. to NWH Delta Loc. | 16 | 24,437 | 1,490 | 48 | 64,559 | 1,353 | 75 | 92,983 | 1,223 |
| Lbr Trans. to NWH Wash. Loc. | 257 | 297,483 | 1,158 | 1,113 | 1,203,702 | 1,081 | 5,288 | 5,253,057 | 993 |
| Lbr Trans. to NWH Ore. Loc. | 10 | 12,577 | 1,258 | 22 | 23,031 | 1,047 | 32 | 31,483 | 981 |
| Total Lumber Sales - MBF | 2,351 | 1,658,492 | 714 | 7,844 | 5,132,799 | 655 | 34,234 | 23,917,311 | 699 |
| Log Yard Sales | | | | | | | | | |
| 3rd Party - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | 4,771 | 0 |
| Weyco - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Log Transfers | | | | | | | | | |
| NWH WA - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 8 | 0.702 | 88 |
| NWH OR - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 0 | (0.000) | 0 |
| Total Log Sales - MBF | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 8 | 5,473 | 684 |
| Chip Sales - 3rd Party - BDT | 1,693 | 127,106 | 75 | 5,644 | 421,753 | 75 | 23,867 | 1,903,885 | 80 |
| Freight - 3rd Party | | (10,342) | (6) | | (43,720) | (8) | | (196,084) | (8) |
| Chip Sales - Weyco - BDT | 0 | (0.000) | 0 | 0 | (0.000) | 0 | 2,066 | 172,284 | 83 |
| Freight - Weyco | | (0.000) | 0 | | (0.000) | 0 | | (16,543) | (8) |
| Total Chip Sales - BDT | 1,693 | 116,763 | 69 | 5,644 | 378,034 | 67 | 25,933 | 1,863,541 | 72 |
| By-Products | 864 | 3,549 | 4 | 2,878 | 11,647 | 4 | 12,603 | 48,646 | 4 |
| Freight - By-Products | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Other Services | | (0.000) | 0 | | (0.000) | 0 | | (0.000) | 0 |
| Total Sales Revenue - MBF | 2,351 | 1,778,804 | 765 | 7,844 | 5,511,962 | 703 | 34,234 | 24,834,972 | 725 |
| Beg. Inventory - Logs | 1,374 | 750,295 | 546 | 981 | 371,267 | 464 | 686 | 277,036 | 404 |
| Purchased Logs - 3rd Party | 830 | 386,933 | 466 | 3,632 | 1,713,318 | 472 | 17,104 | 8,282,212 | 484 |
| Other Handling Costs | | 11,339 | 14 | | 14,436 | 4 | | 43,143 | 3 |
| Purchased Logs - Weyco | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Log Transferred In | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred In - NWH WA | 0 | 0.000 | 0 | 1,435 | 843,648 | 588 | 5,336 | 3,306,397 | 621 |
| Other Handling Costs | | 29,133 | 0 | | 78,748 | 54 | | 194,535 | 37 |
| Logs Transferred In - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Other Handling Costs | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Raw Materials Available | 2,204 | 1,177,670 | 534 | 5,632 | 3,021,397 | 536 | 23,126 | 12,103,323 | 524 |
| Sawmill Conversion - MBF | 2,526 | 960,063 | 380 | 7,317 | 2,703,762 | 369 | 31,346 | 11,882,591 | 379 |
| Sawmill Conversion - Surcharge | 1,766 | | 544 | 5,199 | | 520 | 22,671 | | 524 |
| 3rd Party Sales | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Logs Transferred Out - NWH WA | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 8 | 3.057 | 382 |
| Logs Transferred Out - NWH OR | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Ending Inventory - Logs | (438) | (217,575) | 497 | (438) | (217,575) | 497 | (438) | (217,575) | 497 |
| Total Net RM Cost to Loc. | 1,766 | 960,063 | 544 | 5,199 | 2,703,762 | 520 | 22,679 | 11,885,648 | 524 |

EXHIBIT 482 P. 65

Sedro Woolley - Mill Summary Results

Northwest Hardwoods - Sedro Woolley

($000)

| December 1981 | Month | | | Quarter-To-Date | | | Year-To-Date | | |
|---|---|---|---|---|---|---|---|---|---|
| | Volume | $000's | Average | Volume | $000's | Average | Volume | $000's | Average |
| Lumber Purchases | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Lumber Transfers from Wash. Lac. | 184 | 119.910 | 1,117 | 291 | 381.389 | 1,224 | 3,329 | 3,713,437 | 961 |
| Freight from Wash. Lac. | | 0.020 | 0 | | 3.426 | 22 | | 36.711 | 11 |
| Lumber Transfers from Ore. Lac. | 0 | 0.000 | 777 | 18 | 19.785 | 1,126 | 23 | 24.183 | 1,054 |
| Freight from Ore. Lac. | | 0.000 | 0 | | 0.261 | 15 | | 0.261 | 11 |
| Custom Services | | 3.119 | 0 | | 168.328 | 0 | | 168.328 | 0 |
| Total Outside Inventory Lbr | 111 | 329.963 | 1,160 | 309 | 581.506 | 1,866 | 3,352 | 3,443.129 | 1,027 |
| Variable Costs | | | | | | | | | |
| Operating Labor | 2,326 | 191.979 | 78 | 9,337 | 612.885 | 63 | 31,346 | 2,374.123 | 93 |
| Maintenance Labor | | 37.730 | 15 | | 114.360 | 35 | | 398.530 | 35 |
| Payroll Loading | | 91.899 | 38 | | 384.139 | 41 | | 1,304.825 | 38 |
| Operating Supplies | | 32.828 | 13 | | 80.394 | 11 | | 383.911 | 12 |
| Maintenance Supplies | | 18.271 | 7 | | 73.881 | 10 | | 297.923 | 9 |
| Natural Gas | | 23.233 | 9 | | 92.890 | 13 | | 289.675 | 12 |
| Electricity/Utilities | | 34.926 | 14 | | 105.539 | 14 | | 449.829 | 14 |
| Rent | | 4.680 | 2 | | 18.857 | 2 | | 68.835 | 2 |
| Outside Services | | 8.911 | 4 | | 25.423 | 3 | | 133.307 | 4 |
| Outside Services - Drying | | (1.170) | (0) | | (1.122) | (0) | | (3.120) | (0) |
| Fee on Lumber | | 0.297 | 0 | | 1.980 | 0 | | 9.281 | 0 |
| Fringebenefit Expenses | | 0.000 | 0 | | (54.463) | (7) | | (0.280) | (0) |
| Miscellaneous | | 2.781 | 2 | | 18.498 | 2 | | 91.439 | 2 |
| Total Variable Costs | 2,326 | 454.758 | 180 | 9,337 | 1,598.999 | 199 | 31,346 | 6,111.672 | 191 |
| Depreciation | 2,351 | 77.731 | 31 | 7,844 | 222.441 | 30 | 34,234 | 941.018 | 27 |
| Taxes | | 4.327 | 2 | | 14.187 | 2 | | 97.157 | 3 |
| Other | | 34.470 | 15 | | 210.134 | 27 | | 548.000 | 28 |
| Period Costs | 2,351 | 113.068 | 48 | 7,844 | 456.761 | 58 | 34,234 | 1,586.345 | 58 |
| Bad Debt Expense | 0 | 0.000 | 0 | 0 | 0.000 | 0 | 0 | 0.000 | 0 |
| Beg. Inventory Lumber - MBF | 3,951 | 3,035.729 | 769 | 4,487 | 3,451.538 | 769 | 3,907 | 3,078.591 | 879 |
| Ending Inventory Lumber - MBF | (4,268) | (2,930.185) | 686 | (4,268) | (2,930.185) | 686 | (4,268) | (2,930.185) | 686 |
| Total Cost of Sales | 2,351 | 1,702.141 | 749 | 7,844 | 5,564.373 | 709 | 34,234 | 28,584.966 | 689 |
| Gross Profit Contribution | 2,351 | 34.655 | 15 | 7,844 | (52.411) | (7) | 34,234 | 1,230.866 | 36 |
| Depreciation | 2,351 | 0.000 | 0 | 7,844 | 0.000 | 0 | 34,234 | 0.000 | 0 |
| Taxes | | 7.606 | 3 | | 31.554 | 3 | | 96.254 | 3 |
| Other | | 0.000 | 0 | | 0.349 | 0 | | 0.605 | 0 |
| Subtotal - Loc. G&A | 2,351 | 7.606 | 3 | 7,844 | 31.902 | 3 | 34,234 | 96.858 | 3 |
| Selling Expense Allocation | 2,351 | 0.000 | 0 | 7,844 | 0.000 | 0 | 34,234 | 0.000 | 0 |
| G&A Expense Allocation | | 0.000 | 0 | | 0.000 | 0 | | 0.000 | 0 |
| Total SG&A Expense | 2,351 | 7.606 | 3 | 7,844 | 31.902 | 3 | 34,234 | 96.858 | 3 |
| Misc Rev/(Exp) | 2,351 | 2.718 | 1 | 7,844 | 9.431 | 1 | 34,234 | 11.057 | 0 |
| Other Rev/(Exp) | 2,351 | (0.918) | (0) | 7,844 | (4.518) | (1) | 34,234 | (10.403) | (0) |
| Pre-Tax Profit/(Loss) | 2,351 | 28.893 | 11 | 7,844 | (69.518) | (9) | 34,234 | 1,133.879 | 33 |
| Lumber Recovery/Logs | | 1.42 | | | 1.41 | | | 1.28 | |
| Chips Recovery/Lumber MBF | | 0.67 | | | 0.75 | | | 0.83 | |
| Timber Profit/Loss | | (0.000) | | | (0.000) | | | (0.000) | |
| Surplus | | 33.893 | | | (69.518) | | | 1,133.879 | |
| Difference | | (0.000) | | | (0.000) | | | 0.000 | |

EXHIBIT 482 P. 66

NWH Longview - Weyco Log Comparison -- October 1997

Alder Logs: High (H) and Medium (M) Sort

| Sort | Diameter | Longview Weyco 9248001 $/MBF | Longview Weyco Twin Harb $/MBF | Longview-Twin Harb Difference $/MBF | Longview Weyco 9248001 $/MBF | Longview Willamette Industries $/MBF | Longview-Willamette Difference $/MBF | Longview Weyco 9248001 $/MBF | Centralia Weyco $/MBF | Longview-Centralia Difference $/MBF |
|---|---|---|---|---|---|---|---|---|---|---|
| H | 01-05 | $221.70 | $291.25 | -$69.55 | $221.70 | n/a | n/a | $221.70 | 0 | 221.70 |
| H | 06-07 | $222.88 | $309.93 | -$87.05 | $222.88 | 425 | -202.12 | $222.88 | 300 | -77.12 |
| H | 08 | $241.70 | $385.12 | -$143.42 | $241.70 | 475 | -233.30 | $241.70 | 400 | -158.30 |
| H | 09 | $257.57 | $385.19 | -$127.62 | $257.57 | 475 | -217.43 | $257.57 | 425 | -167.43 |
| H | 10-11 | $302.91 | $530.00 | -$227.09 | $302.91 | 590 | -287.09 | $302.91 | 525 | -222.09 |
| H | 12-14 | $350.93 | $555.00 | -$204.07 | $350.93 | 625 | -274.07 | $350.93 | 575 | -224.07 |
| H | 15+ | $372.56 | $555.00 | -$182.44 | $372.56 | 625 | -252.44 | $372.56 | 575 | -202.44 |
| M | 01-05 | $216.83 | $197.05 | $19.78 | $216.83 | 200 | 16.83 | $216.83 | 0 | 216.83 |
| M | 06-07 | $214.21 | $242.84 | -$28.63 | $214.21 | 200 | 14.21 | $214.21 | 200 | 14.21 |
| M | 08 | $224.45 | $320.00 | -$95.55 | $224.45 | 475 | -250.55 | $224.45 | 400 | -175.55 |
| M | 09 | $232.26 | $341.91 | -$109.65 | $232.26 | 475 | -242.74 | $232.26 | 425 | -192.74 |
| M | 10-11 | $255.37 | $486.58 | -$231.21 | $255.37 | 590 | -334.63 | $255.37 | 525 | -269.63 |
| M | 12-14 | $290.20 | $423.10 | -$132.90 | $290.20 | 625 | -334.80 | $290.20 | 575 | -284.80 |
| M | 15+ | $342.74 | n/a | n/a | $342.74 | 625 | -282.26 | $342.74 | 575 | -232.26 |

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[Exhibit 485]

NWH Longview - Weyco Log Comparison -- October 1998

Alder Logs: High (H) and Medium (M) Sort

| Sort | Diameter | Longview Weyco 9248000 $/MBF | Longview Weyco Twin Harb. $/MBF | Longview-Twin Harb Difference $/MBF | Longview Weyco 9248000 $/MBF | Longview Willamette Industries $/MBF | Longview-Willamette Difference $/MBF | Longview Weyco 9248000 $/MBF | Centralia Weyco $/MBF | Longview-Centralia Difference $/MBF |
|---|---|---|---|---|---|---|---|---|---|---|
| H | 01-05 | $177.27 | n/a | n/a | $177.27 | n/a | n/a | $177.27 | 0 | 177.27 |
| H | 06-07 | $199.25 | $250.00 | -50.75 | $199.25 | 325 | -125.75 | $199.25 | 250 | -50.75 |
| H | 08 | $283.31 | $375.00 | -91.69 | $283.31 | 400 | -116.69 | $283.31 | 375 | -91.69 |
| H | 09 | $309.42 | n/a | n/a | $309.42 | 425 | -115.58 | $309.42 | 400 | -90.58 |
| H | 10-11 | $395.70 | $475.00 | -79.30 | $395.70 | 550 | -154.30 | $395.70 | 475 | -79.30 |
| H | 12-14 | $459.65 | $525.00 | -65.35 | $459.65 | 575 | -115.35 | $459.65 | 525 | -65.35 |
| H | 15+ | $443.83 | $525.00 | -81.17 | $443.83 | 575 | -131.17 | $443.83 | 525 | -81.17 |
| M | 01-05 | $180.46 | $100.00 | 80.46 | $180.46 | n/a | n/a | $180.46 | 0 | 180.46 |
| M | 06-07 | $179.49 | $150.00 | 29.49 | $179.49 | 175 | 4.49 | $179.49 | 150 | 29.49 |
| M | 08 | $214.50 | $300.00 | -85.50 | $214.50 | 400 | -185.50 | $214.50 | 300 | -85.50 |
| M | 09 | $235.48 | $325.00 | -89.52 | $235.48 | 425 | -189.52 | $235.48 | 325 | -89.52 |
| M | 10-11 | $293.84 | $425.00 | -131.16 | $293.84 | 550 | -256.16 | $293.84 | 425 | -131.16 |
| M | 12-14 | $368.69 | $475.00 | -106.31 | $368.69 | 575 | -206.31 | $368.69 | 475 | -106.31 |
| M | 15+ | $450.83 | $475.00 | -24.17 | $450.83 | 575 | -124.17 | $450.83 | 475 | -24.17 |

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[Exhibit 486]

NWH Longview - Weyco Log Comparison – October 1999
Alder Logs: High (H) and Medium (M) Sort

| Sort | Diameter | Longview Weyco 9248000 $/MBF | Longview Weyco Twin Harb $/MBF | Longview-Twin Harb Difference $/MBF | Longview Weyco 9248000 $/MBF | Longview Willamette Industries $/MBF | Longview-Willamette Difference $/MBF | Longview Weyco 9248000 $/MBF | Centralia Weyco Willapa $/MBF | Longview-Centralia Difference $/MBF |
|---|---|---|---|---|---|---|---|---|---|---|
| H | 01-05 | $209.00 | $245.00 | -36.00 | $209.00 | n/a | n/a | $209.00 | n/a | n/a |
| H | 06-07 | $230.19 | $345.00 | -114.81 | $230.19 | 350 | -$119.81 | $230.19 | 325 | -$94.81 |
| H | 08 | $373.35 | $499.55 | -126.20 | $373.35 | 500 | -$126.65 | $373.35 | 487.91 | -$114.56 |
| H | 09 | $411.36 | $505.06 | -93.70 | $411.36 | 525 | -$113.64 | $411.36 | 499.27 | -$87.91 |
| H | 10-11 | $496.65 | $571.83 | -75.18 | $496.65 | 575 | -$78.35 | $496.65 | 573.41 | -$76.76 |
| H | 12-14 | $603.45 | $612.06 | -8.61 | $603.45 | 625 | -$21.55 | $603.45 | 614.11 | -$10.66 |
| H | 15+ | $584.35 | $611.76 | -27.41 | $584.35 | 625 | -$40.65 | $584.35 | 618.95 | -$34.60 |
| M | 01-05 | $211.75 | n/a | n/a | $211.75 | n/a | n/a | $211.75 | 0 | $211.75 |
| M | 06-07 | $208.03 | $240.00 | -31.97 | $208.03 | 175 | $33.03 | $208.03 | 325 | -$116.97 |
| M | 08 | $299.13 | $499.59 | -200.46 | $299.13 | 500 | -$200.87 | $299.13 | 490.48 | -$191.35 |
| M | 09 | $357.57 | $505.11 | -147.54 | $357.57 | 525 | -$167.43 | $357.57 | 502.13 | -$144.56 |
| M | 10-11 | $458.15 | $566.75 | -108.60 | $458.15 | 575 | -$116.85 | $458.15 | 574.97 | -$116.82 |
| M | 12-14 | $522.55 | $614.35 | -91.80 | $522.55 | 625 | -$102.45 | $522.55 | 610.02 | -$87.47 |
| M | 15+ | $520.47 | $616.92 | -96.45 | $520.47 | 625 | -$104.53 | $520.47 | 616.92 | -$96.45 |

EXHIBIT
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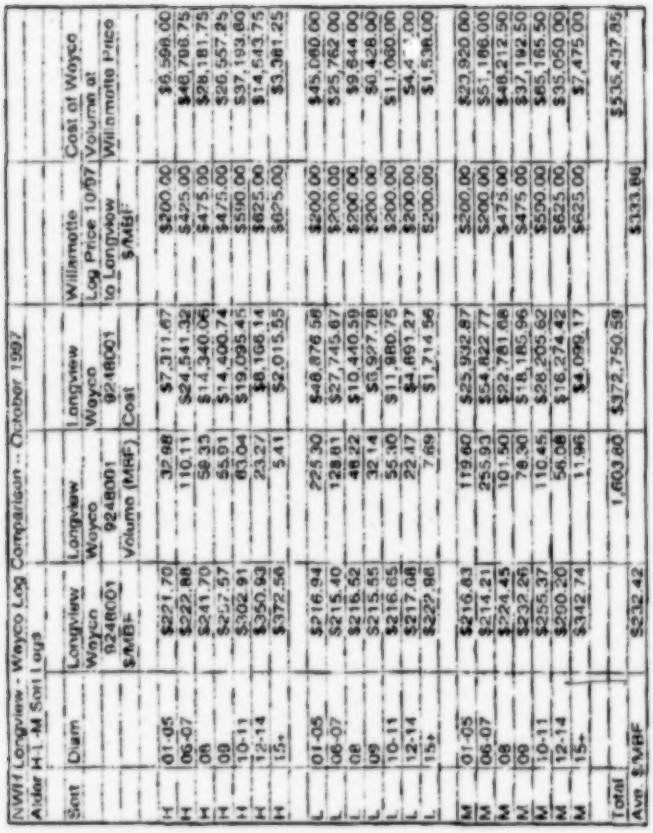
[Exhibit 487]

# [Exhibit 488]



NWH Longview - Weyco Log Comparison -- October 1997
Alder H-L-M Soil Log

| Sort | Diam | Longview Weyco 9248001 $/MBF | Longview Weyco 9248001 Volume (MBF) | Longview Weyco 9248001 Cost | Willamette Log Price 10/97 to Longview $/MBF | Cost of Weyco Volume at Willamette Price |
|---|---|---|---|---|---|---|
| H | 01-05 | $221.70 | 32.98 | $7,311.67 | $200.00 | $6,596.00 |
| H | 06-07 | $222.88 | 110.11 | $24,541.32 | $425.00 | $46,798.75 |
| H | 08 | $241.70 | 59.35 | $14,340.06 | $475.00 | $28,181.75 |
| H | 09 | $257.57 | 55.01 | $14,400.74 | $475.00 | $26,557.25 |
| H | 10-11 | $302.91 | 63.04 | $19,095.45 | $590.00 | $37,193.60 |
| H | 12-14 | $350.93 | 23.27 | $8,166.14 | $625.00 | $14,543.75 |
| H | 15+ | $372.56 | 5.41 | $2,015.55 | $625.00 | $3,381.25 |
| L | 01-05 | $216.94 | 225.30 | $48,878.58 | $200.00 | $45,060.00 |
| L | 06-07 | $215.40 | 128.81 | $27,745.67 | $200.00 | $25,762.00 |
| L | 08 | $216.52 | 46.22 | $10,440.59 | $200.00 | $9,244.00 |
| L | 09 | $215.55 | 32.14 | $6,927.78 | $200.00 | $6,428.00 |
| L | 10-11 | $216.65 | 55.30 | $11,980.75 | $200.00 | $11,060.00 |
| L | 12-14 | $217.08 | 22.47 | $4,881.27 | $200.00 | $4,494.00 |
| L | 15+ | $222.96 | 7.69 | $1,714.96 | $200.00 | $1,538.00 |
| M | 01-05 | $216.83 | 119.60 | $25,932.87 | $200.00 | $23,920.00 |
| M | 06-07 | $214.21 | 255.93 | $54,822.77 | $200.00 | $51,186.00 |
| M | 08 | $224.45 | 101.50 | $22,781.68 | $475.00 | $48,212.50 |
| M | 09 | $232.26 | 78.30 | $18,185.96 | $475.00 | $37,192.50 |
| M | 10-11 | $255.37 | 110.45 | $28,205.62 | $590.00 | $65,165.50 |
| M | 12-14 | $200.20 | 56.08 | $16,274.42 | $625.00 | $35,050.00 |
| M | 15+ | $342.74 | 11.96 | $4,099.17 | $625.00 | $7,475.00 |
| Total | | | 1,603.80 | $372,750.59 | | $535,437.85 |
| Ave. $/MBF | | $232.42 | | | $333.86 | |

EXHIBIT
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# [Exhibit 493]

## ***Market Share in Western Oregon***

1997 projected mmbf

| Supplier | N.W. purchase | available at high bid | available with trade | not available | total harvest | comments |
|---|---|---|---|---|---|---|
| | | | | | | |
| Georgia Pacific | 4 | 3 | 3 | | 10 | chipping and selling to H.R. Jones and Stedco for about $70 per ton |
| R.F.P. | 9 | 1 | 2 | 0 | 12 | chipping their own pulp |
| Wil. Ind. | 0.5 | 2 | 1 | 3 | 6.5 | chipping their own pulp and buying pulp at up to $40 per ton |
| Hampton | 8 | 2 | | | 10 | |
| Hancock | 1 | 1.5 | | | 2.5 | |
| Weyerhaeuser | 12 | | | | 12 | |
| Menasha | 3 | 3 | | 0.5 | 6.5 | sawlog going to P and M for about $650 12" plus |
| Lone Rock | 2 | 2 | 1 | 0.5 | 5.5 | sawlog going to P and M for about $665 12" plus |
| Siletz Tribe | 0 | 2 | | 0.5 | 2.5 | going to stedco joint venture |
| State Lands | 8 | 4 | | | 12 | |
| Federal lands | 0 | 1 | | | 1 | |
| Simpson | 1 | 4 | | | 5 | all lump sum tbr. bids |
| Port Blakely | | 3 | | | 3 | |
| Boise cascade | | 4 | 4 | | 8 | |
| Citifor | 4 | | | | 4 | |
| Frank Lbr. | 0.5 | 0.5 | | | 1 | |
| Freres | | 0.5 | 0 | | 0.5 | |
| Davidson | 1.5 | 2.5 | | | 4 | |
| Starker | 1.5 | 0.5 | | | 2 | |
| Thompson | 0.3 | 0.7 | | | 1 | |
| Southcoast | | 5 | | | 5 | |
| | | | | | | |
| Misc. | 26 | 15 | 10 | 5 | 56 | |
| | | | | | | |
| total | 82.3 | 55.2 | 21.5 | 9.5 | 170.0 | |
| | | | | | | |
| | | | | | | |
| % mkt. share | 49% | 33% | 13% | 6% | | |

## ***Market Share in Coos Bay***

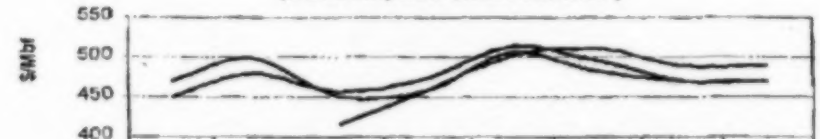
| Supplier | N.W. purchase | available at high bid | available with trade | not available | total harvest | comments |
|---|---|---|---|---|---|---|
| Georgia Pacific | 0.2 | 2.8 | 0 | 0.5 | 3.5 | chipping at arriola and selling to rfp, and selling sawlog to p and m |
| RFP | 1.5 | 0 | 0 | 0 | 1.5 | chipping own pulp log |
| Hancock | 1 | 0 | 0 | 0 | 1 | |
| Weyerhaeuser | 5 | 0 | 0 | 0 | 5 | |
| Menasha | 1.5 | 1 | 0 | 0.5 | 3 | selling to myrtle point |
| Lone Rock | 2 | 2 | 1 | | 5 | |
| Federal | 0 | 0.5 | 0 | 0 | 0.5 | |
| State | 0 | 2 | 0 | 0 | 2 | |
| Coos County | 0 | 2 | 0 | 0 | 2 | |
| Port Blakely | 0.2 | 1.8 | 0 | 0 | 2 | |
| Citifor | 0.4 | 1 | 0 | 0 | 1.4 | |
| Southcoast | | 5 | | | 5 | veneer producer |
| Moore Mill | 0.2 | 0.3 | | | 0.5 | |
| Superior | 0.1 | 0.1 | | | 0.2 | peels sometimes |
| Misc | 10 | 6 | 3 | 0 | 19 | mostly land owners |
| | | | | | | |
| Total | 22.1 | 24.5 | 4 | 1 | 51.6 | |
| | | | | | | |
| mkt share | 43% | | | | | |

## Raw Material
## Log Cost Trend



- Annualized cost impact through 2003 timeframe
- Every $10 reduction of sawlog cost across WA/OR adds $2,000M to the bottom line and ~1% RONA

**Log Cost Trend - Examples**
**(Consumption $/Mbf Scribner)**




| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 Outlook | 2002 Outlook | 2003 Outlook |
|---|---|---|---|---|---|---|---|---|
| Centralia, WA | 450 | 479 | 456 | 473 | 514 | 496 | 470 | 470 |
| Eugene, OR | 470 | 499 | 449 | 458 | 508 | 482 | 470 | 470 |
| WA/OR Total | | | 415 | 457 | 502 | 510 | 490 | 490 |

EXHIBIT
495



[Exhibit 495]
903a

**[Exhibit 1008]**

**Ross-Simmons Hardwood Lumber Co.**
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Siletz Tribal Council
P.O. Box 549
Siletz, Oregon 97380

Attn. Bonnie Peterson
Dennis Lancaster 11/9/98

Re: Updated Business Plan

Dear Bonnie,

The updated business plan that you requested 10/28/98 is enclosed. The reference point is the Ross-Simmons / STEDCO business projection presented to the Council on May 21 of this year. At that time we had hopes that the market had bottomed out and that improved markets along with mill improvements would help us get the Joint Venture back into a profitable position. Unfortunately, the market continued to deteriorate. As a result Ross-Simmons gave notice to the Council in early September to disband the Joint Venture.

At this time, Ross-Simmons has no plans to recommence operations of the sawmill. So, the current business plan is to sell the remaining lumber inventory at the best possible price, safe guard the facility and implement a Storm Water Prevention Control Plan and a Spill Prevention, Containment and Cleanup Plan and terminate the JV in accordance with our notice of September 3, 1998.

I have tried to identify some of the circumstances that have changed since our May 21 meeting which have led us to conclude that continuing to operate in this environment is no

longer viable. Please have Dennis Lancaster call if he needs any clarification for planning purposes.

Regards

/S/GARY NELSON
Gary Nelson, VP Resources
Ross-Simmons Hardwood Lumber Co.

[P. 2] The following are some of the key factors which led us to conclude that continuing the operation of the Toledo mill is uneconomic. To put the discussion in perspective, the Toledo operation is a high cost operation in part due to major mill design flaws and in part due to the extra transportation cost to another facility for drying and planing. A high cost operation cannot compete in a weak sales environment. Although production and quality was improved, the operation was caught in a price/cost squeeze resulting in the decision to cease operations.

1. Production. The May business plan was based on operating one shift eight hours per day, four days per week. This was based on the assumption that we could sell this production and a little bit more so that lumber inventories would trend down. The weak demand in Asia and Europe forced more alder lumber into US domestic markets creating an oversupply. In addition lumber prices did not rebound as anticipated to make the operation profitable. Consequently we could not sell enough volume to support this operating schedule. In June and July we ran the mill only 7 of the possible 9 weeks and our inventory was flat over that period. In the first week of August, we ceased production and laid off the employees.

The new head rig, new sawyer and new mill manager all contributed to achieving our hourly production goal of 34.5mbf per shift. We were producing a quality product and also sailing the low grade green product directly into the pallet market. Even with these successes we could not compete

with the larger more efficient mills in Oregon for market share. We estimated our production to be 85% dry lumber and 15% green lumber. Due to no market for low grade dry lumber we pushed more of it into the green pallet market so that our ratio of dry to green became closer to 75% dry and 25% green.

2. Sales. In May, we assumed that the market would allow all lumber to be sold at projected sales prices. However, we were only able to sell about 80% of the volume produced on the curtailed schedule. In addition we found that our average prices were 12% lower than we projected.

3. Timber Resources. One of the bright spots was our ability to procure good logs at a lower average price. Unfortunately we could only push log prices down to a certain point as our competition kept a floor on log prices. Also, softwood log markets were poor, so the overall logging activity was down resulting in a supply of alder logs that was lower than normal.

4. Waste Recovery. Residual prices also trended down. Hog fuel prices were basically flat, but chip prices were down about 10% as result of poor pulp and paper markets.

5. Production Costs. Production costs were higher than anticipated due to not being able to produce at the projected level of 4 eight hour shifts per week. Thus there was less production to carry our fixed costs such as real property taxes, insurance, security, certain employee fringe benefits, etc...

Our goal is to have sold the balance of the Joint Venture lumber inventory by year end. We are on a pace to reach this goal but we have had to discount some items to get them to market. The hardwood mills in the Northwest are beginning to run at near normal levels. Up from the 65% of production capacity that we have seen for the last 12 months. However, Weyerhaeuser still has a large inventory of unsold lumber

inventory so lumber prices are still stagnant. In addition the seasonal increase in log prices has begun so conditions are not good for buying logs for the next 5 months. Even though there has been some recent improvement in the lumber market the factors that led to our decision to cease production at the Toledo mill have not changed and make it very unlikely that we would consider restarting the mill before the cessation date of the Joint Venture.

# BEST AVAILABLE COPY

908a

[Exhibit 1378]

Weekly Hardwood Review

Volume 13, Number 37 — Your Source For Accurate Hardwood Pricing Information — May 22, 1998

In This Issue


- Editorial
- Kiln Dried Prices/Grade
- Kiln Dried Prices/Net
- Northern Prices
- Regional Mo
- Southern Prices
- Appalachian Prices
- Eastern White Pine Prices
- Imported Prices
- Oak Roofing Prices
- Dimension / Strip Prices
- Cypress Prices
- Lower Lumber Prices
- Railroad Tie Prices
- Market Comments
- Hardwood Statistics
- Classified Advertising


Hardwood Review

## Why Do Stumpage Prices Increase More Than Lumber Prices?

### A Reason for Shrinking Profits

*The following article was from a presentation by William G. Luppold, Project Leader, USDA Forest Service, Princeton, WV, at the annual Hardwood Symposium, sponsored by the National Hardwood Lumber Association at Cashiers, NC.*

Every sawmiller who has been in business more than 5 years realizes that hardwood stumpage prices tend to increase faster than lumber prices, decreasing the margin between these two prices. Although increases in stumpage versus lumber prices are clearly visible, the reason for the margin decrease is not.

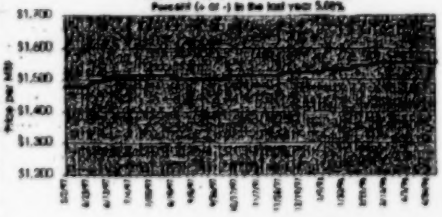
During any given year, progressive sawmills adopt new production technologies and marketing procedures in an effort to increase profits. Additional mills may implement these processes if they appear profitable, while other mills cannot or will not adopt them. When periodic downturns in the lumber market occur, many less efficient mills are forced out of the market. When subsequent increases in price occur, the efficient mills remaining vigorously compete for stumpage, quickly erasing any short-term profits gained by new technologies or marketing methods. Each time this happens the stumpage/lumber market margin decreases.

One fact in the hardwood sawmilling business that is painfully apparent is that stumpage prices continue to increase faster than lumber prices. This is especially visible when stumpage and lumber prices are indexed at a common year and examined over a 30-year period. Because of this trend, profit margins in sawmilling have narrowed, forcing lumber producers to become more efficient or go out of business.

To adequately explain what is happening to stumpage price, some background information

Continued on page 21.

S/4 FAS/1F Southern Red Oak KD
Price history over the last 12 months
Percent (+ or -) in the last year 5.08%




DEFENDANT'S EXHIBIT 1378
00-1693-PA

## Editorial

*Continued from page 1.*

must be presented. Hardwood lumber production and price cycles every 5 to 6 years. These cycles occur because lumber producers and users are seldom in sync with one another. The cycles can be made more severe when combined with a general economic downturn, delayed by economic growth, or altered by price shocks, but would occur even if the economy grew at a constant rate. Between 1970 and 1995, hardwood production has cycled five times. During this 25-year period, the relative demand and prices for the various species has also changed.

The table below illustrates how stumpage versus lumber margins has changed over the years. The table is divided by the various price cycles experienced during the 25-year period from 1970 to 1995.

At first glance, one could attribute increasing stumpage prices to reduced supplies, an explanation that can be supported by anecdotal evidence, but which is difficult to support when examining estimates of forest sawtimber inventories. Another explanation often used is that demand is increasing at a faster rate than supply, but again the data contradicts this argument. In fact, evidence indicates that the large increase in lumber production that occurred in the late 1980's could have been a result of the large volume of eastern timber resources reaching sawtimber size classes of that time.

Although previous analysis by Luppold and Dempsey (1996) found that estimates of forest inventory might not reflect the resource desired by or available to the hardwood sawmilling industry, changes in timber availability cannot solely explain escalating stumpage prices. However, changes in the demand curve for stumpage provide an alternate explanation. The demand curve for stumpage emanates from the production process that converts stumpage into lumber and also is influenced by the price of lumber and the prices of all materials and labor used in the production of lumber. If lumber prices increase, the volume demand for stumpage shifts upward. Similarly, if sawmilling process becomes more efficient, the demand for stumpage changes. In both of these cases the upward shift in demand not only increases the total quantity demanded, but also the price of stumpage.

While increases in lumber prices seem to cause instantaneous increase in stumpage prices and quantity demanded, increases in efficiency by one mill or a group of mills does not have the same

Continued on page 20.

TABLE 1 - Estimated percentage margin between stumpage and lumber prices for White Oak, Red Oak, Yellow Poplar and Hard Maple in Ohio between 1970 and 1995.

| Statistic | White Oak | Red Oak | Y. Poplar | Hard Maple |
|---|---|---|---|---|
| [illegible] | | | | |
| Period 2: 1970-1974 | 62.6 | 64.9 | 65.2 | 65.0 |
| [illegible] | | | | |
| Period 4: 1970-1974 | 48.1 | 50.0 | 57.7 | 57.9 |
| [illegible] | | | | |

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## Editorial

Continued from page 21.

instantaneous impact. The fact is that mills upgrade equipment to increase profits. Will that undertake such efforts do not go out and try to bid up stumpage prices to erase these profits. Therefore, stumpage prices that tend to be influenced by mills will lower levels of production efficiency, but than the hardwood cycle kicks in.

During periods of declining prices and production, the less efficient or poorly managed sawmills are forced out of the market. Once demand starts to increase, the remaining (more efficient) sawmills that upgraded their equipment are forced to compete in the stumpage market to quickly procure material to capitalize on high lumber prices. Each time this happens, any temporary increase in profits previously enjoyed by these mills is transferred to the resource owner in the form of higher stumpage prices which narrows the margin between stumpage and timber prices.

The margin between lumber and stumpage prices is primarily the result of processing costs but can include short-term profits and the value of veneer and export logs. Most people consider a margin as the difference between lumber and stumpage price. Although this absolute margin is easy to estimate, alternate definitions may be better at explaining market behavior.

The greatest decrease in the margin between stumpage and lumber prices has occurred for the species that had the greatest increase in demand. This occurs because the higher the increase in lumber price, the greater the competition between sawmills for stumpage of that species. However, as the recent increase in Hard Maple lumber price and subsequent decrease in market margin reveals, all hardwood species will eventually have similar margins because all are produced using similar technology.

The one question that may be keeping sawmillers is "Will the decrease in margins continue?" The answer to this question is yes, however, there will come a point where production efficiency cannot be significantly increased. At that point, there will be a natural bottom to the percentage margin. Still that bottom is impossible to predict. The only possible advice to sawmillers is to keep track of what is happening, anticipate the decline in market margin, reap short term profits when they are available, and forward contract the price paid for stumpage, if possible.

*The Authors of the above report are: William G. Luppold, Project Leader, USDA Forest Service, Northeastern Research Station., Princeton, WV, and John E. Baumgras, Research Forest Products Technologist, USDA Forest Service, Northeastern Research Station., Morgantown, WV.*


**BUCHANAN HARDWOODS**

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FAX: (334) 875-9438

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**RED OAK - Kiln Dried**

1 T/L 5/4 FAS1F & Better 12" & wider

1 T/L 5/4 FAS1F & Better 60% 14'-16'

2 T/L 4/4 #2A Common

**BEECH - Kiln Dried**

1 T/L 3/4 #1 Common & Better

**[Exhibit 1397]**

**Ross-Simmons Hardwood Lumber Co.**
**SPECIALIZING IN PACIFIC COAST RED ALDER AND PACIFIC COAST MAPLE**
**250 Industrial Way P.O. Box 366 Longview, Washington 98532**
**Telephone (360) 423-8210 Fax (360) 423-6550**

June 17, 1998

To: Log suppliers

Re: Log deliveries

As a result of adverse market conditions, Ross Simmons Hardwood is forced to begin curtailing log deliveries at the Longview mill. The log yard will be closed to deliveries for two weeks beginning on June 29, 1998 and resume operations on July 13, 1998. We regret any inconvenience this may cause. Hopefully, this action will alleviate our problem and further action will not be necessary.

Also, would you please be aware of the expiration date on your log purchase agreement. There has been an excessive number of logs delivered recently on expired agreements. Contact me at the Longview office, (360) 423-8210, before the expiration date if you wish to continue log deliveries after that date. Loads delivered after expiration dates may be subject to price deductions.

Thank you for your cooperation during these difficult market conditions.

/s/ Wayne Demarest

Wayne Demarest

Log Buyer

# [Exhibit 1400]

HARDWOOD MARKET REPORT
Lumber News Letter
ISSUED EVERY SATURDAY - ESTABLISHED 1922
TELEPHONE (901) 767-0139 - FAX (901) 767-7534 - EMail: hmr@hmr.com - Website: http://www.hmr.com
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VOLUME LXXX April 13, 2002 OUR 80th YEAR NUMBER 15

## ARE HARDWOOD MARKETS CHANGING?

**Editorial Note**

The *Hardwood Market Report* is pleased to present "Are Hardwood Markets Changing?", printed by special permission from **William G. Luppold, Ph.D., *Northeastern Research Station, Forestry Sciences Laboratory, USDA Forest Service.*** Dr. Luppold has written and lectured extensively on numerous subjects concerning the hardwood industry, and is recognized as a leading analyst of both Domestic and International hardwood markets. He has devoted much time in research, as well as his vast knowledge of the hardwood industry in developing this article. The subject matter he has chosen has regularly been at the center of market observations and commentary made by the *Hardwood Market Report*. Dr. Luppold's article is interesting, thought provoking, and timely, and is another authoritative perspective of the challenges facing the North American Hardwood Industry. While Dr. Luppold's message has value to the industry, *Hardwood Market Report* makes no endorsements or disagreements with the article's contents. This presentation is made entirely for the benefit of *Hardwood Market Report* subscribers, and it is left to the individual readers to formulate their own conclusions from this analysis.

HARDWOOD MARKET REPORT

Dr. Luppold's article begins on page 11.

| OAK FLOORING -- Industry estimate | SHIPMENTS 12 MONTHS | | SHIPMENTS 12 YEAR | |
|---|---|---|---|---|
| Courtesy of NOFMA, THE WOOD FLOORING MANUFACTURERS ASSOCIATION | FEBRUARY 2002 | 47,149 | 8 MONTHS 2002 | 93,839 |
| | FEBRUARY 2001 | 39,778 | 8 MONTHS 2001 | 78,969 |
| | 2002 to 2001 | 119% | 2002 to 2001 | 119% |

## 3/4" x 2-1/4" OAK FLOORING

Figures in the Appalachian and Southern Area columns represent our estimate of the current predominant FOB mill price levels for Unfinished Oak Strip Flooring. Figures in parenthesis are our estimate of the prevailing industry ranges of FOB mill prices, with variations in pricing due in part to differences in freight considerations, nature of markets, volume, etc. Prices are for truckload or carload quantities graded in accordance with NOFMA Rules. Prices are in US Dollars Per MBF (thousand board feet) and Per SF (square foot). For square foot price, add 1/3 to board foot price. Compared with our estimate of prior week, figures in Bold Print signify changes have occurred; those followed by a Plus (+) indicate an increase, a Minus (–) indicate a decrease.

| | APPALACHIAN AREA | | SOUTHERN AREA | | PREVAILING INDUSTRY RANGE | |
|---|---|---|---|---|---|---|
| | MBF | SF | MBF | SF | MBF | SF |
| CLEAR PLAIN WHITE OAK | 1770 | 2.36 | 1790 | 2.37 | (1665-1850) | (2.20-2.47) |
| CLEAR PLAIN RED OAK | 1860 | 2.47 | 1840 | 2.45 | (1772-1950) | (2.35-2.57) |
| SELECT PLAIN WHITE OAK | 1360 | 1.81 | 1340 | 1.79 | (1275-1415) | (1.72-1.89) |
| SELECT PLAIN RED OAK | 1495 | 1.83 | 1488 | 1.85 | (1418-1650) | (1.89-2.17) |
| No. 1 COM PLAIN WHITE OAK | 1118 | 1.49 | 1135 | 1.47 | (1030-1260) | (1.37-1.67) |
| No. 1 COM PLAIN RED OAK | 1290 | 1.72 | 1255 | 1.67 | (1165-1372) | (1.55-1.83) |
| No. 2 COM WHITE OAK | 920 | 1.35 | 945 | 1.25 | (825-1000) | (1.25-1.33) |
| No. 2 COM RED OAK | 1040 | 1.38 | 1040 | 1.38 | (969-1103) | (1.32-1.47) |

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80 YEARS AUTHORITATIVE HARDWOOD MARKET REPORTING

DEFENDANT'S EXHIBIT 1400 00-1693-PLF

[D]

# Are Hardwood Markets Changing?

By William G. Luppold, Ph.D.,
*Northeastern Research Station - Forestry Sciences Laboratory*
*USDA Forest Service*
*April 13, 2002*

So, here we go again! The recession seems to be ending and the hardwood industry is gearing up. With any luck, lumber production will soon be profitable allowing firms to undo the financial damage caused by the most recent market decline. Still, every upturn in the market cycle seems to bring a new set of problems and opportunities that were never anticipated two years earlier. With this in mind, perhaps it's time to examine some 'important' market issues such as, how much has lumber production decreased, how have global hardwood markets changed, and why are hardwood stumpage prices so high?

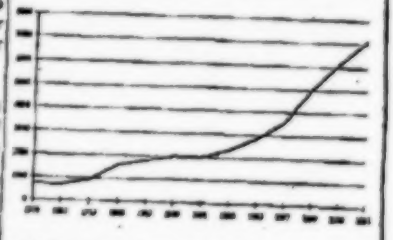
## How Bad was the Downturn this Time?

As in past recessions, hardwood lumber producers have suffered through more than a year of poor or negative profits brought on by declining lumber prices, low volume of shipments, and high stumpage prices. Lumber shipments and prices fell during 2001 as secondary manufacturers reduced production and consumed their lumber inventories. Not only did furniture plants and other lumber users deplete their inventories, but also lumber inventories held at closed facilities were redistributed among the remaining plants. The reduction in demand and price brought on by these changes caused lumber production to decline as sawmills shut down or reduced hours. *But how great was the decline?*

The extent of the decline in lumber production depends on whom you talk to and what part of the market they are talking about. Some firms in the Appalachian region feel that production has dropped 25 percent or more, while reports from other regions are not quite as dismal. It is difficult to compare the market "buzz" on the current decline in production to previous declines, because many of the smaller mills that use to silently shut down in past market downturns no longer exist. Therefore, the larger grade mills are absorbing a greater amount of the decline in sales than in the past downturns. My feeling is that total Eastern production may have decreased by 15 percent between 1999 and 2001, or 1.8 billion board feet. That's equivalent to 360 sawmills with annual production levels of 5 million board feet shutting down. If these projections hold true, we are looking at the *largest volume decline* in hardwood lumber production since the 1979 to 1981 period.

Firms in the Appalachian region have been especially hard hit by this recession because of furniture plant closures. Although furniture imports have continually gained market shares on the domestic furniture industry over the last 20 years (Figure 1), there has not been a noticeable decline in Domestic manufacturing until recently. However, over the last year, plants in North Carolina and Virginia have closed displacing an estimated 5,000 production workers. Furthermore, *globalization* of markets may have a profound effect on Domestic and International sales of Eastern hardwood lumber.

Imports of Wood Household Furniture
(billions of 1982 constant dollars)



Graph Developed by U.S.D.A. Forest Service, Princeton, WV.
Using U.S. Dept. of Commerce and U.S. Dept. of Labor Data

*(continued on page 12)*

*(continued from page 11)*

### The Global Market for Furniture and Other Wood Products

The U.S. has emerged from this recession with a significant production cost disadvantage in the *global* furniture market. Higher labor costs, older physical plants, and high value of the U.S. dollar have all contributed to Domestic furniture plant closings. Still, our sawmilling industry has some advantages, including a large timber inventory and an efficient system to extract that timber and ship it to customers *(distributional advantage)*. However, will this distributional advantage continue to allow U.S. hardwood lumber manufacture's to profitably produce lumber at 1999 levels when the economy fully rebounds?

I feel that a potential problem the U.S. hardwood lumber industry faces in the near future is increased *global competition* in Export and Domestic markets. Ironically, this dilemma is a result of success, for its roots are in the strong dollar and the increased lumber exports to Asia.

Initially, the hardwood lumber industry saw Asian furniture manufacturers as a market opportunity. We shipped lumber; they manufactured furniture along traditional U.S. styles and sold it to U.S. consumers at low prices. However, once Asian manufacturers established a critical mass of production capacity, they may have noticed that U.S. consumers showed little brand or species loyalty. Concurrently, the high dollar fueled the search for *alternative* low cost sources of wood in Asia. Eastern Europe (including Russia), and South America. As a result, Asian furniture manufacturers can ship low priced furniture to the U.S. that contains smaller quantities of U.S. hardwoods.

If efforts by Asian furniture manufacturers to cultivate new sources of hardwood lumber result in the development of better distributional infrastructure in these areas of the world, then U.S. hardwood lumber producers may find competition from sources they never anticipated. Over the years, many researchers and analysts have discounted the ability of non-U.S. sources to increase the supply of temperate hardwood species because of the immense size of the U.S. industry and resource. What these analysts missed was that it only takes a combined area the size of West Virginia to produce all the lumber (on a sustained basis) to supply all Export markets outside of North America. It was not our large timber base that provided U.S. producers a comparative advantage, but the efficient lumber distribution system afforded by this timber base. Once alternative "efficient" lumber distribution systems are in place, the value of the U.S. dollar will determine whether international buyers receive lumber from the United States or other sources.

It does not take too great of a leap of logic to realize that if we lose Export market share, we could also lose Domestic markets for hardwood lumber. Already, we have seen a number of lumber species produced outside of the U.S. show up in furniture manufactured in Asia and Europe. Soon, we may find increased imports of kitchen cabinet fronts, flooring, and millwork that are not manufactured from U.S. species. In this worst-case scenario, the only alternative for U.S. producers is to increase the efficiency of production and distribution. This may mean better equipment, more marketing efforts, better scheduling of production and shipments, etc. Still, any increase in efficiency may only aggravate the problem of high stumpage and log prices. Continual increases in timber prices may be the U.S. sawmills biggest disadvantage in a global market.

### Why are Hardwood Stumpage prices so High?

Over the last 25 years, stumpage prices have increased substantially faster than lumber prices but have not decreased much when lumber prices drop. This has caused a continual *narrowing* of the margin between lumber and stumpage prices. Increases in stumpage prices seem to be triggered by upturns in the hardwood production cycle and species with the greatest demand during this period have the greatest increase in price. However, the actual process causing high stumpage prices is complex and is influenced by changing markets for hardwood lumber, adoption of better sawmilling

technology, the competitive nature of the hardwood industry, stumpage ownership, and in some cases, decreasing relative supplies of higher quality hardwood stumpage.

Since the late 1970's, hardwood lumber production has increased by approximately 60 percent even as the number of sawmills has declined. This increase resulted from improved sawing technology (increased production efficiency), increased demand for grade lumber by Domestic and International buyers, and an increase in sawtimber inventories. Because the production of grade lumber was more profitable than the production of industrial products (pallet stock and crossties), the increased lumber production efficiency was caused by updating sawmill equipment with a focus on increased grade and volume recovery from better quality logs. This focused increase in recovery caused higher-grade logs to be in greater demand.

The manner in which increases in production efficiency increases hardwood stumpage prices is related to the hardwood production cycle and can be examined in stages. During periods of strong sales and higher prices, many progressive sawmills adopt technology (update equipment) and more efficient marketing and management practices in an effort to increase profits. Each time the hardwood demand and price declined, some mills go out of business. Many of these unfortunate mills are less efficient or are updated mills that for some reason could not maintain sufficient *cash flow*. Still, the modern equipment purchased by these updated mills is absorbed by the industry through auctions. The bottom line is that the production costs for mills operating at the beginning of a market cycle are lower, on average, than similar mills that operated during the previous market cycle.

At the beginning of a market upturn, increases in lumber prices cause mills to demand more stumpage. Because mills are more efficient (lower production costs) and the competitive nature of the hardwood market, mills usually pay higher prices for this stumpage. These increases in stumpage prices during periods of high lumber prices would not be so bad if they would decrease during periods of low lumber prices. However, most owners of hardwood stumpage are individuals who have the luxury of *not having* to sell their timber during periods of low prices. Previous high prices cause these owners to hold out until the price rises. This is the process that is causing the percentage margin between stumpage prices and lumber prices to shrink. What is even more ironic is that the mechanism that eventually causes a serious crimp in profitability at the end of the hardwood cycle is set in motion at the beginning of the cycle.

A silver lining associated with a potentially slower than normal increase in lumber demand and price in this recovery is that there may not be the usual surge in stumpage price. However, it may be wishful thinking to believe that stumpage prices will drop substantially even if lumber prices remain low.

An additional factor that may be causing the price of higher quality stumpage to increase is the change in timber quality. While decreases in quality are difficult to establish in the total Eastern hardwood region, there are specific areas in which a decline in the number of higher-grade trees relative to lower grade trees appears to be occurring. Analysis of the forest survey estimate of sawtimber inventories provides ambiguous results. Examination of changes in West Virginia timber quality between 1975 and 1989 indicates a decline in the percentage of higher quality timber while an examination of Tennessee between 1989 and 1999 indicates quality is increasing. Regardless of the changes in timber quality, changes in hardwood lumber demand seem to have resulted in a strong demand for a relatively small proportion of the forest resource.

## Concluding Comments

The hardwood lumber industry has undergone numerous upturns and downturns in the market over the last 25 years. In the past, the industry that has emerged after a downturn in the market has been more technologically advanced and more efficient than the industry that existed before the downturn. Still, there are some "serious" problems the industry will face in the future as markets and the timber resource continue to change. The survivors of the next market cycle will be the mills that recognize and react to the "changes" that are influencing their particular sector of the market.

**[Exhibit 1456]**

NORTHWEST
HARDWOODS
A Division
of Weyerhaeuser
120 INDUSTRIAL WAY
LONGVIEW, WASHINGTON 98632
206/577-4578 FAX 206/577-7412

October 16, 1989

Weyerhaeuser Company
P.O. Box 188
Longview, WA 98632

ATT: STEVE STRECKER

Steve,

I wish to take this means to go back over the past year and look at what has occurred with hardwood chip production here at Northwest Hardwoods.

I have taken a look at our pulp log inventory and find at the present time we have approximately 20,000 wet tons of pulp logs. These are stored at Longview Boom, I.P. Pond, Tennant Way Yard and our mill log yard.

The question that I must answer is why do I have this excess inventory?

If we start at the beginning of 1989 and look at the volume of chips we were asked to supply to Longview Paper Co., we find this to be 2600 BDT per week. For the first 39 weeks, we have been allowed to deliver only slightly more than 2200 BET per week. 39 X 400 BDT shortage is equal to 15,600 BDT, if you multiply 2.3 wet tons per BDT. We find that according to original plan, we would have used 35,900 more wet tons of logs. Our inventory of pulp would be much greater if we had not sold Pacific Fibre Products 60,000 wet tons of logs instead of the 25,000 to 30,000 tons as originally planned.

Now I can understand your inability to predict accurately, the pulp mill usage and I can understand the necessity of reducing volumes by 15%, but I can't understand reducing

Northwest's and not your other suppliers. In fact, you allowed other suppliers to over-produce their original quotas, while using us to regulate your chip inventory.

You also agreed in early September, that we could start delivering 2600 BDT per week. After restarting deliveries from Tenway chipper, you suddenly lowered our volume to 2200 BDT per weak, thereby shutting down Tenway . I also receive weekly pressure to further curtail production from our Tillamook chipper. If you recall our original discussion of the Tillamook operation, you agreed to support our chipping activities there. While you have supported the price of the hardwood chips, you have removed your support of softwood chips completely. Supporting the pride of hardwood chips is of little value if we are unable to continue deliveries. If I must curtail deliveries from Tillamook, I must also curtail log purchases. If I curtail log purchases, the stable alder market I have begun to develop in Tillamook will be destroyed. If this happens, I will have no choice but to close Tillamook entirely. We will Just lick our wounds, hide our heads and depart.

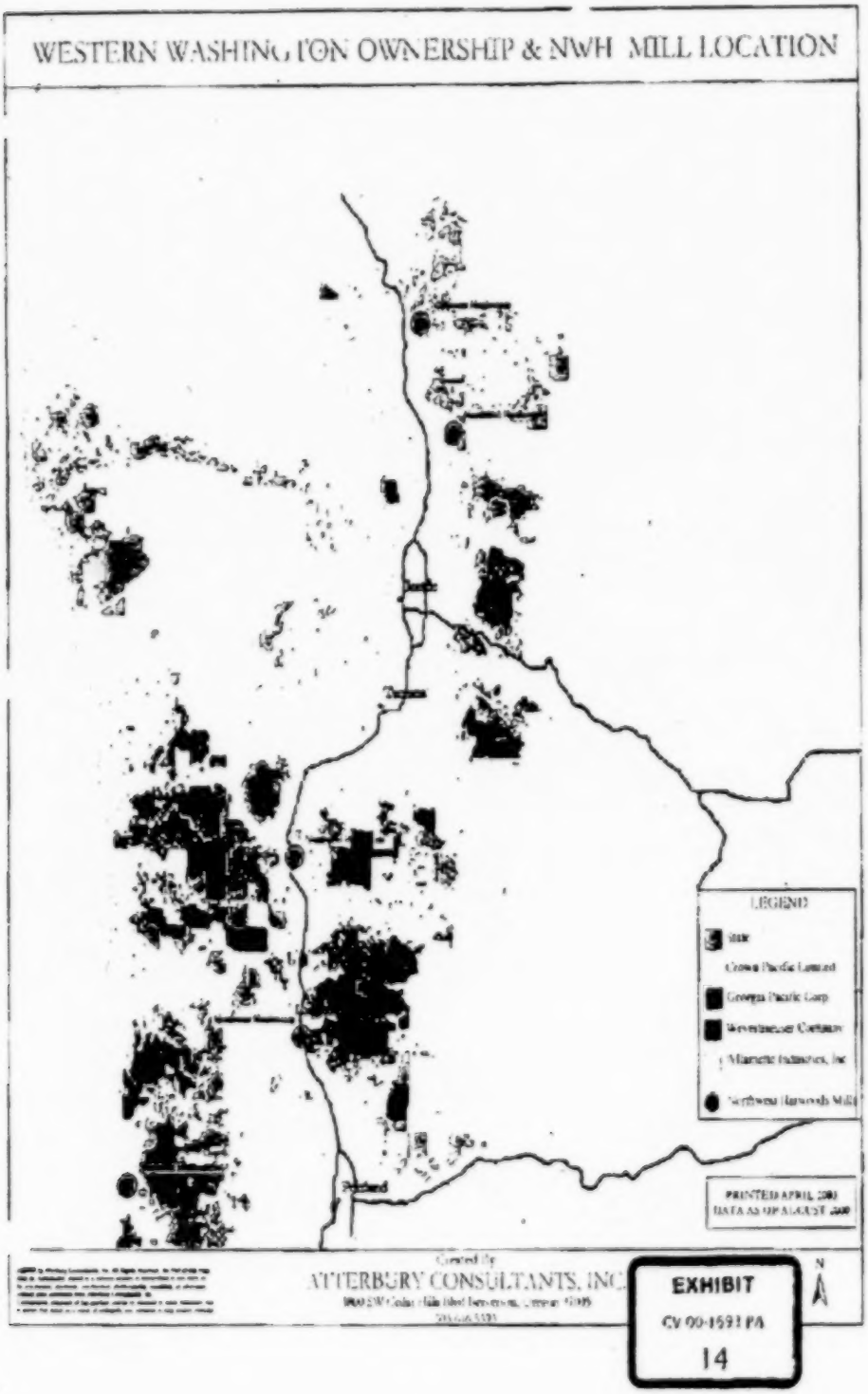
If in the future you could provide us with more accurate information as to your chip needs and the volume you will take from us; if you will be fair and equal with curtailments in deliveries; if when you make agreements you fulfill them, it will be much easier for us to plan our raw materials purchases to provide a constant supply of logs for our sawmill and chips for your needs.

/s/DAVIS
DAVIS E. WOOD, Raw Materials Mgr.
Northwest Hardwoods
Longview Operation

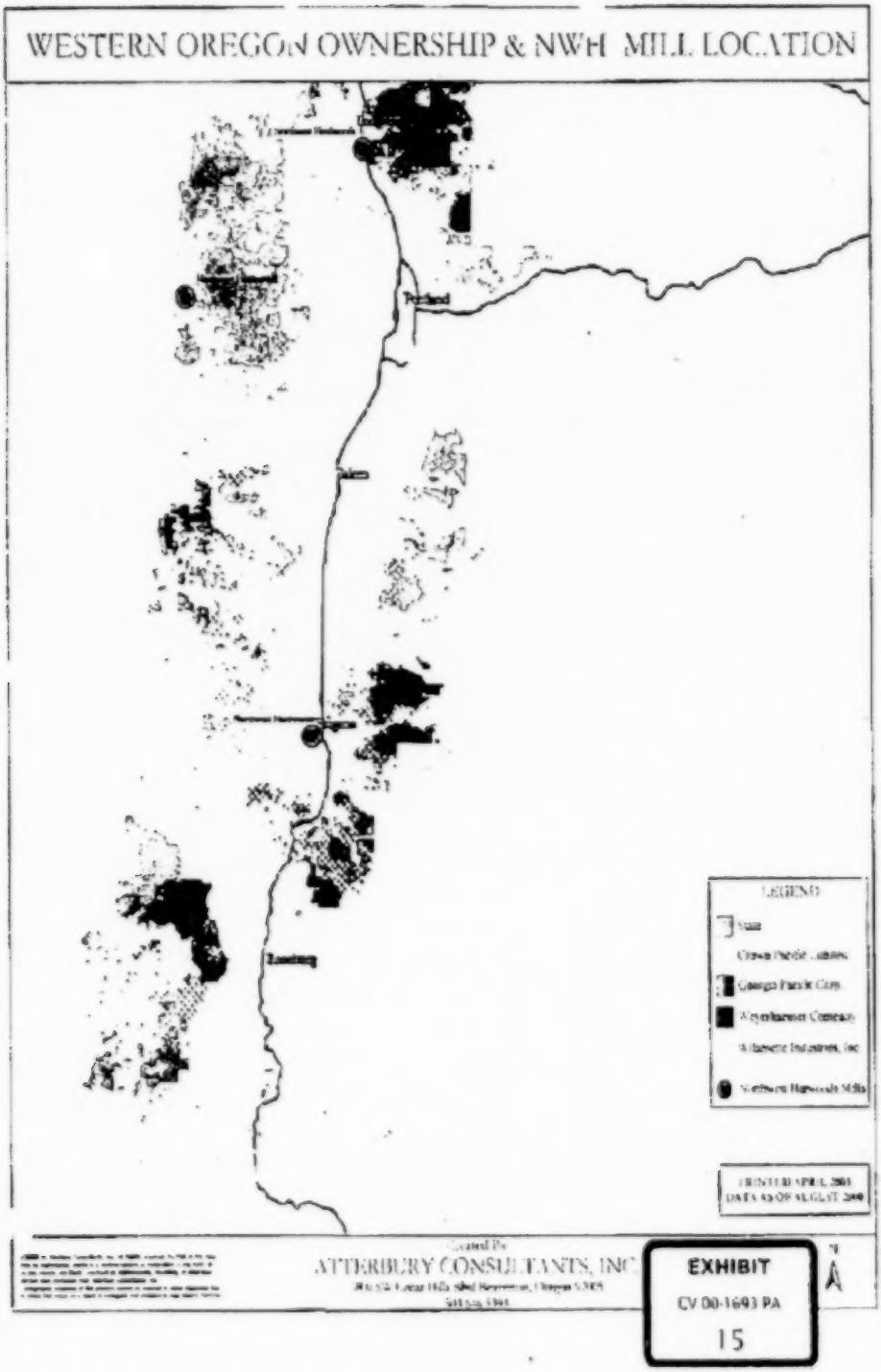
DEW/jw
cc: Arnold Curtis
Heinz Hohendorf

# EXCERPTS OF RELEVANT TRIAL EXHIBITS (COLOR)

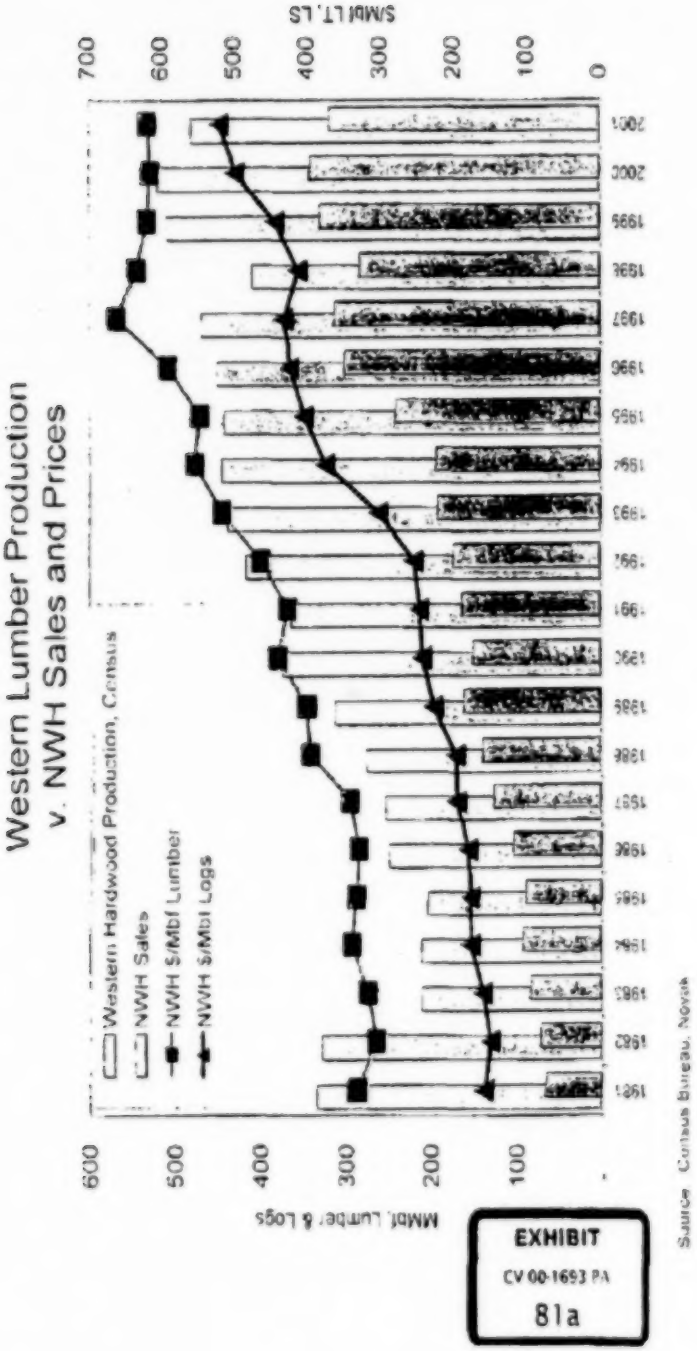
**[Exhibit 14]**


WESTERN WASHINGTON OWNERSHIP & NWH MILL LOCATION
LEGEND
State
Crown Pacific Limited
Georgia Pacific Corp
Weyerhaeuser Company
Willamette Industries, Inc
Northwest Harwoods Mill
PRINTED APRIL 2003
DATA AS OF AUGUST 2000
Created By
ATTERBURY CONSULTANTS, INC.
N
EXHIBIT
CV 00-1593 PA
14

**[Exhibit 15]**


WESTERN OREGON OWNERSHIP & NWH MILL LOCATION
Portland
Salem
Eugene
LEGEND
ATTERBURY CONSULTANTS, INC.
EXHIBIT
CV 00-1693 PA
15

**[Exhibit 81a]**


Western Lumber Production
v. NWH Sales and Prices
Western Hardwood Production, Census
NWH Sales
NWH $/Mbf Lumber
NWH $/Mbf Logs
MMbf Lumber & Logs
$/Mbf Lt. Ls
EXHIBIT
CV 00-1693 PA
81a
Source: Census Bureau, Noyes

**[Exhibit 82]**

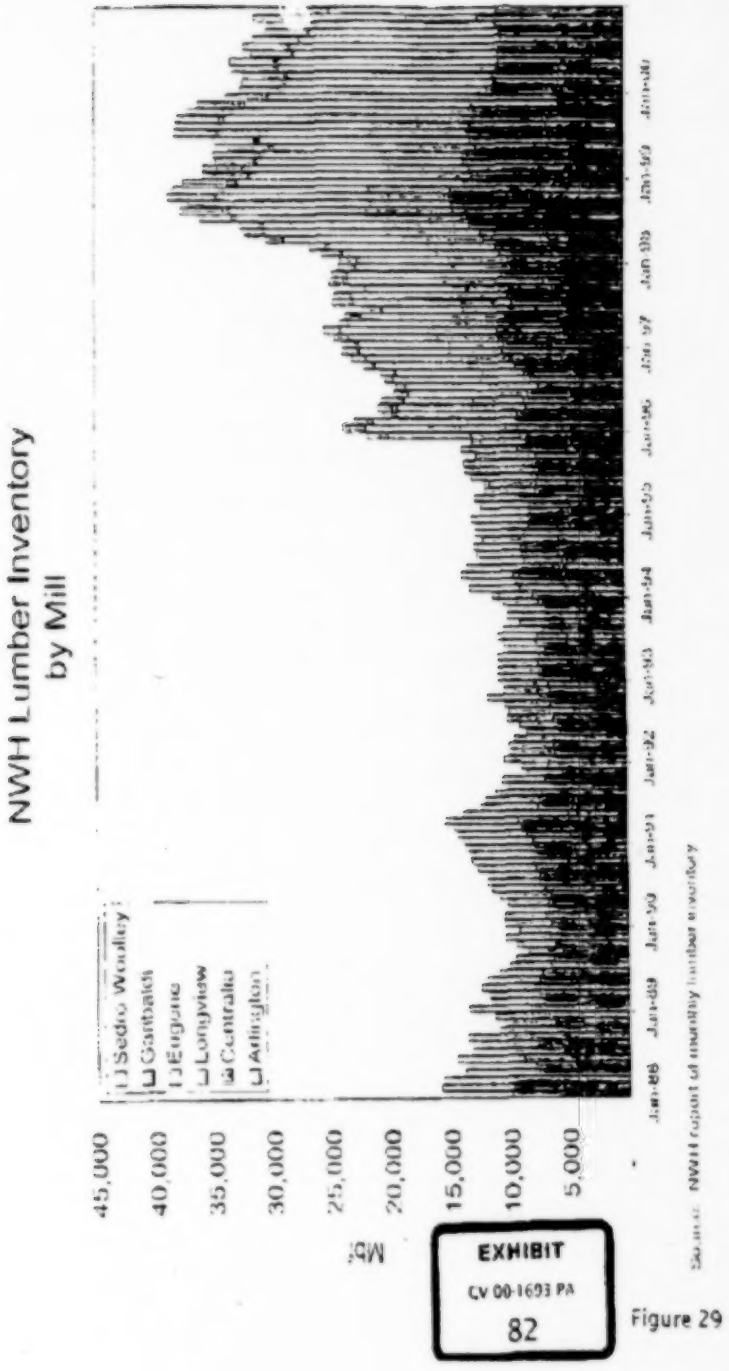



Figure 29

**[Exhibit 96]**

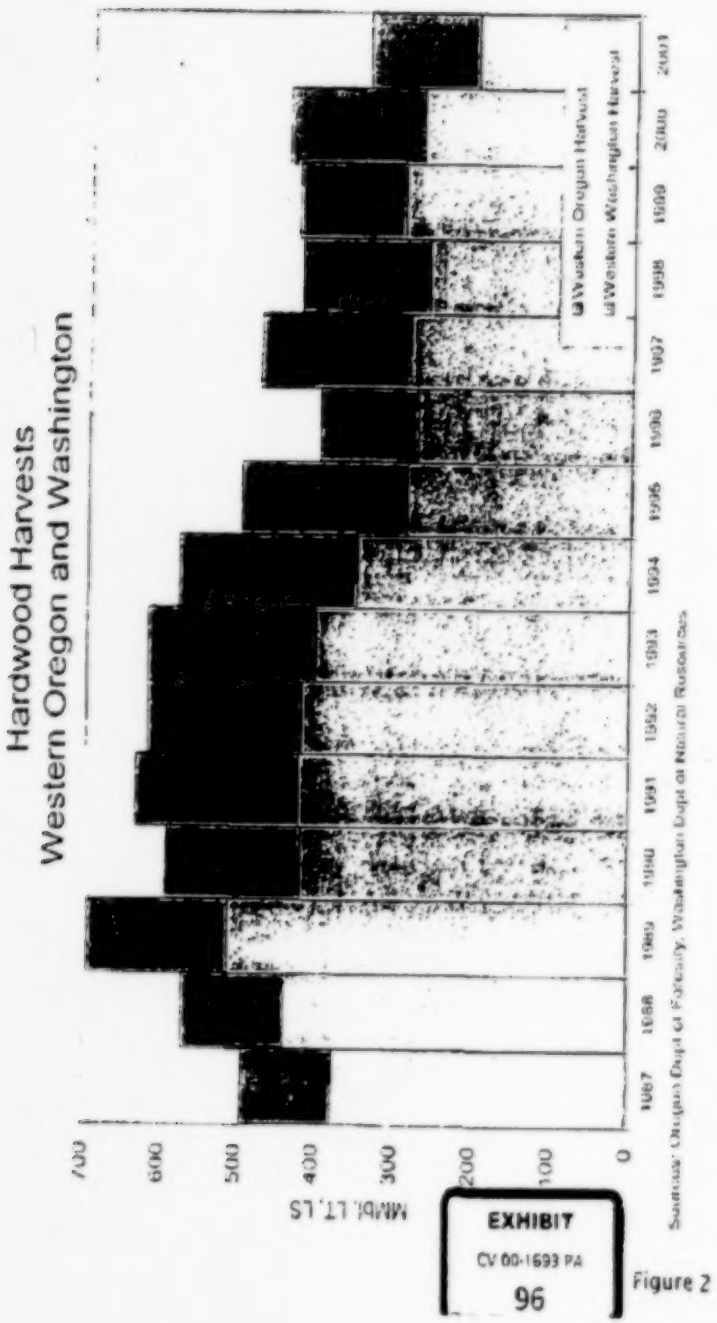



Figure 2

**[Exhibit 98]**

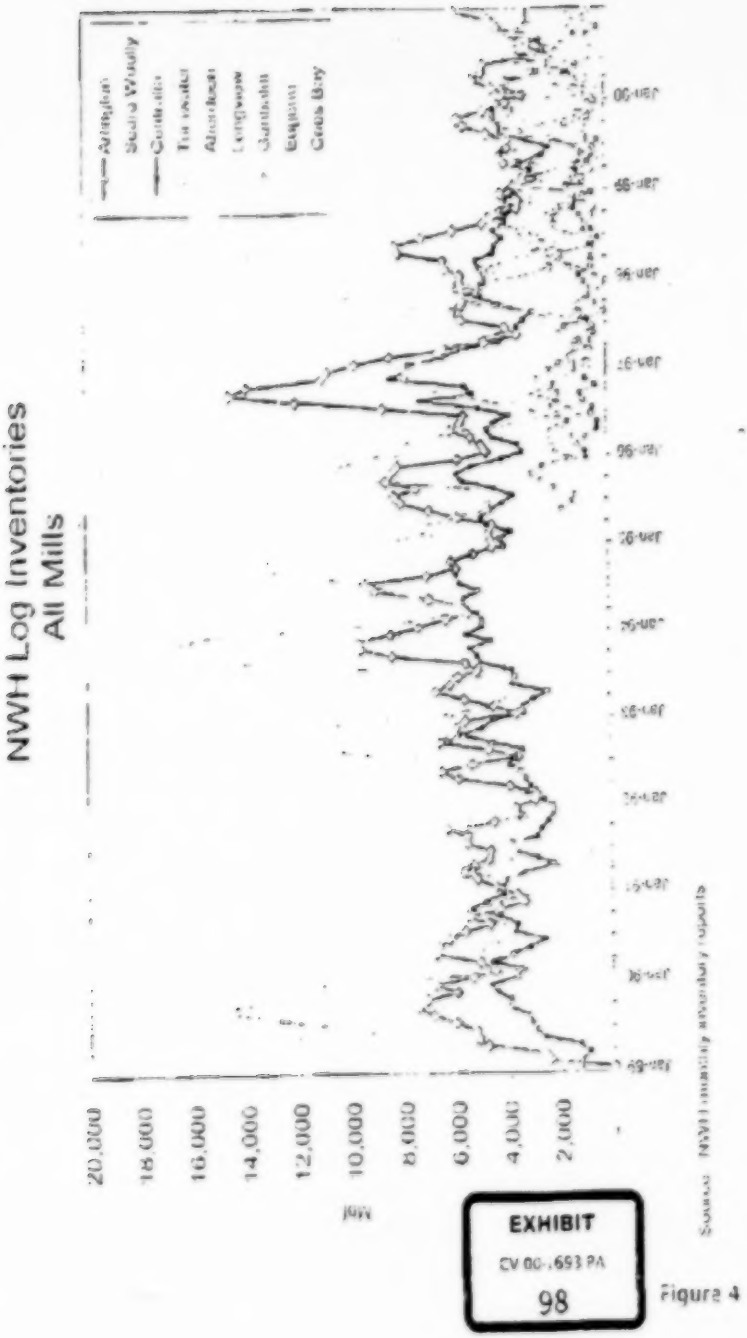



Figure 4

# [Exhibit 99]

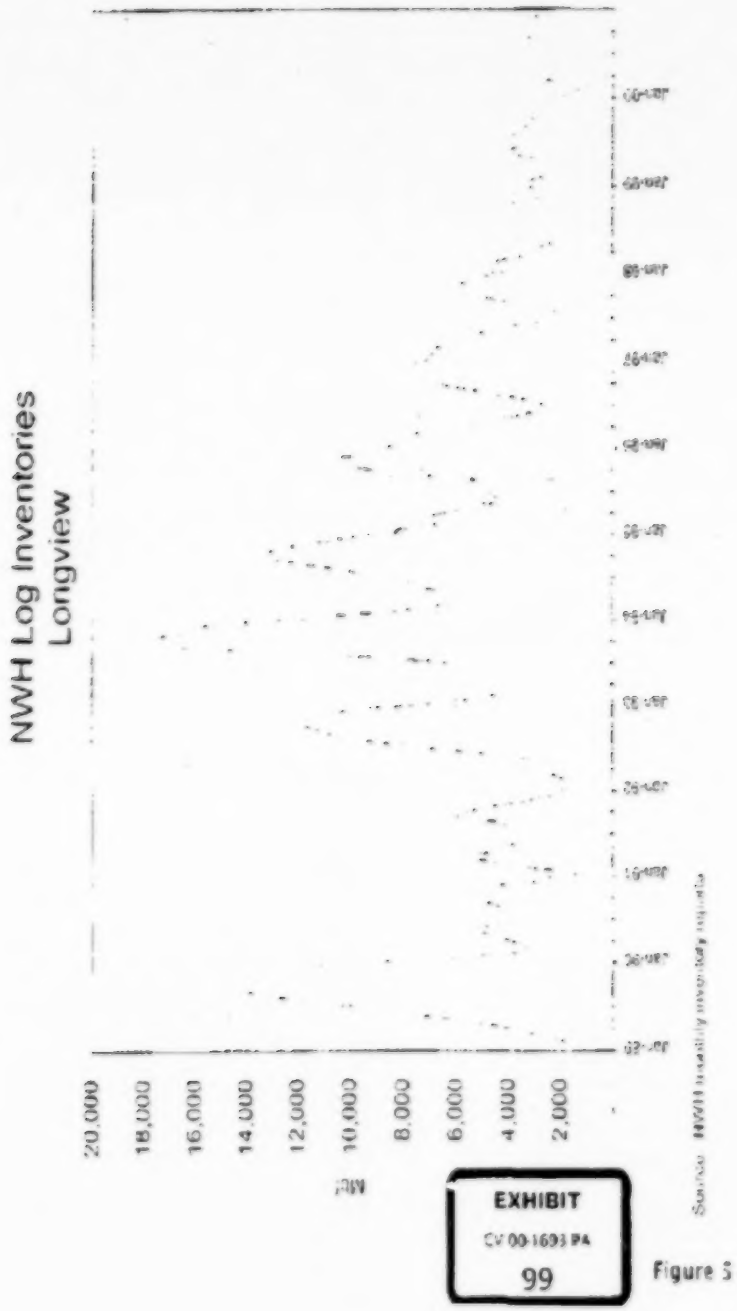
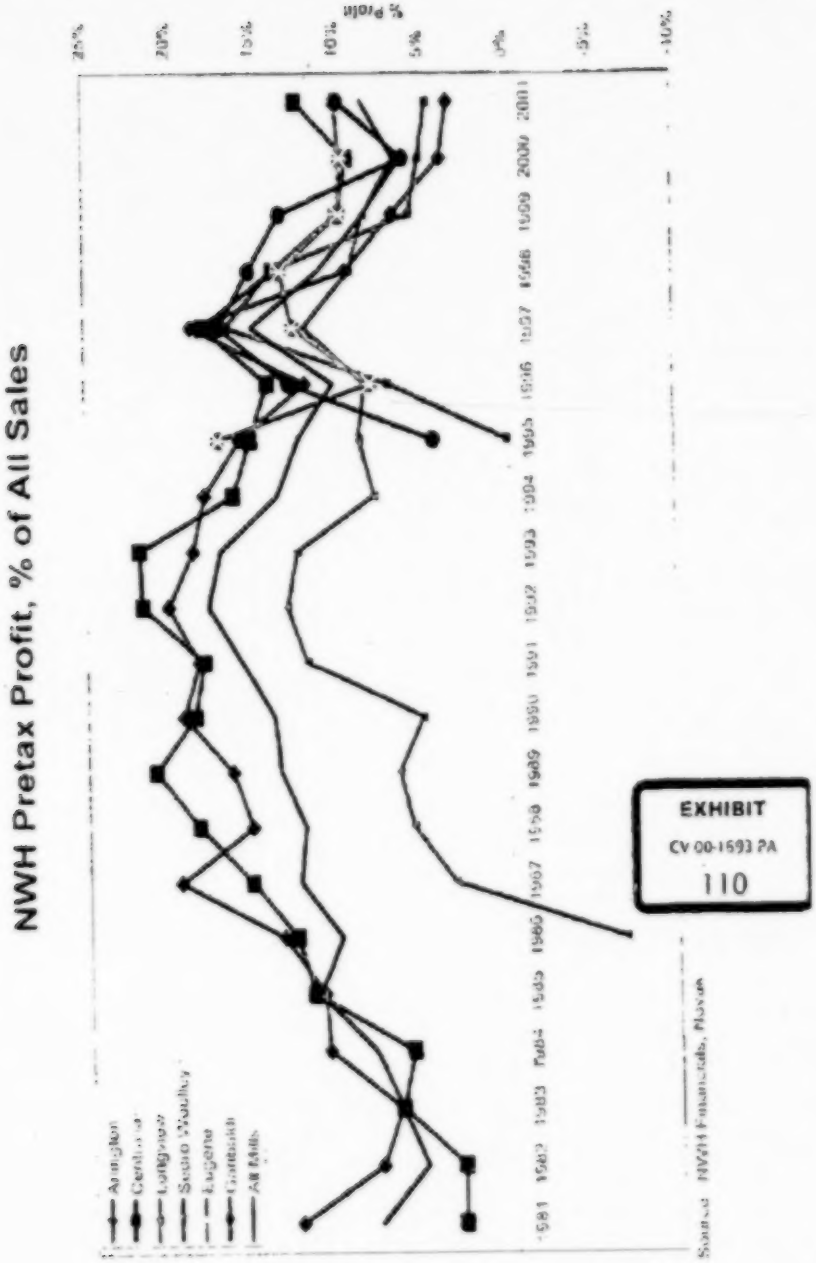
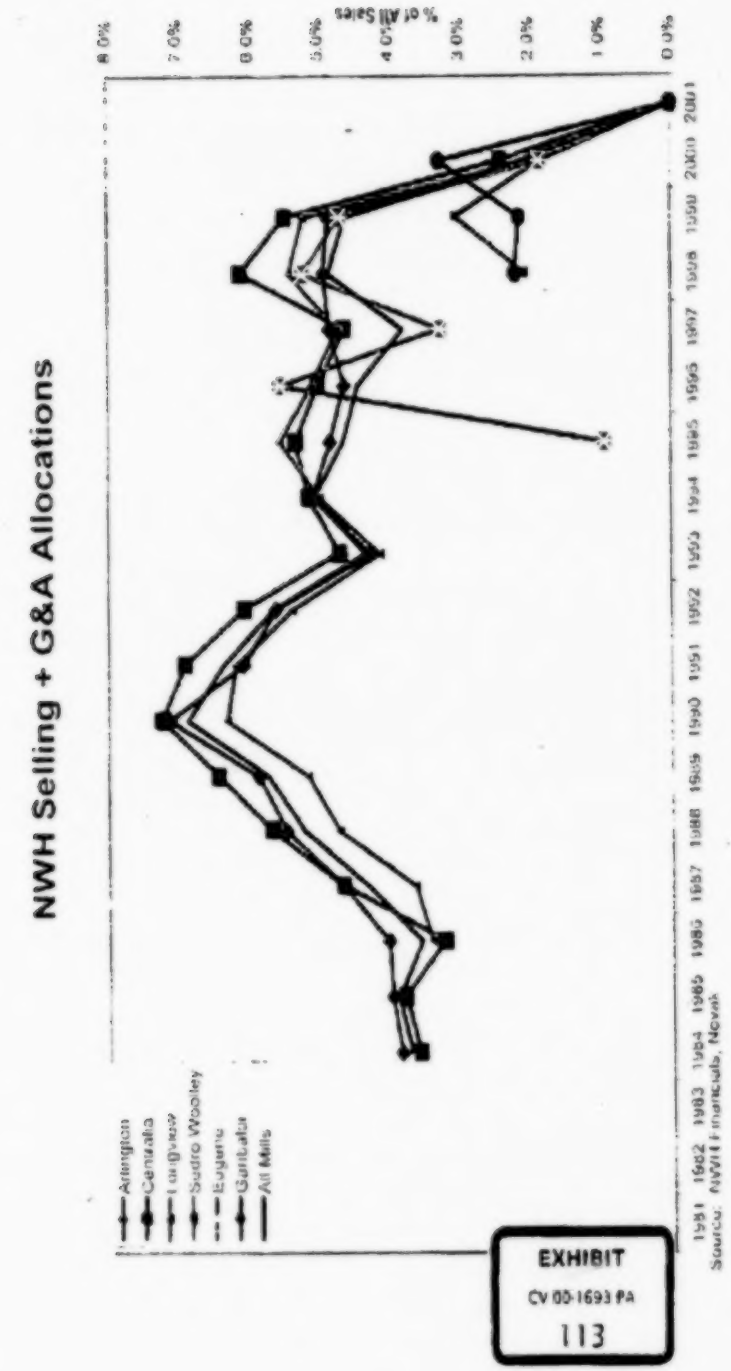



Figure 5

**[Exhibit 110]**


NWH Pretax Profit, % of All Sales
% Profit
EXHIBIT
CV 00-1693 PA
110

**[Exhibit 113]**


NWH Selling + G&A Allocations
% of All Sales
8.0%
7.0%
6.0%
5.0%
4.0%
3.0%
2.0%
1.0%
0.0%
Arrington
Centralia
Longview
Sudro Woolley
Eugene
Gunbarrel
All Mills
1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001
Source: NWH Financials, Novak
EXHIBIT
CV 00-1693 PA
113

**[Exhibit 1384]**

# NORTHWEST HARDWOODS

A Weyerhaeuser Business

## Innovation

The people of Northwest Hardwoods are known for innovation. We started with one Washington alder mill in 1967, and after more than 30 years in business, we now cut approximately 400 million board feet of North American hardwoods. We have become one of the largest manufacturers of hardwood lumber in the world. We manufacture alder in seven mills located in British Columbia, Washington, and Oregon. We also manufacture a variety of other species including red and white oak, cherry, hard and soft maple, basswood, cottonwood and walnut, from sawmills in Wisconsin, Michigan, Pennsylvania, Arkansas, and Oklahoma.

Along the way, Northwest Hardwoods has notched a number of industry "firsts" both in marketing and sawmill technology. We were the first company to develop alder as a valued and dependable hardwood, and the first to develop a proprietary grading system designed to improve customer yield. Within our sawmill technology, Northwest Hardwoods designed an abrasive planer for hardwood lumber. Abrasive sanders produce a clear and uniform surface not associated with the industry's standard knife planing.

Our success brought us to the attention of Weyerhaeuser who acquired Northwest Hardwoods in 1980.

The two cornerstones of Northwest Hardwoods' marketing program are proprietary grades and program sales to our customer base.

## Proprietary Grades

Developed in the 1970's, Northwest Hardwoods' proprietary grading system was designed to standardize lumber quality among the alder mills on the west coast, to refine the grades beyond NHLA standards, and to develop products that better matched our customer requirements. Our first key operating premise is product consistency. This means consistent manufacturing, drying and surfacing practices. By adhering to proprietary grades among all the mills, we can assure consistent quality and on-grade lumber with every load. We also grade after kiln-drying and surfacing, and ship on net tallies. This method takes into account shrinkage during kiln drying so that our customer is assured of a true tally.

## Consultative Selling

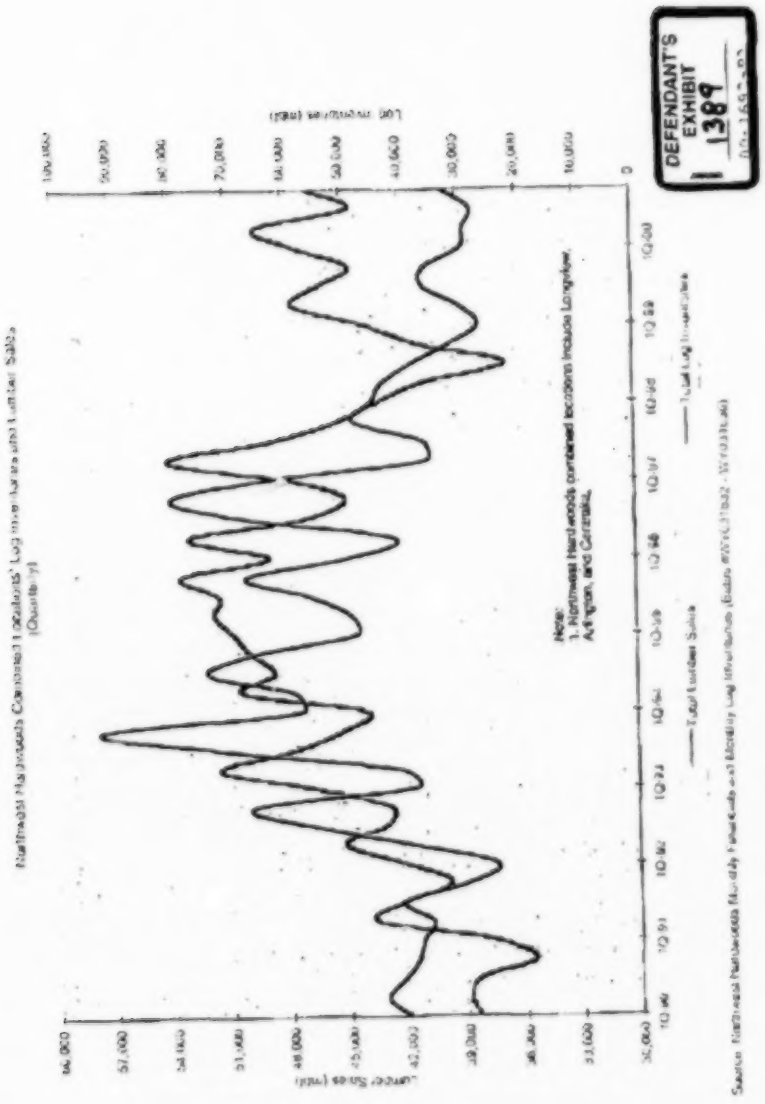
A second key premise is customer fit. The purpose of our proprietary grades is to match the right grade to the customer. This automatically improves his yield because the grade is designed to suit his particular manufacturing needs. How do we match the right grade to the right customer? By maintaining a highly skilled sales team educated in their customers' manufacturing processes. This requires knowledge of customer cut lists, throughput, and manufacturing processes. It's our customers, with the aid of our sales and quality control people, who define both our grades and services. Our goal as a company is to try to put our sawmill and production processes as close as possible to the customer's production processes and needs. This approach increases customer yields, which directly contributes to their bottom line.

**Domestic Sales**
Portland, Oregon, USA
ph: 503-246-5700 • fax: 503-245-3838

**Export Sales**
Federal Way, Washington, USA
ph: 253-874-3683 • fax: 253-838-2639

**Email:**
nwh@weyerhaeuser.com
www.northwesthardwoods.com

# [Exhibit 1389]



**[Defendant's Amended Proposed Verdict Form (Apr. 14, 2003)]**

* * *

Defendant, Weyerhaeuser Company, hereby requests the following amended proposed Verdict Form.

* * *

**VERDICT FORM**

We, the Jury, unanimously find as follows:

**QUESTION 1:** Regarding the claims alleged by plaintiff Confederated Tribes of Siletz Indians of Oregon, we find in favor of:

**ANSWER:** (Place an "X" next to either of the following responses.)

_____ We find in favor of Confederated Tribes of Siletz Indians of Oregon.

_____ We find in favor of Weyerhaeuser Company.

If your answer to Question 1 is an "X" marked next to Confederated Tribes of Siletz Indians of Oregon, your verdict is for that plaintiff. You should then proceed to answer Question 2. If your answer to Question 1 is an "X" marked next to Weyerhaeuser Company, your [P. 2] verdict is for the defendant on this issue. You should then skip Question 2 and proceed to answer Question 3.

**QUESTION 2:**

The amount of damages, if any, that should be awarded to plaintiff Confederated Tribes of Siletz Indians of Oregon and against defendant Weyerhaeuser Company is:

_____.

**QUESTION 3:** Regarding the claims alleged by plaintiff Ross-Simmons Hardwood Lumber Company, we find in favor of:

**ANSWER:** (Place an "X" next to either of the following responses.)

_____ We find in favor of Ross-Simmons Hardwood Lumber Company.

_____ We find in favor of Weyerhaeuser Company.

If your answer to Question 3 is an "X" marked next to Ross-Simmons Hardwood Lumber Company, your verdict is for that plaintiff. You should then proceed to answer Question 4. If your answer to Question 3 is an "X" marked next to Weyerhaeuser Company, your verdict is for the defendant on this issue. You should then skip Question 4. The Presiding Juror should then sign and date this Verdict Form.

**QUESTION 4:**

The amount of damages, if any, that should be awarded to plaintiff Ross-Simmons Hardwood Lumber Company against defendant Weyerhaeuser Company is: _____.

The Presiding Juror should now and date this Verdict Form.

**SO SAYS THE JURY UNANIMOUSLY.**

DATED: April ____, 2003.

_____

**[Defendant's Supplemental Requested Jury Instructions (Apr. 17, 2003)]**

* * *

Defendant, Weyerhaeuser Company, requests that the Court provide to the jury the following supplemental requested jury instructions. This supplemental request is based on new issues and arguments presented by plaintiffs' counsel during trial.

* * *

[P. ii] **INDEX**


| | |
|---|---|
| DEFENDANT'S INSTRUCTION NO. 25. | Tying – Not An Issue in this Case |
| DEFENDANT'S INSTRUCTION NO. 26. | Defendant's Internal Transfer Pricing |


* * *

## [P. 1] REQUESTED JURY INSTRUCTION NO. 25

### Tying – Not an Issue in this Case

A tying arrangement is a marketing method whereby a seller will sell one of its products (referred to as the "tying product"), only on the condition that the buyer of the tying product also buy a different product (referred to as the "tied product"). For example, a supermarket that will sell flour only if its customers will also buy sugar is engaged in tying. In that example, flour would be the tying product, and sugar the tied product. In addition, not all tying arrangements are unlawful under the antitrust laws.

During the trial of this case, there has been occasional reference to the word "tying." You are instructed that there is no evidence of "tying" in this case, as that word is used in the antitrust laws. You are instructed not to consider tying as part of your deliberations.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page B-84 and B-85 (1999); Ninth Circuit Model Civil Jury Instructions 17 (2001).

* * *

[P. 2] **REQUESTED JURY INSTRUCTION NO. 26**

**Defendant's Internal Transfer Pricing**

Plaintiffs allege that Weyerhaeuser has charged itself for alder logs coming from its own timberlands to Weyerhaeuser's Northwest Hardwood" mill in Longview at less than "market prices." Defendant denies that allegation.

You are instructed that there is no law that requires a business to charge itself any particular internal price (or use any particular internal pricing method) for resources that it owns and desires to use as part of its manufacturing process.

AUTHORITY: The requested authority is simply a statement that there is no law prohibiting the described conduct. Defendant is aware of no such law.

[P. 3] DATED this 17th day of April, 2003.

**Respectfully submitted,**

**PERKINS COIE LLP**

By: _____

Michael H. Simon, OSB No. 86090
Thomas R. Johnson, OSB No. 01064
Julia E. Markley, OSB No. 00079
Christopher L. Garrett [Not admitted in Oregon]

Attorneys for Defendant, Weyerhaeuser Company

**[Defendant's Memorandum in Support of Motion for Judgment as a Matter of Law (Liability) (Apr. 17, 2003)]**

* * *

## INTRODUCTION

Plaintiffs Confederated Tribes of Siletz Indians of Oregon ("Siletz") and Ross-Simmons Hardwood Lumber Co. ("Ross-Simmons") (collectively, "Plaintiffs") claim that Weyerhaeuser Company ("Weyerhaeuser") engaged in predatory practices in the purchasing of alder sawlogs in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiffs' evidence of alleged predatory practices supports nothing more than a charge that Weyerhaeuser inflicted economic harm on its [P. 2] rivals by raising their costs of doing business. That theory of predation has never accepted by any court where, as here, the defendant raised its own costs as much or greater than its rivals'. Accordingly, as a matter of law, Plaintiffs have insufficient evidence of predatory conduct to support a violation of Section 2. Weyerhaeuser respectfully requests that this Court grant its Motion for Judgment as a Matter of Law against Plaintiffs' monopolization and attempted monopolization claims and enter judgment in favor of Weyerhaeuser.

Alternatively, Weyerhaeuser's Motion should be granted with respect to several specific acts that Plaintiffs claim are anticompetitive. First, plaintiffs claim that Weyerhaeuser's log supply contracts with Georgia-Pacific ("G-P"), its log supply contracts with Crown Pacific Ltd. Partnership ("CP"), and the deed restrictions Weyerhaeuser imposed when it sold Eugene-area timberlands are anticompetitive. As a matter of law, however, those log supply contracts and deed restrictions do not violate Section 2 because they are not exclusive arrangements, they do not foreclose any significant share of the market, and Weyerhaeuser had legitimate business justifications for entering into them. Second, Plaintiffs claim that Weyerhaeuser intentionally made false statements to the

Oregon State Forester and the office of the Governor of the State of Washington to maintain a dominant share of the alder market. Plaintiffs failed to introduce any evidence showing that any of Weyerhaeuser's statements were intentionally false or that the statements caused plaintiffs any harm. Accordingly, Weyerhaeuser alternatively requests this Court to rule that Plaintiffs cannot base their Section 2 claims on the foregoing specific allegations.

Weyerhaeuser also moves for judgment as a matter of law against Plaintiffs' attempted monopolization claim. Plaintiffs have failed to introduce any evidence or elicit any testimony supporting the essential element that there was a dangerous probability that Weyerhaeuser would achieve monopoly power in any relevant market.

## [P. 3] LEGAL STANDARDS

Federal Rule of Civil Procedure 50(a)(1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

## DISCUSSION

### A. Plaintiffs' Evidence of Predatory Conduct Amounts to a Claim that Weyerhaeuser "Raised Rivals Costs," Which Is Not a Legally Recognized Theory of Predation Under These Circumstances.

Plaintiffs claim that Weyerhaeuser engaged in predatory practices in the purchasing of alder sawlogs. Plaintiffs' witnesses have testified that Weyerhaeuser, without regard to its own costs or log needs, bid up the price of alder logs with the

intent of driving competitors from the market. Plaintiffs also assert that Weyerhaeuser, through contracts or acquisition, and again without regard to its own requirements, locked up a portion of the available supply of alder logs so that Plaintiffs could not acquire logs at a reasonable price. (Those contracts are discussed in more detail below.)

These claims are all variations of a claim that Weyerhaeuser employed a strategy of inflicting economic harm on its rivals by raising their costs of doing business, and that Weyerhaeuser was willing to raise its own costs in the process. Moreover, Plaintiffs' witness William Nelson testified that Weyerhaeuser engaged in these practices over a 20-year period. In general, Plaintiffs allege that they were forced out of business because they could not afford to pay the same log prices that Weyerhaeuser was paying.

Plaintiffs' predation theory—known as "raising rivals' costs"—has never been accepted in the federal courts in the form and under the economic conditions alleged by Plaintiffs. Specifically, no court has adopted that theory in a case where the alleged predator *raised its own* [P. 4] *costs* in addition to allegedly raising the costs of its rivals. Such a claim is essentially a type of predatory pricing claim without the element of "below cost" pricing. Furthermore, any predatory pricing claim here fails as a matter of law because Plaintiffs have no evidence that Weyerhaeuser priced its alder lumber below an appropriate measure of its costs, either marginal or average variable. A predatory pricing claim requires a showing that the alleged predator absorbed actual losses—either by selling outputs below an appropriate measure of its costs or by purchasing inputs at prices that exceeded revenues ultimately received for those inputs. Plaintiffs merely argue that Weyerhaeuser made less of a profit than it could have made. This claim, even if true, is not cognizable predatory conduct under the antitrust laws.

**1. Plaintiffs' theory has never been adopted in the form that they urge.**

The "raising rivals' costs" theory has received considerable attention (and criticism) in scholarly journals, but it has not been generally accepted in the federal courts. See E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Implications*, at 6.04[G] (3rd ed. 1998) (stating that the theory of raising rivals' costs has received "considerable attention from commentators, but scant attention from the courts"). The theory has been cited only once in the Ninth Circuit. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997). As this Court noted in its Opinion denying Weyerhaeuser's Motion for Summary Judgment, *Forsyth* is distinguishable because the plaintiffs in that case were not competitors of the defendant. Even more significantly, that case is also distinguishable on the ground that in *Forsyth*, the defendant did not increase its own costs at all when it allegedly raised the plaintiff's costs. In *Forsyth*, the defendant hospital allegedly diverted indigent or low-paying patients to other area hospitals. *Forsyth*, 114 F.3d at 1478. That would have *lowered* the defendant's own costs. Here, Plaintiffs contend that Weyerhaeuser raised the costs of alder sawlogs to *itself* as well as to its competitors.

No federal case has ever applied the theory of "raising rivals' costs" to a situation where the alleged predator raised its own costs in addition to those of its rivals. Moreover, the cases cited in *Forsyth* all involved situations where rivals' costs were allegedly raised at no cost to the [P.5] defendant. *See, e.g., Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof. Pubs., Inc.*, 63 F.3d 1540, 1553 (10th Cir. 1995) (defendants allegedly created schedule conflicts between their course offerings and those of their competitors); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractor's Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (defendant association, whose members contributed 1% of gross payroll to collective bargaining fund, used union to obtain

1% contributions from non-members, thus raising non-members' costs).

**2. Plaintiffs' theory is essentially a predatory pricing claim that fails as a matter of law because Plaintiffs cannot show and have not alleged that Weyerhaeuser engaged in below-cost pricing**

In theory, predatory pricing involves an alleged monopolist, hoping to drive competitors out of business, selling its goods below cost, driving down the market price so that neither it nor its competitors can make a profit. If successful, this leaves the monopolist free to raise prices and thereby recoup its earlier losses. A plaintiff alleging predatory pricing must demonstrate both: (1) that the prices complained of are below an appropriate measure of the alleged monopolist's costs, and (2) that the alleged monopolist has a reasonable chance of eventually recouping the losses. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (discussing the requirements of predatory pricing and also its "general implausibility"); *Rebel Oil*, 146 F.2d at 1092. The federal courts place a high burden on plaintiffs alleging predatory pricing. "The Supreme Court has expressed extreme skepticism of predatory pricing claims." *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999). *See Matsushita*, 475 U.S. at 589 (noting that "the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition").

In claiming that Weyerhaeuser raised its own costs along with theirs, Plaintiffs are essentially claiming that Weyerhaeuser engaged in "predatory bidding." To succeed on a "predatory bidding" theory, however, instead of proving that Weyerhaeuser sold the manufactured output at a loss, Plaintiffs must prove: (1) that Weyerhaeuser sustained a loss by purchasing its inputs (alder logs) at prices such that Weyerhaeuser could not make a profit on their manufacture [P. 6]

and sale as alder lumber (i.e. that Weyerhaeuser's marginal costs exceeded its marginal revenues); and (2) that Weyerhaeuser has a reasonable chance of recouping these losses in the future.[1]

Plaintiffs' theory fails because they have failed to introduce any evidence that Weyerhaeuser ever lost money in selling alder lumber. The financial data show not only that Weyerhaeuser's alder mills made profits overall, but also that incremental log purchases added to profits. Thus, Plaintiffs fail to meet the first element of the test for predatory pricing because they cannot show that Weyerhaeuser priced its lumber below "an appropriate level of its costs." *Brooke Group*, 509 U.S. at 222-23. Indeed, Plaintiffs fail even to allege such conduct. Rather, they argue that Weyerhaeuser could have earned greater profits if only it had purchased logs at a lower price. But even if this were true, it is legally irrelevant.

To prove predatory pricing, Plaintiffs must demonstrate that Weyerhaeuser engaged in below-cost pricing. *See Brooke Group*, 509 U.S. at 223 ("[W]e have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws") (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). In short, Plaintiffs have introduced no evidence, even on the margin, of Weyerhaeuser purchasing logs with the result (let alone the intention) of losing money. Because Plaintiffs' conception of predatory conduct would fail under the standard for a predatory pricing claim, this Court should reject a "raising rivals' costs" theory that depends on the same conception.

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[1] As to this second requirement, it should be noted that Plaintiffs' witness William Nelson claims Weyerhaeuser has been sustaining these "losses" for 20 years. *See* W. Nelson Statement at 4.

Accordingly, Weyerhaeuser requests that this Court enter judgment in favor of Weyerhaeuser on Plaintiffs' monopolization and attempted monopolization claims.

[P. 7] **B. Weyerhaeuser's Supply Contracts and Deed Restrictions Are Legal Arrangements**

**1. Factual background of the supply contracts and deed restrictions**

In 1996, G-P approached Weyerhaeuser and suggested that the parties enter into a written log supply contract. See Testimony of David M. Kurtz; Testimony of Larry Bray; Pls.' Exh. 429. After protracted negotiations, Weyerhaeuser and G-P entered into a one-year log supply agreement on January 1, 1998. Pls.' Exh. 430. In that contract, Weyerhaeuser agreed to sell 40,000 green tons of its whitewood pulp logs in Washington State to G-P. G-P agreed to sell to Weyerhaeuser 80 percent of its annual hardwood sawlog production from its Toledo tree farm. On January 19, 1999, Weyerhaeuser and G-P entered into another one-year contract. Pls.' Exh. 431. Again, Weyerhaeuser agreed to sell to G-P 40,000 green tons of its whitewood pulp logs. G-P agreed to sell to Weyerhaeuser 70 percent of its annual hardwood sawlogs production from its Toledo tree farm. Under both agreements, the price was to be based on the current market price and would be set at intervals throughout the contract term.

In 1998 and 1999, Weyerhaeuser and CP entered into three different supply agreements. First, on November 19, 1998, CP agreed to sell to Weyerhaeuser approximately 2,500 thousand board feet ("MBF") over a five-month period. Pls.' Exh. 432. The contract price was $1,125,000. On March 31, 1999, the parties entered into a second agreement wherein CP agreed to sell 1,695 MBF from its Olympic tree farm over a nine-month period for $874,620. Pls.' Exh. 433. On that same day, the parties entered into a third agreement. In their third agreement, CP agreed to sell 4,500 MBF from

its Hamilton tree farm over a 13-month period for $2,025,000. Pls.' Exh. 434.

In 1995, Weyerhaeuser purchased Diamond Lumber's sawmill and timberlands in the Eugene, Oregon, vicinity. In late 1998 and early 1999, Weyerhaeuser sold approximately 4,200 acres of those timberlands in several transactions to different buyers. In each deed, Weyerhaeuser [P. 8] reserved "the right to purchase all alder sawlogs harvested on the property" for the period ending on December 31, 2001 (approximately three years). Pls.' Exh. 481.

**2. Legal Standards Governing Exclusive Contracts**

Plaintiffs claim that the G-P and CP contracts and the deed restrictions are illegal exclusive arrangements under Section 2. Exclusive contracts are examined under the "rule of reason." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 446 U.S. 2 (1984); *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 329 (1961). Under the rule of reason, a court inquires into the actual effect of the exclusive contract on competition, the duration of the contract, the existence of an alternative source of competitors' supply, and the business justifications for the contract. *Jefferson Parish,* 446 U.S. at 29.

Only those exclusive arrangements whose "probable" effect is to "foreclose competition in a substantial share of the line of commerce affected" violate the antitrust laws. *Tampa Elec.*, 365 U.S. at 327; *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). Foreclosure of twenty percent or less is presumptively legal. *See, e.g., Retina Assocs. v. Southern Baptist Hosp. of Florida,* 105 F.3d 1376 (11th Cir. 1997) (15 percent foreclosure insufficient); *see also* 11 Areeda, 1821c at 160 (stating that foreclosure percentages of less than 20 percent is harmless to competition; citing additional authority). If a contract is not actually exclusive, then the possibility of foreclosure reduces significantly. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d

227, 236-238 (1st Cir. 1983) (Breyer, J.) (rejecting plaintiff's characterization of large requirements contracts as "exclusive").

Even a high foreclosure percentage creates no injury to competition if no one is being excluded in fact by the arrangement. *Omega*, 127 F.3d at 1164. In *Omega*, the court upheld exclusive distributing arrangements that foreclosed 38 percent of the relevant market because, a manufacturer (a competitor of the defendant) had entered the market during the relevant time and was able to establish a distribution system despite the exclusive distributorship agreements. 127 F.3d at 1164.

[P. 9] A one-year exclusive agreement is presumptively legal. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) ("exclusive dealing contracts terminable in less than a year are presumptively lawful"); 11 Areeda, 1821d3 at 167; *see also Omega*, 127 F.3d at 1164-65 (upholding one-year exclusive distributorship agreement). Courts have also approved two- and three-year exclusive agreements. Courts have also approved two- and three-year exclusive agreements; *see also Omega*, 127 F.3d at 1164 (quoting with approval two-year reasonableness rule in *Barry Wright*, 724 F.2d at 237).

The existence of an alternative source of supply indicates that an exclusive contract is not anticompetitive. *Omega*, 127 F.3d at 1163 ("The short answer is that the antitrust laws were not designed to equip the plaintiffs' hypothetical competitor with [the defendant's] legitimate competitive advantage. . . . Competitors are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors. Antitrust laws require nothing more.").

If Weyerhaeuser had "valid business reasons" for its conduct, then it did not violate Section 2. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). The Supreme Court has specifically acknowledged that supply con-

tracts are economically advantageous to both buyers and sellers: "In the case of the buyer it may assure supply, while on the part of the seller it may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and offer the possibility of a predictable market." *Tampa Electric*, 365 U.S. at 334 (quoting *Standard Oil Co. v. United States*, 337 U.S.S 293, 306 (1949) (internal quotation marks omitted)); *accord* 11 Areeda, 1811b at 128-29.

**3. Weyerhaeuser's Supply Contracts and Deed Restrictions Are Legal**

Weyerhaeuser's supply contracts and deed restrictions do not violate Section 2 of the Sherman Act because they were not exclusive, they did not foreclose a significant share of the market, and their time periods were not excessive. The small foreclosure means that competitors, [P. 10] like Plaintiffs, had alternative supply sources. Moreover, Weyerhaeuser had legitimate business justifications for the G-P and CP supply contracts and for the deed restrictions.

First, the G-P contracts, the CP contracts, and the deed restrictions were not exclusive. As to the contracts, there are no exclusivity clauses in any of the contracts or deed restrictions. In fact, G-P sold logs from its Toledo tree farm to third parties. The provision in the G-P contracts that "Nothing herein shall be construed to allow G-P to sell the logs to any third party," refers only to those logs G-P used internally, as it comes in the paragraph relating to G-P's right to use logs internally. Mr. David Kurtz, the G-P Vice-President who signed the contracts, so testified. The deed restrictions are not exclusive, as they simply grant Weyerhaeuser the right of first refusal to purchase alder sawlogs from the property. If Weyerhaeuser did not want to buy the property owner's logs, then the property owner was free to put the logs on the open market. Because the log supply contracts and the deed restrictions are not exclusive, they do not viola-

tion Section 2. *See Barry Wright*, 724 F.2d at 237 (upholding large requirements contract).

Second, Plaintiffs have failed to introduce any evidence of the extent of the market foreclosed by the G-P contracts, the CP contracts, or the deed restrictions. To prove their Section 2 claim with respect to those arrangements, Plaintiffs had to introduce evidence that the foreclosure rate approached 40 percent. *See Omega*, 127 F.3d at 1164 (upholding exclusive arrangement that foreclosed 38 percent of market). They have wholly failed to show what share of the market was foreclosed by these arrangements and, on that point alone, plaintiffs have failed to prove that the supply contracts and deed restrictions are anticompetitive. Moreover, there is evidence that Westwood Industries opened a sawmill entered the Eugene-area market during the relevant time, which shows there was no actual exclusion.

Third, evidence shows that many alternative supply sources were available to the Plaintiffs. In fact, numerous witnesses testified that the Joint Venture mill was able to purchase logs from small landowners and many other log suppliers.

[P. 11] Fourth, the short one- to three- year terms of the log supply contracts and the deed restrictions support their legality. As noted above, courts routinely uphold exclusive arrangements of such duration.

Finally, Weyerhaeuser had a legitimate business justification to enter into the challenged log supply contracts and deed restrictions: it desired to secure a steady supply of logs at a favorable price. The Supreme Court has recognized exactly that justification in *Tampa Electric*. 365 U.S. 334 (stating that requirements contract "may well be of economic advantage to buyers as well as to sellers").

**C. Plaintiffs Have Failed to Introduce Sufficient Evidence of Any Intentional False Statements**

Plaintiffs have alleged that Weyerhaeuser intentionally made false statements to the Oregon State Forester and the office of the Governor of the State of Washington to maintain a dominant share of the alder market. Plaintiffs have failed to introduce any evidence that Weyerhaeuser's statements were intentionally false or that the statements caused Plaintiffs any harm. Accordingly, this Court should rule as a matter of law that Plaintiffs cannot base any of their Section 2 claim on this allegation.

**D. Plaintiffs Have Failed to Introduce Sufficient Evidence on Their Attempted Monopolization Claim**

An essential element of a claim of attempted monopolization is that the plaintiff must prove by a preponderance of the evidence that there was a dangerous probability that the defendant would successfully achieve monopoly power in the relevant market. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1477 (9th Cir. 1997). Plaintiffs have failed to introduce any evidence supporting this element of their attempted monopolization claim.

All Plaintiffs' witnesses who have testified on the issue of monopoly power have testified that Weyerhaeuser actually had and still does have monopoly power in the alder log and alder lumber markets. Even if Plaintiffs are correct that the alder log or alder lumber is the relevant [P. 12] product market[2], the only reasonable inference supported by their evidence is that Weyerhaeuser actually possessed monopoly power. Therefore, there is no basis that Weyerhaeuser was dangerously close to achieving monopoly power. Weyerhaeuser requests that this Court grant its motion for judgment as a matter of law against Plaintiffs' attempted monopolization claim.

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[2] Weyerhaeuser contends that the only relevant market is the domestic or international hardwood lumber market.

## CONCLUSION

For the foregoing reasons, Weyerhaeuser respectfully requests that this Court grant its Motion for Judgment as a Matter of Law and enter judgment in favor of Weyerhaeuser. Alternatively, Weyerhaeuser requests that this Court hold grant its Motion against Plaintiffs' claims to the extent they are based on the G-P and CP supply contracts, the deed restrictions, and the alleged false statements made to the States of Oregon and Washington. Weyerhaeuser also requests that this Court grant its Motion against Plaintiffs' attempted monopolization claim.

DATED this 17th day of April, 2003.

**Respectfully submitted,**

**PERKINS COIE LLP**

By:_____

Michael H. Simon, OSB No. 86090
Thomas R. Johnson, OSB No. 01064
Julia E. Markley, OSB No. 00079
Christopher L. Garrett [Not admitted in Oregon]

Attorneys for Defendant,
Weyerhaeuser Company

**[Court's Draft Jury Verdict Form (Apr. 18, 2003)]**

* * *

We, the Jury, unanimously find as follows:

**QUESTION 1:** Have the Plaintiffs established, by a preponderance of the evidence, that there is a relevant market for alder sawlogs in the Pacific Northwest?

Yes_____ No_____

**QUESTION 2:** Have the Plaintiffs established, by a preponderance of the evidence, that there is a relevant market for finished alder lumber in the United States?

Yes_____ No_____

[P. 2] If you answered "yes" to Question 1, or to Question 2, or both, then you should proceed to Question 3-A. If you answered "no" to both Questions 1 and 2, then your verdict is for the Defendant and you should not answer the remaining questions.

**QUESTION 3-A:** Has Plaintiff Ross-Simmons Hardwood Lumber Company ("Ross Simmons") proven, by a preponderance of the evidence, its claim for monopolization?

Yes_____ No_____

**QUESTION 3-B:** If your answer to Question 3-A is yes, what sum of damages do you award to Ross-Simmons?

$_____

**QUESTION 4-A:** Has Plaintiff Ross-Simmons proven, by a preponderance of the evidence, its claim for attempted monopolization?

Yes_____ No_____

**QUESTION 4-B:** If your answer to Question 4-A is yes, what sum of damages do you award to Ross-Simmons?

$_____

Do not be concerned about duplicating the damages, if any, awarded to Ross-Simmons in 3-B. The court will make any necessary adjustments.

[P. 3] **QUESTION 5-A:** Has Plaintiff Confederated Tribes of Siletz Indians of Oregon ("the Siletz Tribe") proven, by a preponderance of the evidence, its claim for monopolization?

Yes_____ No_____

**QUESTION 5-B:** If your answer to Question 5-A is yes, what sum of damages do you award to the Siletz Tribe?

$_____

**QUESTION 6-A:** Has Plaintiff Siletz Tribe proven, by a preponderance of the evidence, its claim for attempted monopolization?

Yes_____ No_____

**QUESTION 6-B:** If your answer to Question 6-A is yes, what sum of damages do you award to the Siletz Tribe?

$_____

Do not be concerned about duplicating the damages, if any, awarded to the Siletz Tribe in 5-B. The court will make any necessary adjustments.

DATED: April _____, 2003. _____

Presiding Juror

**[Court's First Draft of Jury Instructions (Apr. 17, 2003)]**

* * *

Members of the jury, you have heard all the evidence in this case and it is now your duty to decide the facts and reach your decision.

I will tell you the law that you must follow in reaching your decision. Although you may think the law is, or should be, different, you are bound by your oath to apply the law that I give to you.

During the trial, I have occasionally sustained objections to questions or pushed the attorneys to keep this trial moving along. You should not construe anything that I have said or done as expressing an opinion regarding the evidence or which party your verdict should be for.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons. All persons, including corporations, partnerships, tribes, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Your decision must be based solely on the evidence. Do not allow bias, prejudice or sympathy to influence you. The evidence consists of the testimony of the witnesses, the exhibits you will have in the jury room, and any facts to which the parties have agreed. A list of stipulated facts and a glossary are in [P. 2] your juror notebooks. Additional stipulations were read to you during the trial. When the parties stipulate to a fact, you should consider that fact to be true.

The comments of the attorneys are not evidence. If your recollection of the evidence differs from that of the attorneys, rely upon your own memory.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

You are the judges of whether the witnesses were telling the truth when they testified. You must presume that each witness told the truth, but you are free to decide otherwise based on the manner in which the witness testified, the motive or bias of the witness, or if there was other different evidence which you believe. If you find that a witness intentionally lied in one part of his or her testimony, you are free to disregard anything else that witness said. You are the judges of how much weight a witness's testimony deserves. In considering testimony you are permitted to form reasonable conclusions by using your good common sense.

You should not decide a fact merely by counting the number of witnesses or exhibits. The testimony of one witness whom you believe is enough to prove any fact in dispute.

You have heard testimony from persons who, because of their education or experience, are permitted to state opinions and the reasons for their opinions.

[P. 3] Expert testimony should be judged like any other testimony. You may give it whatever weight you think it deserves, considering the education and experience of the expert witness, the reasons given for the opinion, and all the other evidence in the case. If, in reaching an opinion, an expert relied on certain facts that you find were not true, you are free to disregard that opinion.

Questions have been asked in which a witness was requested to assume that certain facts were true, and to give an opinion based on those assumed facts. These are called hypothetical questions. If you find that material facts assumed and relied upon by the witnesses in forming an opinion were not established by the evidence or were untrue, you may disregard that opinion.

Some parties to this case are corporations. A corporation is responsible for the acts of its directors, officers, employees, or other agents, when such acts are performed in the course of conducting the corporation's business. You should regard such actions as the acts of the corporation. To the extent a corporation's intentions or motives are at issue in this case, you may impute to a corporation the intentions and motives of its directors, officers, employees, or other agents in conducting the corporation's business.

In a moment, I will instruct you on the law that governs the particular claim in this case, and I will tell you that the Plaintiffs have the burden of proving their claims by a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight of evidence. It is such evidence that when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs more heavily, you must resolve that question against the plaintiff upon whom the burden of proof [P. 4] rests. You should base your decision on all of the evidence, regardless of which party presented it.

Plaintiffs' Claims

I will now instruct you on the law governing the particular claims in this case. The Plaintiffs are the Confederated Tribes of Siletz Indians of Oregon and the Ross-Simmons Hardwood Lumber Co. The Defendant is the Weyerhaeuser

Company. You should decide the case as to each plaintiff separately.

The Plaintiffs seek damages for injuries they claim to have sustained as a result of Defendant's alleged violations of the antitrust laws of the United States. Plaintiffs contend that the Defendant unlawfully monopolized or attempted to monopolize the markets for alder sawlogs and finished alder lumber, in violation of Section 2 of the Sherman Antitrust Act. Defendant denies those allegations.

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or monopolization of any business or industry. The Sherman Act protects competition, not particular competitors. The mere fact that a particular company is unable to compete in the market place, or goes out of business, does not establish a violation of the antitrust laws. Only conduct that unfairly tends to destroy competition itself violates the Sherman Antitrust Act. In other words, the Plaintiffs must prove that Defendants acts injured not only the plaintiff itself, but also injured competition in the relevant market.

The antitrust laws apply to more than just retail sales of finished goods to end users such as a family. The antitrust laws also protect businesses that purchase goods for their own use, or that buy or sell raw materials to be [P. 5] transformed into other products. In other words, the antitrust laws apply to "inputs" as well as "outputs."

Monopolization and attempted monopolization are two distinct claims, with somewhat different elements. You should analyze those claims separately.

Monopolization Claim

To prevail on its claim for unlawful monopolization, a Plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that the Defendant had monopoly power in a relevant market;

Second, that the Defendant willfully acquired or maintained that power through anti-competitive conduct; and

Third, that the Plaintiff was injured in its business or property because of Defendant's anti-competitive conduct.

A Plaintiff must prove, by a preponderance of the evidence, all three of those elements in order to prevail on its monopolization claim. If you find that a Plaintiff did not prove one or more of those three elements, then your verdict on that claim would be for the Defendant and against that Plaintiff.

Before you can decide whether the Defendant has monopoly power, you must first define the scope of the "relevant market." There are two aspects to this: (1) the "product market" and (2) the "geographic market."

The "relevant product market" includes the specific products at issue, along with any other products that, though not necessarily identical, are reasonable substitutes from a buyer's point of view. In other words, the relevant product market includes those products that compete meaningfully with each other. Plaintiffs contend there are two relevant product markets in this case: the alder sawlog market and the finished alder lumber market. Defendant contends [P. 6] that the only relevant product market is the finished hardwood lumber market.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in

the same market. You also may consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are followed by changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

You have heard references to the term "submarket." A submarket is just another way of defining the relevant market. For purposes of this case, the terms "market" and "submarket" are synonymous.

The second factor you must consider, in determining the relevant market, is the "relevant geographic market." This is the area in which the Defendant faces competition from suppliers that (1) are in the relevant product market, and (2) to which a buyer can practicably turn for supplies. This relevant geographic market can be as large as the entire world or the United States or as small as a single community. Plaintiffs contend the relevant geographic market for alder sawlogs is the Pacific Northwest, and the relevant geographic market for finished alder lumber is the United States. Defendant contends that the relevant geographic market is at least the entire United States.

To determine the proper geographic market, you may consider whether changes in prices at one location have fairly direct substantial effects on prices [P. 7] or sales at other locations, and if people in the industry and the public at large view sellers in the different locations as being in competition with each other. Such evidence would tend to prove that these different locations are in the same relevant geographic market.

You also may consider how readily sellers can and do shift from selling in one location to selling in another. Evidence that sellers shift readily among different locations in

response to price changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where purchasers, as a practical matter, can and do buy the product; that is, whether buyers residing in one area buy from the same sources as buyers residing in another area or if they buy from local sources rather than more distant sources because they find it more convenient or practical to do so. In this regard, you may consider whether an increase in prices charged by suppliers in one location would cause a substantial number of purchasers to turn to more remote sources of supply. If so, the two locations are part of the same geographic market.

Once you have defined the relevant market or markets, you must then determine whether defendant has monopoly power in that market. "Monopoly power" in sales of finished products is the power to control selling prices in, or to exclude competition from, the relevant market.

A "monopsony" is a monopoly on the buyer side of the transaction. A "monopsonist" has the power to control the purchase price of an item that is necessary in the production of a product, or to exclude competition. When I refer in these instructions to a monopoly or to monopoly power, that term also includes a monopsony unless the context indicates otherwise.

[P. 8] The "power to control prices" is the power of a company to establish appreciably higher prices for goods sold than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices on goods sold eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices. A similar rule applies to a monopsonist, except the power to control prices is the power to reduce the price the monopsonist must pay for the raw materials or goods that it purchases.

The "power to exclude competition" means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, the Plaintiffs need not prove that prices were raised or that competition actually was excluded, but only that the Defendant had the power to raise prices or exclude competition. A company may face some competition in the relevant market and still have monopoly power. Likewise, a monopsonist need only have the power to lower prices or exclude competition, regardless of whether that power has actually been exercised yet.

You may infer that Defendant has monopoly power in a market if you find that (1) defendant controls a dominant share of that market and (2) there are significant barriers to entry to that market and existing competitors lack the capacity to increase their output significantly in the short run.

"Market share" is a firm's share of total industry sales expressed as a percentage. If you determine that the Defendant's share of the relevant market is less than 50 percent, that market share by itself does not permit you to infer [P. 9] that the Defendant has monopoly power. If you determine that Defendant's share of the relevant market is 80 percent or higher, that is strong evidence of the existence of monopoly power. If you determine that Defendant's market share is somewhere between 50 percent and 80 percent, you may infer the existence of monopoly power from that share, and the inference is stronger the higher Defendant's market share is within that range.

You also may consider the trend in Defendant's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor that you may consider is the number and size of the Defendant's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to Defendant in the relevant market, this may tend to indicate that Defendant has monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that Defendant does not have monopoly power.

If you find that Defendant has monopoly power in one or more relevant markets, as alleged by the Plaintiffs, you should then determine whether Defendant willfully acquired or maintained that monopoly power through anti-competitive conduct.

Anti-competitive conduct is conduct that has the effect of wrongly preventing or excluding competition, or frustrating or impairing the efforts of other firms to compete for customers within the relevant market, making it very difficult or impossible for competitors to engage in fair competition. Not [P. 10] everything that enables a company to gain or maintain a monopoly is anti-competitive.

In deciding whether conduct is anti-competitive, you should consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition. Anti-competitive conduct does not include ordinary means of competition, such as offering better products or services, exercising superior skill or business judgment, utilizing more efficient technology, better marketing, or exercising natural competitive advantages such as unique geographic access to raw materials or markets.

To establish that the defendant acted willfully, plaintiff must prove either (1) that defendant engaged in anti-

competitive conduct with the conscious object of furthering the dominance of defendant in the relevant market, or (2) that this was the necessary direct consequence of defendant's conduct or business arrangements.

One of the Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act if you also find that Defendant had a reasonable expectation that it could subsequently recoup any losses it had sustained through this conduct, either by paying lower log prices in the future or by charging higher prices for Defendant's products due to a reduction in competition from other saw mills.

There has been some testimony in this case regarding contracts that gave [P. 11] Defendant the exclusive right to purchase part or all of the hardwood logs harvested on certain lands during an agreed-upon time period. There has also been testimony regarding certain restrictions the Defendant attached to timber lands it sold, or to timber sales, requiring the buyer to sell back to the Defendant all hardwood logs harvested from those lands. You may find that these contracts or restrictions were anti-competitive conduct if you conclude that they substantially and unreasonably lessened competition in the relevant market. Some of the factors you should consider include the duration of the agreement or restriction, whether competing buyers had adequate alternative sources of supply, the circumstances under which the defendant entered into the exclusive contracts or the other restrictions, and its reasons for doing so.

Plaintiffs have also contended that the Defendant made false statements to the Oregon Department of Forestry in order to obtain an exemption from log export regulations. In deciding whether this was anti-competitive conduct, some of

the factors you should consider include whether the statements were false, the significance of any misstatements, whether Defendant knew the information was erroneous or tried to correct any error it discovered. Defendant's motives, and the extent to which this exemption harmed competition in the relevant market. The effect upon competition is always an important consideration. Bear in mind that this is an anti-trust case. The Defendant is not on trial for making false statements to the government.

The final element of Plaintiffs' claim for monopolization requires a Plaintiff to show, by a preponderance of evidence, that it was injured in its business or property because of Defendant's anti-competitive conduct. I will cover that issue in more detail later in these instructions.

[P. 12] In summary, if you find that a Plaintiff has established all three required elements of its claim for monopolization, then your verdict on this claim is for that Plaintiff. On the other hand, if a Plaintiff has failed to establish one or more of the three required elements, then your verdict on this claim is for the Defendant and against that Plaintiff. Bear in mind that the claims of each Plaintiff must be analyzed separately.

Attempted Monopolization

Plaintiffs' second claim alleges that they were injured by defendant's unlawful attempt to monopolize. To prevail on a claim of attempted monopolization, a plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that defendant engaged in anti-competitive conduct;

Second, that defendant had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market; and

Fourth, that the plaintiff was injured in its business or property by the defendant's anti-competitive conduct.

The definitions of anti-competitive conduct, monopoly power, relevant market, and injury, are the same as in the previous claim. The principal difference between the claims is that, on their claim for attempted monopolization, Plaintiffs need not show that the Defendant actually succeeded in achieving monopoly power. It is sufficient for the Plaintiffs to establish the four elements that I have just listed.

The term "specific intent to achieve monopoly power" means acting with [P. 13] the conscious object of acquiring the power to control prices or to exclude or destroy competition in the relevant market. Proof of that intent may be shown by direct evidence, or it can be inferred from indirect evidence such as the Defendant's conduct.

Plaintiffs must also show, by a preponderance of the evidence, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market if it continued to engage in the same or similar conduct. This is sometimes referred to as a "dangerous probability of success." The plaintiff does not have to prove that Defendant was nearly certain to achieve monopoly power. However, the chance of success must have been substantial and real. Put another way, Plaintiffs must show that the Defendant intended to achieve monopoly power, and there was a reasonable likelihood that Defendant would ultimately achieve that goal.

In evaluating this element, you should consider the market share and power of defendant as compared to its competitors; whether defendant's share of the relevant market was increasing or decreasing; the actual or probable impact on competition of defendant's anti-[P. 14] competitive conduct; and whether barriers to entry made it difficult for competitors to enter the market.

In evaluating the extent of any barriers to entry, you should consider the ability of prospective competitors to obtain necessities such as raw materials, manufacturing facilities, labor, financing, and customers. You should also consider how readily firms that presently produce other products could shift to the production of products that do compete in the relevant product market.

The final element of each of the Plaintiffs' claims requires them to show that the plaintiff was injured in its business or property by the defendant's anti-competitive conduct. The term "business" includes any commercial interest or venture. It is undisputed that both Ross-Simmons and the STEDCO joint venture were businesses. It is not necessary to quantify the precise amount of that loss. If you find that a Plaintiff sustained at least some injury resulting from an antitrust violation committed by the Defendant, then you should consider this element of that Plaintiffs' claims to have been proven.

Damages

If you find for a plaintiff on one or both of its claims, you must then decide the amount of damages that plaintiff is entitled to recover from the Defendant. In instructing you about damages, I do not mean to suggest which party your verdict should be for.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property that was a direct result or a likely consequence of the conduct that you have found to be unlawful. The wrongful conduct of the defendant need not have been the exclusive cause of the harm, nor need the plaintiff rule out all other possible causes of injury. However, the defendant's wrongful conduct must have been a material cause of the injury, that is, it must have been a substantial factor in producing the harm. If you find that a plaintiff's injury was caused solely by something other than an antitrust violation,

then that plaintiff is not entitled to recover damages for that injury.

Difficulty in fixing the precise amount of damages does not preclude fairly compensating a plaintiff so long as there is a reasonable basis in the evidence for your award. The law does not requires that damages be calculated with mathematical precision. However, you may not calculate damages based only [P. 15] on speculation or guesswork.

A plaintiff is entitled to recover any profits that you determine it lost as a result of an antitrust violation by the Defendant. The term "profit" means the amount by which a plaintiff's gross revenues would have exceeded all of the costs and expenses necessary to produce those revenues. "Past lost profits" is the difference between the profit (or loss) that the company actually earned during the specified time period versus the profit that company would have earned during the same time period but for the Defendant's violation of the antitrust laws.

One method of estimating past lost profits is by looking at the company's actual net profits before the alleged antitrust violation. If you find that the earlier period is a reliable guide to estimate what that plaintiff's actual net profits would have been in the absence of the antitrust violation, then you may calculate the plaintiff's loss of profits by comparing (a) the plaintiff's actual net profits in the earlier period with (b) the plaintiff's actual net profits (or loss) thereafter. You are permitted to use other methods of computing lost profits, such as calculating the additional costs incurred by the plaintiff as a result of the antitrust violation less any cost savings that resulted, so long as you have a sufficient basis for making that determination.

If you find that a plaintiff was forced out of business by the defendant's violation of the antitrust laws, then that plaintiff also is entitled to recover either its projected future lost profits or the "going-concern value." The going concern

value of a business is what a willing buyer knowing all available information would have paid a willing seller for that business. This may be measured by comparing the fair market value of the business both before and after the [P. 16] antitrust violation harming that business. The most important element of going concern value is the potential earning power of the business and expected future profitability.

You may not award damages for both loss of going concern value and also lost future profits because the going concern value of a business is a method of valuing the future profitability of a business. You should therefore consider the anticipated future profits of a business as a factor in determining the loss of the going concern value of that business.

Your decision must be based on the considered judgment of each of you. Your verdict in this case must be unanimous. In other words, each of you must agree with the final decision.

You must talk with one another with the idea of reaching an agreement, if you can do so based on your own judgment. You must each decide the case for yourself. Do not reach a decision until you have impartially considered the evidence in the case with your fellow jurors. Do not hesitate to reexamine your views or change your mind if you become convinced that you are wrong, but do not change your mind about the effect or credibility of the evidence solely because your fellow jurors disagree with you, or because you want to reach a unanimous decision.

When you go to the jury room, select a presiding juror. The presiding juror shall preside over the deliberations, but has no greater voice than any other juror.

A verdict form has been prepared for your use. This form will be with you in the jury room. When you have reached unanimous agreement as to your verdict, the presiding juror should fill in, date and sign the form to state the [P. 17] ver-

dict upon which you unanimously agree. You will then return your verdict to the courtroom.

In the unlikely event that it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your presiding juror, or by one or more members of the jury. No member of the jury should attempt to communicate with the court by means other than a signed writing. The court will not communicate with any member of the jury about the merits of the case other than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You may communicate with the bailiff regarding personal needs or in an emergency.

Do not reveal to any person—not even to the court—how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

April 17, 2003 (8:31AM)

**[Verdict for the Plaintiff (Apr. 18, 2003)]**

* * *

We, the Jury, unanimously find as follows:

**QUESTION 1:** Have the Plaintiffs established, by a preponderance of the evidence, that there is a relevant market for alder sawlogs in the Pacific Northwest?

Yes__X__ No_____

**QUESTION 2:** Have the Plaintiffs established, by a preponderance of the evidence, that there is a relevant market for finished alder lumber in the United States?

Yes_____ No__X__

[P. 2] If you answered "yes" to Question 1, or to Question 2, or both, then you should proceed to Question 3-A. If you answered "no" to both Questions 1 and 2, then your verdict is for the Defendant and you should not answer the remaining questions.

**QUESTION 3-A:** Has Plaintiff Ross-Simmons Hardwood Lumber Company ("Ross Simmons") proven, by a preponderance of the evidence, its claim for monopolization?

Yes__X__ No_____

**QUESTION 3-B:** If your answer to Question 3-A is yes, what sum of damages, if any, do you award to Ross-Simmons?

$26,256,406 (SCENARIO B)

**QUESTION 4-A:** Has Plaintiff Ross-Simmons proven, by a preponderance of the evidence, its claim for attempted monopolization?

Yes__X__ No_____

**QUESTION 4-B:** If your answer to Question 4-A is yes, what sum of damages, if any, do you award to Ross-Simmons?

$26,256,406 (SCENARIO B)

Do not be concerned about duplicating the damages, if any, awarded to Ross-Simmons in 3-B. The court will make any necessary adjustments.

[P. 3] **QUESTION 5-A:** Has Plaintiff STEDCO Joint Venture proven, by a preponderance of the evidence, its claim for monopolization?

Yes_____ No___X_____

**QUESTION 5-B:** If your answer to Question 5-A is yes, what sum of damages, if any, do you award to the STEDCO Joint Venture?

$_____

**QUESTION 6-A:** Has Plaintiff STEDCO Joint Venture proven, by a preponderance of the evidence, its claim for attempted monopolization?

Yes_____ No___X_____

**QUESTION 6-B:** If your answer to Question 6-A is yes, what sum of damages, if any, do you award to the STEDCO Joint Venture?

$_____

Do not be concerned about duplicating the damages, if any, awarded to the Joint Venture in 5-B. The court will make any necessary adjustments.

DATED: April 18, 2003. /s/Don Treece
Presiding Juror
Don Treece

**[Court's Instructions to the Jury (Apr. 21, 2003)]**

* * *

Members of the jury, you have heard all the evidence in this case and it is now your duty to decide the facts and reach your decision.

I will tell you the law that you must follow in reaching your decision.

Although you may think the law is, or should be, different, you are bound by your oath to apply the law that I give to you.

During the trial, I have occasionally sustained objections to questions or pushed the attorneys to keep this trial moving along. You should not construe anything that I have said or done as expressing an opinion regarding the evidence or which party your verdict should be for.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons. All persons, including corporations, partnerships, tribes, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Your decision must be based solely on the evidence. Do not allow bias, prejudice or sympathy to influence you. The evidence consists of the testimony of the witnesses, the exhibits you will have in the jury room, and any facts to which the parties have agreed. A list of stipulated facts and a glossary are in [P. 2] your juror notebooks. Additional stipulations were read to you during the trial. When the parties stipulate to a fact, you should consider that fact to be true.

The comments of the attorneys are not evidence. If your recollection of the evidence differs from that of the attorneys, rely upon your own memory.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

You are the judges of whether the witnesses were telling the truth when they testified. You must presume that each witness told the truth, but you are free to decide otherwise based on the manner in which the witness testified, the motive or bias of the witness, or if there was other different evidence which you believe. If you find that a witness intentionally lied in one part of his or her testimony, you are free to disregard anything else that witness said. You are the judges of how much weight a witness's testimony deserves. In considering testimony you are permitted to form reasonable conclusions by using your good common sense.

You should not decide a fact merely by counting the number of witnesses or exhibits. The testimony of one witness whom you believe is enough to prove any fact in dispute.

You have heard testimony from persons who, because of their education or experience, are permitted to state opinions and the reasons for their opinions. [P. 3] Expert testimony should be judged like any other testimony. You may give it whatever weight you think it deserves, considering the education and experience of the expert witness, the reasons given for the opinion, and all the other evidence in the case. If, in

reaching an opinion, an expert relied on certain facts that you find were not true, you are free to disregard that opinion.

Questions have been asked in which a witness was requested to assume that certain facts were true, and to give an opinion based on those assumed facts. These are called hypothetical questions. If you find that material facts assumed and relied upon by the witnesses in forming an opinion were not established by the evidence or were untrue, you may disregard that opinion.

Some parties to this case are corporations. A corporation is responsible for the acts of its directors, officers, employees, or other agents, when such acts are performed in the course of conducting the corporation's business. You should regard such actions as the acts of the corporation. To the extent a corporation's intentions or motives are at issue in this case, you may impute to a corporation the intentions and motives of its directors, officers, employees, or other agents in conducting the corporation's business. These rules I have just given you regarding corporations apply to joint ventures as well.

In a moment, I will instruct you on the law that governs the particular claims in this case, and I will tell you that the Plaintiffs have the burden of proving their claims by a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight of evidence. It is such evidence that when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which [P. 4] side it weighs more heavily, you must resolve that question against the plaintiff upon whom the burden of proof rests. You should base your decision on all of the evidence, regardless of which party presented it.

Plaintiffs' Claims

I will now instruct you on the law governing the particular claims in this case. The Plaintiffs are the Ross-Simmons Hardwood Lumber Co., and the STEDCO Joint Venture between Ross-Simmons and the Confederated Tribes of Siletz Indians of Oregon. The Defendant is the Weyerhaeuser Company. You should decide the case as to each plaintiff separately.

The Plaintiffs seek damages for injuries they claim to have sustained as a result of Defendant's alleged violations of the antitrust laws of the United States. Plaintiffs contend that the Defendant unlawfully monopolized or attempted to monopolize the alleged relevant markets for alder sawlogs and finished alder lumber, in violation of Section 2 of the Sherman Antitrust Act, and that the Plaintiffs were damaged thereby. Defendant denies those allegations.

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or monopolization of any business or industry. The Sherman Act protects competition, not particular competitors. The mere fact that a particular company is unable to compete in the market place, or goes out of business, does not establish a violation of the antitrust laws. Only conduct that unfairly tends to destroy competition itself violates the Sherman Antitrust Act. In other words, the Plaintiffs must prove that Defendant's acts injured not only the plaintiff itself, but also injured competition in the relevant market.

[P. 5] The antitrust laws apply to more than just retail sales of finished goods to end users such as a family. The antitrust laws also protect businesses that purchase goods for their own use, or that buy or sell raw materials to be transformed into other products. In other words, the antitrust laws apply to "inputs" as well as "outputs."

Monopolization and attempted monopolization are two distinct claims, with somewhat different elements. You should analyze those claims separately.

Monopolization Claim

To prevail on its claim for unlawful monopolization, a Plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that the Defendant had monopoly power in a relevant market;

Second, that the Defendant willfully acquired or maintained that power through anti-competitive conduct; and

Third, that the Plaintiff was injured in its business or property because of Defendant's anti-competitive conduct.

A Plaintiff must prove, by a preponderance of the evidence, all three of those elements in order to prevail on its monopolization claim. If you find that a Plaintiff did not prove one or more of those three elements, then your verdict on that claim would be for the Defendant and against that Plaintiff.

Before you can decide whether the Defendant has monopoly power, you must first define the scope of the "relevant market." There are two aspects to this: (1) the "product market" and (2) the "geographic market."

The "relevant product market" includes the specific products at issue, along with any other products that, though not necessarily identical, are reasonable substitutes from a buyer's point of view. In other words, the relevant [P. 6] product market includes those products that compete meaningfully with each other. Plaintiffs contend there are two relevant product markets in this case; the alder sawlog market and the finished alder lumber market. Defendant contends that the only relevant product market is the finished hardwood lumber market.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in the same market. You also may consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are followed by changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

You have heard references to the term "submarket." A submarket is just another way of defining the relevant market. For purposes of this case, the terms "market" and "submarket" are synonymous.

The second factor you must consider, in determining the relevant market, is the "relevant geographic market." This is the area in which the Defendant faces competition from suppliers that (1) are in the relevant product market, and (2) to which a buyer can practicably turn for supplies. This relevant geographic market can be as large as the entire world or the United States or as small as a single community. Plaintiffs contend the relevant geographic market for alder sawlogs is the Pacific Northwest, and the relevant geographic market for finished alder lumber is the United States. Defendant contends that the relevant [P. 7] geographic market is the finished hardwood market for at least the entire United States, and that alder sawlogs are not a relevant market.

To determine the proper geographic market, you may consider whether changes in prices at one location have fairly direct substantial effects on prices or sales at other locations, and if people in the industry and the public at large view sellers in the different locations as being in competition with

each other. Such evidence would tend to prove that these different locations are in the same relevant geographic market.

You also may consider how readily sellers can and do shift from selling in one location to selling in another. Evidence that sellers shift readily among different locations in response to price changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where purchasers, as a practical matter, can and do buy the product; that is, whether buyers residing in one area buy from the same sources as buyers residing in another area or if they buy from local sources rather than more distant sources because they find it more convenient or practical to do so. In this regard, you may consider whether an increase in prices charged by suppliers in one location would cause a substantial number of purchasers to turn to more remote sources of supply. If so, the two locations are part of the same geographic market.

Once you have defined the relevant market or markets, you must then determine whether defendant has monopoly power in that market. "Monopoly power" in sales of finished products is the power to control selling prices in, or to exclude competition from, the relevant market.

[P. 8] A "monopsony" is a monopoly on the buyer side of the transaction. A "monopsonist" has the power to control the purchase price of an item that is necessary in the production of a product, or to exclude competition. When I refer in these instructions to a monopoly or to monopoly power, that term also includes a monopsony unless the context indicates otherwise.

The "power to control prices" is the power of a company to establish appreciably higher prices for goods sold than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a com-

pany that has raised prices on goods sold eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices. A similar rule applies to a monopsonist, except the power to control prices is the power to reduce the price the monopsonist must pay for the raw materials or goods that it purchases.

The "power to exclude competition" means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, the Plaintiffs need not prove that prices were raised or that competition actually was excluded, but only that the Defendant had the power to raise prices or exclude competition. A company may face some competition in the relevant market and still have monopoly power. Likewise, a monopsonist need only have the power to affect prices or exclude competition, regardless of whether that power has actually been exercised yet.

You may infer that Defendant has monopoly power in a market if you find that (1) defendant controls a dominant share of that market and (2) there are [P. 9] significant barriers to entry to that market and existing competitors lack the capacity to increase their output significantly in the short run.

"Market share" is a firm's share of total industry sales expressed as a percentage. If you determine that the Defendant's share of the relevant market is less than 50 percent, that market share by itself does not permit you to infer that the Defendant has monopoly power. If you determine that Defendant's share of the relevant market is 80 percent or higher, that is strong evidence of the existence of monopoly power. If you determine that Defendant's market share is somewhere between 50 percent and 80 percent, you may infer the existence of monopoly power from that share, and the

inference is stronger the higher Defendant's market share is within that range.

You also may consider the trend in Defendant's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor that you may consider is the number and size of the Defendant's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to Defendant in the relevant market, this may tend to indicate that Defendant has monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that Defendant does not have monopoly power.

If you find that Defendant has monopoly power in one or more relevant markets, as alleged by the Plaintiffs, you should then determine whether Defendant willfully acquired or maintained that monopoly power through anti-[P. 10] competitive conduct.

Anti-competitive conduct is conduct that has the effect of wrongly preventing or excluding competition, or frustrating or impairing the efforts of other firms to compete for customers within the relevant market, making it very difficult or impossible for competitors to engage in fair competition. Not everything that enables a company to gain or maintain a monopoly is anti-competitive.

In deciding whether conduct is anti-competitive, you should consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition. Anti-competitive conduct does not include ordinary

means of competition, such as offering better products or services, exercising superior skill or business judgment, utilizing more efficient technology, better marketing, or exercising natural competitive advantages such as unique geographic access to raw materials or markets.

To establish that the defendant acted willfully, plaintiff must prove either (1) that defendant engaged in anti-competitive conduct with the conscious object of furthering the dominance of defendant in the relevant market, or (2) that this was the necessary direct consequence of defendant's conduct or business arrangements.

One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

[P. 11] There has been some testimony in this case that the Defendant has some restrictive rights to purchase part or all of the hardwood logs harvested on certain lands during an agreed-upon time period. There has also been testimony regarding certain restrictions the Defendant attached to timber lands it sold, or to timber sales, requiring the buyer to sell back to the Defendant all hardwood logs harvested from those lands. You may find that these restrictions were anti-competitive conduct if you conclude that they substantially and unreasonably lessened competition in the relevant market. Some of the factors you should consider include the duration of the agreement or restriction, whether competing buyers had adequate alternative sources of supply, the circumstances under which the defendant entered into the contracts or the other restrictions, its reasons for doing so, and the relative bargaining strength of the parties to the arrangement.

Plaintiffs have also contended that the Defendant made false statements to the Oregon Department of Forestry in order to obtain an exemption from log export regulations. In deciding whether this was anti-competitive conduct, some of the factors you should consider include whether the statements were false, the significance of any misstatements, whether Defendant knew the information was erroneous or tried to correct any error it discovered, Defendant's motives, and the extent to which this exemption harmed competition in the relevant market. The effect upon competition is always an important consideration. Bear in mind that this is an anti-trust case. The Defendant is not on trial for making false statements to the government.

The final element of Plaintiffs' claim for monopolization requires a Plaintiff to show, by a preponderance of evidence, that it was injured in its business or [P. 12] property because of Defendant's anti-competitive conduct. I will cover that issue in more detail later in these instructions.

In summary, if you find that a Plaintiff has established all three required elements of its claim for monopolization, then your verdict on this claim is for that Plaintiff. On the other hand, if a Plaintiff has failed to establish one or more of the three required elements, then your verdict on this claim is for the Defendant and against that Plaintiff. Bear in mind that the claims of each Plaintiff must be analyzed separately.

Attempted Monopolization

Plaintiffs' second claim alleges that they were injured by defendant's unlawful attempt to monopolize. To prevail on a claim of attempted monopolization, a plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that defendant engaged in anti-competitive conduct;

Second, that defendant had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market; and

Fourth, that the plaintiff was injured in its business or property by the defendant's anti-competitive conduct.

The definitions of anti-competitive conduct, monopoly power, relevant market, and injury, are the same as in the previous claim. The principal difference between the claims is that, on their claim for attempted monopolization, Plaintiffs need not show that the Defendant actually succeeded in achieving monopoly power. It is sufficient for the Plaintiffs to establish the four [P. 13] elements that I have just listed.

The term "specific intent to achieve monopoly power" means acting with the conscious object of acquiring the power to control prices or to exclude or destroy competition in the relevant market. Proof of that intent may be shown by direct evidence, or it can be inferred from indirect evidence such as the Defendant's conduct.

Plaintiffs must also show, by a preponderance of the evidence, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market if it continued to engage in the same or similar conduct. This is sometimes referred to as a "dangerous probability of success." The plaintiff does not have to prove that Defendant was nearly certain to achieve monopoly power. However, the chance of success must have been substantial and real. Put another way, Plaintiffs must show that the Defendant intended to achieve monopoly power, and there was a reasonable likelihood that Defendant would ultimately achieve that goal.

In evaluating this element, you should consider the market share and power of defendant as compared to its competitors; whether defendant's share of the relevant market was increasing or decreasing; the actual or probable impact on

competition of defendant's anti-competitive conduct; and whether barriers to entry made it difficult for competitors to enter the market.

In evaluating the extent of any barriers to entry, you should consider the ability of prospective competitors to obtain necessities such as raw materials, manufacturing facilities, labor, financing, and customers. You should also consider how readily firms that presently produce other products could shift to the production of products that do compete in the relevant product market.

[P. 14] The final element of each of the Plaintiffs' claims requires them to show that the plaintiff was injured in its business or property by the defendant's anticompetitive conduct. The term "business" includes any commercial interest or venture. It is undisputed that both Ross-Simmons and the STEDCO joint venture were businesses. It is not necessary to quantify the precise amount of that loss. If you find that a Plaintiff sustained at least some injury resulting from an antitrust violation committed by the Defendant, then you should consider this element of that Plaintiffs' claims to have been proven.

Damages

If you find for a plaintiff on one or both of its claims, you must then decide the amount of damages that plaintiff is entitled to recover from the Defendant, if any. In instructing you about damages, I do not mean to suggest which party your verdict should be for.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property that was a direct result or a likely consequence of the conduct that you have found to be unlawful. The wrongful conduct of the defendant need not have been the exclusive cause of the harm, nor need the plaintiff rule out all other possible causes of injury. However, the defen-

dant's wrongful conduct must have been a material cause of the injury, that is, it must have been a substantial factor in producing the harm. If you find that a plaintiff's injury was caused solely by something other than an antitrust violation, then that plaintiff is not entitled to recover damages for that injury.

Difficulty in fixing the precise amount of damages does not preclude fairly compensating a plaintiff so long as there is a reasonable basis in the evidence [P. 15] for your award. The law does not requires that damages be calculated with mathematical certainty. However, you may not calculate damages based only on speculation or guesswork.

A plaintiff is entitled to recover any profits that you determine it lost as a result of an antitrust violation by the Defendant. The term "profit" means the amount by which a plaintiff's gross revenues would have exceeded all of the costs and expenses necessary to produce those revenues. "Past lost profits" is the difference between the profit (or loss) that the company actually earned during the specified time period versus the profit that company would have earned during the same time period but for the Defendant's violation of the antitrust laws.

One method of estimating past lost profits is by looking at the company's actual net profits before the alleged antitrust violation. If you find that the earlier period is a reliable guide to estimate what that plaintiff's actual net profits would have been in the absence of the antitrust violation, then you may calculate the plaintiff's loss of profits by comparing (a) the plaintiff's actual net profits in the earlier period with (b) the plaintiff's actual net profits (or loss) thereafter. You are permitted to use other methods of computing lost profits, such as calculating the additional costs incurred by the plaintiff as a result of the antitrust violation less any cost savings that resulted, so long as you have a sufficient basis for making that determination.

If you find that a plaintiff was forced out of business by the defendant's violation of the antitrust laws, then that plaintiff also is entitled to recover either its projected future lost profits or the "going-concern value." The going concern value of a business is what a willing buyer knowing all available information [P. 16] would have paid a willing seller for that business. This may be measured by comparing the fair market value of the business both before and after the antitrust violation harming that business. The most important element of going concern value is the potential earning power of the business and expected future profitability.

You may not award damages for both loss of going concern value and also lost future profits because the going concern value of a business is a method of valuing the future profitability of a business. You should therefore consider the anticipated future profits of a business as a factor in determining the loss of the going concern value of that business.

Your decision must be based on the considered judgment of each of you. Your verdict in this case must be unanimous. In other words, each of you must agree with the final decision.

You must talk with one another with the idea of reaching an agreement, if you can do so based on your own judgment. You must each decide the case for yourself. Do not reach a decision until you have impartially considered the evidence in the case with your fellow jurors. Do not hesitate to reexamine your views or change your mind if you become convinced that you are wrong, but do not change your mind about the effect or credibility of the evidence solely because your fellow jurors disagree with you, or because you want to reach a unanimous decision.

When you go to the jury room, select a presiding juror. The presiding juror shall preside over the deliberations, but has no greater voice than any other juror.

[P. 17] A verdict form has been prepared for your use. This form will be with you in the jury room. When you have reached unanimous agreement as to your verdict, the presiding juror should fill in, date and sign the form to state the verdict upon which you unanimously agree. You will then return your verdict to the courtroom.

In the unlikely event that it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your presiding juror, or by one or more members of the jury. No member of the jury should attempt to communicate with the court by means other than a signed writing. The court will not communicate with any member of the jury about the merits of the case other than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You may communicate with the bailiff regarding personal needs or in an emergency.

Do not reveal to any person — not even to the court — how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

April 17, 2003 (11:25PM)

**[Court's Final Draft of the Verdict (Apr. 21, 2003)]**

* * *

We, the Jury, unanimously find as follows:

**QUESTION 1:** Have the Plaintiffs established, by a preponderance of the evidence, that there is a relevant market for alder sawlogs in the Pacific Northwest?

Yes_____ No_____

**QUESTION 2:** Have the Plaintiffs established, by a preponderance of the evidence, that there is a relevant market for finished alder lumber in the United States?

Yes_____ No_____

[P. 2] If you answered "yes" to Question 1, or to Question 2, or both, then you should proceed to Question 3-A. If you answered "no" to both Questions 1 and 2, then your verdict is for the Defendant and you should not answer the remaining questions.

**QUESTION 3-A:** Has Plaintiff Ross-Simmons Hardwood Lumber Company ("Ross Simmons") proven, by a preponderance of the evidence, its claim for monopolization?

Yes_____ No_____

**QUESTION 3-B:** If your answer to Question 3-A is yes, what sum of damages, if any, do you award to Ross-Simmons?

$_____

**QUESTION 4-A:** Has Plaintiff Ross-Simmons proven, by a preponderance of the evidence, its claim for attempted monopolization?

Yes_____ No_____

**QUESTION 4-B:** If your answer to Question 4-A is yes, what sum of damages, if any, do you award to Ross-Simmons?

$_____

Do not be concerned about duplicating the damages, if any, awarded to Ross-Simmons in 3-B. The court will make any necessary adjustments.

[P. 3] **QUESTION 5-A:** Has Plaintiff STEDCO Joint Venture proven, by a preponderance of the evidence, its claim for monopolization?

Yes_____ No_____

**QUESTION 5-B:** If your answer to Question 5-A is yes, what sum of damages, if any, do you award to the STEDCO Joint Venture?

$_____

**QUESTION 6-A:** Has Plaintiff STEDCO Joint Venture proven, by a preponderance of the evidence, its claim for attempted monopolization?

Yes_____ No_____

**QUESTION 6-B:** If your answer to Question 6-A is yes, what sum of damages, if any, do you award to the STEDCO Joint Venture?

$_____

Do not be concerned about duplicating the damages, if any, awarded to the Joint Venture in 5-B. The court will make any necessary adjustments.

DATED: April _____, 2003. _____

Presiding Juror

**[Defendant's Memorandum in Support of Renewed Motion for Judgment as a Matter of Law and Alternative Motion for New Trial (May 2, 2003)]**

* * *

## [P. 1] INTRODUCTION

At the close of all of the evidence, Weyerhaeuser Company ("Weyerhaeuser") moved for judgment as a matter of law on several alternative grounds. Among other things, Weyerhaeuser argued that the damage theories presented by plaintiff Ross-Simmons Hardwood Lumber Co. ("Ross-Simmons") were legally defective and insufficient as a matter of law under well-settled and binding antitrust precedent because they required improper speculation by the jury.

First, Ross-Simmons calculated its lost profits and lost going concern value by looking at *defendant's* profit margins. That is highly unusual, and, as discussed below, prior attempts to calculate antitrust damages in this manner have been rejected by the appellate courts.

Second, and even more significant, Ross-Simmons compared defendant's positive profit margins in several "before" and "after" periods without taking into account the fact that market conditions changed between the "before" period and the "after" period. The unrefuted evidence showed that the Asian economic crisis, which began in late 1997, significantly affected both the price and quantity demanded for hardwood lumber, including alder lumber. In addition, the unrefuted evidence, including evidence offered by plaintiffs, showed that the harvest of hardwood logs in the Pacific Northwest *declined* during several years in the plaintiffs' "after" period.

Thus, changed market conditions affected both the demand for lumber and the supply of logs. Ross-Simmons' damage theories, however, ignored these changed conditions. Because plaintiffs failed to account for these changed condi-

tions, any damage award based on such a comparison of dissimilar "before" and "after" periods was inherently speculative as a matter of law under long-established and binding precedent. As such, judgment as a matter of law should have been granted in favor of Weyerhaeuser. No judgment may be permitted to rest upon such speculative and legally deficient evidence. Weyerhaeuser hereby renews its motion for judgment as a matter of law, both on that basis and for all of the other reasons previously argued.

[P. 2] In addition, Weyerhaeuser alternatively moves for a new trial based on numerous reversible errors made by the Court in both its pretrial and its trial rulings. These errors include, but are not limited to, errors in denying defendant's motions in limine, overruling defendant's objections to plaintiffs' improper evidence (including testimony containing hearsay and speculation), overruling defendant's objections to incorrect legal principles being given to the jury by plaintiff's counsel, sustaining plaintiffs' objection to defendant's attempt to expose the bias of one of plaintiffs' key fact witnesses, denying defendant's request for needed curative instructions, and denying defendant's objections to incorrect and incomplete jury instructions.

## BACKGROUND

Plaintiffs Confederated Tribes of Siletz Indians of Oregon ("Siletz") and Ross-Simmons sued Weyerhaeuser, acting through its business Northwest Hardwoods. Plaintiffs asserted claims of monopolization and attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiffs manufactured and sold hardwood lumber, including alder lumber, at mills located in Oregon and Washington. Plaintiffs' mills competed with defendant's mills as well as with mills owned by third parties. In Oregon, Washington, and British Columbia, defendant operated seven hardwood mills. Defendant also operated other hardwood mills elsewhere.

Plaintiffs alleged two "relevant markets" for antitrust purposes: a relevant market for the input of alder logs; and a relevant market for the output of alder lumber. Both before and during trial, defendant asserted that the only relevant product market in this case, which was brought by manufacturers of hardwood lumber against a competing manufacturer, was the market for hardwood lumber. Defendant's share of that market is less than four percent. Before trial, as part of its motion for summary judgment, defendant argued that it is inappropriate to send to the jury a relevant market for "inputs" in a lawsuit brought by competitors in an "output" market.

After a nine-day trial, the jury found that alder logs (*i.e.* "inputs") were a "relevant market," that alder lumber was not a "relevant market," that plaintiff Ross-Simmons had proven its claims of monopolization and attempted monopolization, and that plaintiff Siletz had not [P. 3] proven its claims. The jury also awarded damages to plaintiff Ross-Simmons in the amount $26,256,406, which the Court then trebled to $78,769,218, pursuant to 15 U.S.C. § 15.[1]

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[1] Plaintiffs' case rests on a theory of liability alleging that defendant raised its own log costs in order to raise its rivals' costs, even though defendant continued to make a profit. Plaintiffs' liability theory is not supported by antitrust precedent. It also makes no economic sense. The principal wrongful activity claimed in this case is that defendant intentionally paid logs suppliers *too much* for their logs. Even if this were true, which defendant denies, this conduct presents no harm either to consumers of hardwood lumber or to suppliers of logs. Because Weyerhaeuser did not operate at a loss, plaintiffs and others should have been able to do the same. The fact that plaintiffs did not operate at a profit only highlights that they were inefficient competitors. Other competitors stayed in business and, in fact, expanded, suggesting that what caused plaintiffs to fail were their own inefficiencies and not actions taken by Weyerhaeuser.

Assuming *arguendo* that the Court continues to accept plaintiffs' underlying liability theories as legally and economically plausible, the verdict for plaintiff Ross-Simmons should still be rejected, and judgment should be entered for Weyerhaeuser. As pointed out in Weyerhaeuser's motion for judgment as a matter of law regarding damages, plaintiff Ross-Simmons failed to offer evidence upon which a jury could make a reasonable conclusion regarding either the fact or the amount of damage to plaintiff Ross-Simmons resulting from Weyerhaeuser's allegedly illegal conduct. The damage calculation expressly accepted by the jury rests on a highly unusual and legally-flawed theory. As such, it is legally insufficient to serve as the basis for a conclusion that plaintiffs suffered any injury as a result of the conduct alleged.

[P. 4] Ross-Simmons's damage theory did not attempt directly to measure Ross-Simmons's own lost profits. Nor did it attempt to estimate "ill-gotten gains" by defendant. Instead, Ross-Simmons estimated the always positive profit

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The antitrust laws do not punish companies for *improving* overall efficiency in the marketplace. *See generally Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) ("we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting."). In addition, there was no evidence, or even any allegation, that Weyerhaeuser used its alleged "monopsony" power over alder logs to drive down the price of that input to the detriment of any log suppliers. Similarly, based on the jury's finding that alder lumber was not a relevant market (or submarket), Weyerhaeuser could not have driven up the price of alder lumber.

margins of defendant, Northwest Hardwoods, and observed that they were lower, but still positive, during the "after" (or "damage") period than they were during the "before" (or "base") period. Ross-Simmons then simply assumed (despite unrefuted evidence to the contrary) that all of Northwest Hardwoods's reduced, but still positive, profit margins must have been caused by defendant's own anti competitive conduct. Plaintiffs further assumed that all of that reduction could have been captured by plaintiffs in their own net profits.[2] Thus, under controlling antitrust precedent relating to both the fact and amount of damages, such a theory, lacking any foundation in admissible evidence, is speculative as a matter of law and legally insufficient to support a verdict for antitrust damages.

In the actual damage scenario expressly adopted by the jury (indeed, in each of Ross-Simmons's multiple, alternative damage scenarios), Ross-Simmons's damage expert did not consider the possibility of any connection between Northwest Hardwoods's lower, but still positive, profit margins in the years 1997-2000 and the other unrefuted factors in the marketplace that could easily account for the decline in profit margins. These unrefuted factors include the decreased hardwood lumber prices and hardwood lumber sales volume resulting from changed market conditions relating to, among other things, the demand for alder lumber beginning in late 1997. These factors also include the unrefuted decrease in the harvest of alder logs that occurred in 1996, 1998, and

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[2] Plaintiffs, however, made no effort to show that their mills (which were demonstrably less efficient than Weyerhaeuser's) would have been able to capture any, let alone all, of the benefits associated with the hypothesized lower log costs. Nor was there any attempt to track how Ross-Simmons's profits in preceding years had compared with Weyerhaeuser's profits for those same years. Thus, there was no interdependence shown between the two figures to account for any correlation.

2001, based on plaintiffs' own evidence. Because of plaintiffs' legally deficient damage theory (as well as the arguments presented in defendant's motions for summary judgment, [P. 5] motions in limine, evidentiary and jury instruction objections, and motions for judgment as a matter of law, all of which are renewed and incorporated herein by reference), Ross-Simmons's verdict cannot be allowed to stand. Judgment as a matter of law should be entered in favor of defendant. Alternatively, defendant's motion for new trial should be granted.

## DISCUSSION

### I. Because the Ross-Simmons Damage Model Accepted by the Jury Failed to Account for Other Causal Factors, Including Changed Market Conditions, the Jury's Verdict Is Speculative as a Matter of Law and Not Supported by the Evidence.

#### A. Settled antitrust law prohibits the jury from rendering a verdict based on speculation or guesswork.

To establish a claim in a civil antitrust action, a plaintiff must prove that the defendant's unlawful conduct in fact injured the plaintiff. To recover damages, the amount of the plaintiff's damage must also be proven. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). To prove the fact of injury, the plaintiff must show with "reasonable certainty" that the defendant's anticompetitive acts were a material cause of some of the plaintiff's injury. *Id.* at 562-63; *Dolphin Tours, Inc. v. Pacifico Creative Serv.*, 773 F.2d 1506, 1510 (9th Cir. 1985). To prove the amount of damage, the plaintiff must present evidence showing "the extent of the damages as a matter of just and reasonable inference." *Story Parchment*, 282 U.S. at 563. Although a more lenient standard applies to proving the amount of damage, *id.* at 562-63, the damage award may not

be "based on speculation or guesswork." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

Regarding the amount of damages, the plaintiff must introduce "something better" than "an interested guess." *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 393-94 (9th Cir. 1957). "[I]t is proper to indulge private antitrust plaintiffs only to the extent that there is evidence on the record from which a trier of fact could make a 'just and reasonable inference' regarding the amount of damages." *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1205 (1st

* * *

[P. 34] **CONCLUSION**

For the foregoing reasons, Weyerhaeuser respectfully requests that the Court grant its renewed motion for judgment as a matter of law and/or its alternative motion for new trial.

DATED this 2nd day of May, 2003.

Respectfully submitted,

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**[Vol. 10 (May 29, 2003)]**
**[Argument on Post-Trial Motions]**

* * *

[Tr. 3] (Thursday, May 29, 2003, 2:00 p.m.)

PROCEEDINGS

(Open court:)

THE COURT: Be seated. Good afternoon.

MR. SIMON: Good afternoon, Your Honor.

THE COURT: All right. We have a number of motions here. I want to take the exhibits first. I, of course, have the letters from the media indicating an interest, which I am sure they had. They have not filed a motion to intervene, which is probably appropriate.

And you have been handed now an exhibit or a listing of exhibits with columns on it indicating what we believe the record to show with regards to what went to the jury, what was used at the trial, what no one objected to as being made public, that is, those not sealed to begin with.

So what I want you to do, I want both counsel to do, is look over that list. It's going to be my determination in connection with these exhibits that it is under the Ninth Circuit law the defendant's burden of proof in this case. And that applies even though there were stipulated agreements to seal certain things.

And I think I still have to make a new analysis of it and it's the defendant's burden to show that it should be sealed.

The Ninth Circuit has pretty clearly held that

* * *

[Tr. 7] on the purpose of the stockholder request.

THE COURT: Well, you can give me a brief on that aspect also.

MR. SIMON: Very well.

THE COURT: As well as the others.

MR. SIMON: Thank you, Your Honor.

THE COURT: And the plaintiff can respond in five days.

All right. Let's go to the other motions. First, the defendant's renewed motion for a judgment as a matter of law, or alternatively, for a new trial. I have the benefit of excellent briefs. I had a good bit of briefing beforehand. I will hear your arguments briefly. I don't want you to repeat what's in your existing briefs, because I have read and studied that, but if you have any last minute pearls of wisdom you want to give me, I will hear it, Mr. Simon.

MR. SIMON: I do, Your Honor, and I appreciate that opportunity. I won't be repeating what's in the brief, but I will start out by observing that the relationship between damages and liability, what did Weyerhaeuser do wrong, is also an intertwined relationship.

And along the question of what did Weyerhaeuser do wrong, I come back to the question of the primary evidence is that they claimed that we have somehow caused prices to [Tr. 8] go too high for the input of alder logs. And although–

THE COURT: Didn't they also claim that you put them out of business?

MR. SIMON: But that's how, in that respect. By causing the log prices to go high, the plaintiffs' claim is that they could not buy logs at that price or those prices in a sufficiently profitable manner for them to remain in business. That is, I believe, the gravamen of the plaintiffs' claim.

THE COURT: I may be wrong, but I think it goes a little further. I think it goes to the availability at any price of alder logs.

MR. SIMON: And there I'd respectfully disagree, Your Honor, because the record does not have any evidence at all of any difficulty in obtaining an adequate number of logs, an adequate supply of logs, only the price. And that's our position on that, Your Honor.

THE COURT: I understand your position.

MR. SIMON: And with respect then to this question of prices, I already put in our briefing, and I won't repeat that, but I will then move on to another point, we already put in our motion for judgment as a matter of law that we filed in writing with the Court the argument that the case law does not accept the theory of predator predation based on this theory that a competitor can cause another [Tr. 9] competitor to go out of business by raising the cost of an input.

We've articulated that primarily in the context of raising rivals' costs, but I'd now like to add one more, you know, nuance on it to make sure this point is squarely before this Court. Because a related issue to that, Your Honor, is the concept of antitrust injury, and that is that a plaintiff is not entitled to recover for the damages or activities of a defendant that do not call – do not constitute what the law recognizes as antitrust injury.

And there is a case exactly on point here, Your Honor, after the Reid Brothers' decision, and I apologize for not briefing it to the Court. Frankly, I only located it and learned about it yesterday, but since it does relate to the issues we've already argued about, argued before the Court, I wanted to make sure the Court had the benefit of this case.

Because the case of the United States Supreme Court decision from 1986, it's after Reid Brothers, the decision is *Cargill v. Monfort of Colorado,* 479 U.S. 104,107 Supreme Court at 484. And very briefly, Your Honor, what that case involved was it was a challenge under the antitrust laws to a proposed merger. Essentially, in the meat packing industry,

the number five competitor in the [Tr. 10] meat packing industry was challenging a proposed merger between the number two and the number three competitors. The argument made by number five is if the number two and number three competitors are allowed to merge, they will obtain such synergies, efficiencies, and, if you will, deep pockets, that they will be able to bid up the price of cattle, the input for meat packing and meat processing, you know, so that they will be able to afford and still make a profit on the price of buying cattle and turning it into processed beef, but that we, the number five company, won't be able to maintain a profit at such a high price and we'd have to go out of business. That was the argument of the number five company.

Ultimately, the U.S. Supreme Court confronted that specific argument and said, that is not antitrust injury, because, in essence, what you are complaining about is that the defendant, the number two and number three companies that wanted to merge, would become more efficient, would be able to afford to pay higher prices for the input, in that case, cattle, maybe because you're not as efficient or not as big you can't afford that, and that produces some type of competitive injury to you. But that is not the type of injury that the antitrust laws were designed to remedy, and as the Supreme Court has said in that case, the antitrust laws were [Tr. 11] designed to foster price competition and promote price competition, and that includes not only competition for the output side, for the sale of the product, in that case, beef, but also price competition for the input, in that case, cattle, in our case, logs.

And so we make the argument, it's related to the arguments we've previously made, but it goes further and adds further support to that, in that there is no antitrust injury here because the types of argument when they complain that we caused the prices to go up of the logs, the inputs, that made it more difficult for them to be able to afford the logs, has been squarely rejected against the – as not recognizable, not cog-

nizable under the antitrust laws. We discussed that previously. I believe their response to the case was Reid Brothers. I've tried previously to distinguish Reid Brothers. I believe my distinction was rejected by the Court in its summary judgment decision, but I call this Cargill case to the attention of the Court because it's a decision of the U.S. Supreme Court after Reid Brothers.

The second point I'd like –

THE COURT: What is the date of the Cargill decision?

MR. SIMON: 1986.

THE COURT: Yes, I recall the case now that you [Tr. 12] remind me of it. Thank you very much.

MR. SIMON: The second point I'd like to call to the Court is that one of the allegations that the plaintiffs have made in this case is that we made false statements, the defendants made false statements to governmental entities, either the State of Oregon or the State of Washington, in order to procure certain log exemptions, official state action from Washington and from Oregon.

And those statements about our projected needs and our projected use of logs were false statements. We objected to that evidence. If the Court will recall, that came in at a very late filed amended. It was after summary judgment had been well briefed and decided. It was practically on the eve of trial. We objected to that as a new claim coming in. The Court overruled our objections.

It came in shortly before trial, and one of our objections at trial was that there's no evidence of intentional false statements. That's in the record, that's part of our renewed motions, I won't repeat that.

But I'd like to add another, if you will, aspect to that that has not be discussed before. For that, I do apologize, but I do want to make sure it's squarely before the Court. And that is

that the antitrust laws have a doctrine generated from the First Amendment, the freedom of speech, freedom of petition of government clause in the

* * *

[Tr. 15] glad to answer any questions about that.

THE COURT: Thank you. Mr. Haglund.

MR. HAGLUND: Yes, Your Honor. As to the first point that counsel makes regarding the Cargill case, I'm somewhat familiar with that case, not thoroughly familiar, because I didn't review it not knowing it was going to come up today, but that's a case that stands for the proposition that a competitor is not – does not have standing or antitrust – cognizable antitrust injury to challenge a potential merger on the grounds that Mr. Simon articulated; that they may do some things, they may have some certain efficiencies that will enable them to monopolize the market down the road.

That's a dramatically different situation than we had here. In this case, we had multiple grounds on which to base our liability claim, and they included the fraudulent procurement of the exemptions from the states, the contracts that they entered into to control portions of the supply, the actions within their own inventories that they took not only with respect to logs early on, but also with respect to what they did in the lumber market in terms of maintaining and building extraordinarily high levels of lumber inventory that made no sense from a business standpoint, were inconsistent with what CEO Steve Rogel suggested the company [Tr. 16] had done across the board in the annual statement in '98, yet were done with the purpose, we believe and we think the jury so found, with the purpose of maintaining upward pressure on the log markets by way of Weyerhaeuser continuing to consume very high levels of logs during this pertinent time period, even though it was a time when more sensible business would have said, "Let's cut all the overtime, let's reduce the amount

of production so as to bring our inventories, lumber, into balance with the market."

We also have the threats, we have the subsidy – log subsidy issue to Longview. Your Honor, our case does not, despite what defendant has claimed in multiple briefs, the gravamen of our case, is not the theory that they latched onto as constituting the entire thrust of our case which is raising rivals' costs.

Raising rivals' costs, their actions in the log market are the contributor to what caused Ross-Simmons to go out of business. The jury found – we proved that the relevant – that alder sawlogs were a relevant market. Question number one, answer: Yes.

We had a whole laundry list of – of means that they used to monopolize that market that were anticompetitive. And to answer the third question yes, as they did, the jury would have had to come to that [Tr. 17] conclusion. This is not – I remember in connection with the summary judgment argument, Your Honor, in January, that Mr. Simon, in his argument, was trying to focus primarily on lumber and avoid really dealing with the log market as the relevant market.

And you asked him at some point in that oral argument, you said – you interrupted and you said, "Mr. Simon, are you taking the position that you cannot monopolize the log market? That there is no such thing as monopsony?" And Mr. Simon correctly paused and said, "No, we're not taking that position." And, in fact, they cannot.

Monopsony is a recognized monopolization, or category of monopolization under the antitrust laws. We've got Reid Brothers in the Ninth Circuit, we've got the Sunkist case, we have cases involving the sugar beet market. The reality is that you can monopolize the input market. We had an abundance of proof on multiple theories and multiple methods

that they used to monopolize that market and characterize the cases strictly.

THE COURT: What do you say about Mr. Simon's argument that there's no evidence that the plaintiffs suffered an inability to get logs, it was only related to price?

MR. HAGLUND: Well, the fact is that if you look [Tr. 18] at the evidence in the case, you would see a decline in the volume of log purchases by Ross-Simmons between the period of 1997-'98, and it went down from there. The supply was relatively stable '96 through 2000, and in '01 it dipped down some.

I think there was evidence about inability that would spring from these categories of testimony. You heard testimony from some of the former Ross-Simmons' log buyers who testified that they had trouble buying logs in the market that was a function of several things when they – one of which was not having adequate capital to buy logs, which was directly a result of the predatory behavior of Weyerhaeuser.

Weyerhaeuser ultimately got Ross-Simmons so weak financially that it was unable to be a competitive player in the log marketplace, so they were unable to secure logs because of Weyerhaeuser, and ultimately they went out of business. So I disagree with his point that it's strictly an issue of the log price going up so high. It's also a function of the action they took that crimped and curtailed Ross-Simmons' ability to compete for a very sizeable portion of the log supply.

We also had considerable evidence from their people about the ways in which they used a number of methods, and I'm referring specifically to Exhibit 493 from [Tr. 19] Mr. Steve Carter, where it showed that if you looked at Western Oregon, they had the first column which was available for purchase by them under their oral right of first refusal position, that was 49 percent of the market. Another 13 percent

of the market was available through the trading arrangements they had.

Only 33 percent, if I'm recalling those columns correctly, showed that it was available for competitive bid. That crimped Ross-Simmons' ability to procure logs at the levels that they wanted, along with all the other evidence that we had.

Let me turn to the second point. If you look at the ABA – and this is their contention that somehow the issue regarding the State of Oregon and State of Washington was – is a basis for a new trial, if you look at the ABA book that was put out in 1999, it's the second edition of the pattern jury instructions for antitrust cases, there's a specific section with pattern instructions for fraudulent procurement of a patent.

That's not covered by Noerr-Pennington. That's not covered by the First Amendment, and we covered this in our briefing, Your Honor. This wasn't fraudulent procurement of a patent, but it was fraudulent procurement of an exemption, a special exemption from the government.

The case law cited in the footnotes in ABA '99 [Tr. 20] book, as well as cited then in our briefs, makes it clear that you can make the same analogy from another fraud procurement type of situation. We certainly had the evidence, I think, to go to the jury on that in this case.

The other argument I'd like to – the other point I'd like to reference, both as to the liability argument they made that I dealt with first, and then this other issue regarding the State, is we had two sets of claims in this case: Not only monopolization, but attempt to monopolize.

And we won as to attempt with an identical verdict from the jury on damages as to attempted monopolization and monopolization, and we're entitled, I think, to a very broad array of evidence in an attempt case, which we had here. Finally, I think as to damages we'll rest on our paperwork, Your

Honor. We're very confident that the damages award is properly supportable given the evidence that we had, and that the hypothetical analyses were done properly, and that the record is clear that the Asian flu and other factors were accounted for in the way the damages methodology was presented.

THE COURT: All right. I'll give you a couple minutes.

MR. SIMON: Thank you. I am going to focus in on the damages. We disagree on the other issues as well, but I'm going to use my few minutes on damages. Because, again, [Tr. 21] we don't have any response to our primary damages argument based on Inglis. And I want to make sure that if the Court has any questions for me on this point, I'm here to answer them.

THE COURT: I understand that. I will look again at Inglis. I have before but I will look at it again very carefully. Let me ask you this: Can't you waive a Noerr-Pennington argument? I don't recall that was ever presented to me before.

MR. SIMON: I don't know the answer to your first question. With respect to your second question, I believe, Your Honor, you are correct. And that is why I raise it to the attention of the Court right now, both as a constitutional argument and as – under the argument of plain error and manifest justice.

There was certainly no intent to waive it. Whether or not legal effect being waived, I suppose it's not something that I really can persuasively address at this time. But with respect to damages – because it is not just the amount of damages but the fact of damages under Inglis, and that's why under Inglis, the directed verdict of judgment as a matter of law is appropriate.

I'd like to make sure that it's clear that the plaintiffs' damages argument essentially has two steps. In step one, and

all of this is spelled out not only in our [Tr. 22] opening brief, but also responding to Mr. Haglund's point now in our reply brief.

That their damages argument has two steps. In the first step, all they do is calculate a log cost reduction number. That is, how much lower would log costs have been, but for their assumed anticompetitive conduct, and then they take that number, the log cost reduction number, and apply it to their second step, which is basically using that number, applying it to the financials, the actual financials of Ross-Simmons, and saying that if Ross-Simmons would have had lower log costs, then they would have had this much more in profit or this much more in going concern value.

THE COURT: Let's assume for a minute that there clearly was antitrust, anticompetitive conduct by the defense. How else would they have proved it?

MR. SIMON: Excellent question. That is answered quite specifically in our reply brief and I'll answer it right now, Your Honor. They would take what they did at a starting point and they would factor out the non-anticompetitive or neutral factors. And then it is a fair nonspeculative interest that what is left, if anything, are damages caused by the antitrust conduct.

That is precisely what the case law says to do. That is precisely what Inglis says to do. That's precisely what all of the other cases that we've cited to the Court [Tr. 23] and our opening brief and reply brief say to do.

There are statistical and economic tools to do precisely that, including regression analyses, which is designed for exactly that purpose.

THE COURT: I assume you agree that even if the damage calculation was wrong, the jury's finding on anticompetitive conduct couldn't be set aside on that basis only. It might

be a basis for a new trial or basis for remitter, but it wouldn't be a basis for a judgment as a matter of law.

MR. SIMON: I respectfully disagree, Your Honor, and here's why: Because part of their elements of an antitrust claim besides the elements of anticompetitive conduct and causation is also the fact of damage.

THE COURT: Well, assuming there's – the conduct is there, even a dollar award or damage amount would be sufficient to justify a verdict as against a judgment as a matter of law.

MR. SIMON: If there was the fact of damage, and that's the key distinction, Your Honor, between –

THE COURT: Okay. I'll look at that. I think I understand your argument. I'll look at Inglis again, and I appreciate the very able arguments and briefs of counsel. I want to tell you that I will give you a discussion very shortly. That decision also will include a decision with [Tr. 24] respect to the defendant's motion for sanctions against the plaintiffs' counsel.

I thank you all very much and we'll be in recess.

* * *

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No. 05-381

Supreme Court, U.S.
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# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

## RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that Weyerhaeuser Company ("Weyerhaeuser") is a publicly owned company that does not have a parent corporation. No publicly owned company owns 10% or more of its stock. However, based on its Schedule 13G as filed with the Securities and Exchange Commission on February 6, 2006, Capital Research and Management Company is deemed to be the beneficial owner of 15.2% of Weyerhaeuser's common stock as a result of acting as an investment adviser to various investment companies registered under the Investment Company Act of 1940.

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**Cases:**

*A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) ..... 17, 24

*American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) ..... 27

*Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940) ..... 29

*Associated Press* v. *United States*, 326 U.S. 1 (1945) ..... 27

*Ball Mem. Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) ..... 30, 40

*Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) ..... *passim*

*Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203 (9th Cir. 1982) ..... 26

*Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988) ..... 46

*Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ..... *passim*

*Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ..... 41

*Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986) ..... *passim*

*City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) ..... 45

*Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) ..... 41

*Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992) ..... 25

*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) ..... 46

**TABLE OF AUTHORITIES – Continued**

**Page(s)**

*FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965) ..... 27

*FTC* v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392 (1953) ..... 27

*Greenbelt Coop. Pub'g Ass'n* v. *Bresler*, 398 U.S. 6 (1970) ..... 46

*Houser* v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225 (3d Cir. 1988) ..... 26

*Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984) ..... 10, 19, 38, 39

*Khan* v. *State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997) ..... 26

*Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) ..... 27

*Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) ..... 27, 29

*Maryland* v. *Baldwin*, 112 U.S. 490 (1884) ..... 45

*Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*

*Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299 (1986) ..... 46

*Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) ..... 20, 26

*National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679 (1978) ..... 19

*Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) ..... 46

*New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1967) ..... 46

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**Page(s)**

*Northern Pac. Ry. Co.* v. *United States*,
356 U.S. 1 (1958) ..... 32

*Schor* v. *Abbott Labs.*,
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*Spectrum Sports, Inc.* v. *McQuillan*,
506 U.S. 447 (1993) ..... 12, 13

*Stearns Airport Equip. Co.* v. *FMC Corp.*,
170 F.3d 518 (5th Cir. 1999) ..... 25

*Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) ..... 45, 46

*Telecor Communications, Inc.* v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002), cert. denied, 538 U.S. 1031 (2003) ..... 31

*Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990) ..... 49

*Todd* v. *Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) ..... 26

*Town of Concord* v. *Boston Edison Co.*,
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*United States* v. *AMR Corp.*,
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*United States* v. *Addyston Pipe & Steel Co.*,
85 F. 271 (6th Cir. 1898), aff'd,
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*United States* v. *Crescent Amusement Co.*,
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*United States* v. *Griffith*, 334 U.S. 100 (1948) ..... 27

*United States* v. *Socony-Vacuum Oil Co.*,
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*United States* v. *Syufy Enters.*,
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*United States* v. *Trans-Missouri Freight Ass'n*,
166 US. 290 (1897) ..... 38

*United States v. Trenton Potteries Cos.*,
273 U.S. 392 (1927) ..... 38

*United States* v. *United States Gypsum Co.*,
438 U.S. 422 (1978) ..... 42

*Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... *passim*

**Statutes:**

15 U.S.C. § 1 ..... 45

15 U.S.C. § 2 ..... *passim*

28 U.S.C. § 1254(1) ..... 1

**Miscellaneous:**

P. Areeda & H. Hovenkamp, ANTITRUST LAW,
(2d ed. 2002) ..... *passim*

R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991) ..... 31

R. Blair & J. Harrison, MONOPSONY (1993) ..... 22, 25, 27

D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION (4th ed. 2005) ..... 28

F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986) ..... 13, 40

F. Easterbrook, *The Limits of Antitrust*,
63 TEX. L. REV. 1 (1984) ..... 22

**TABLE OF AUTHORITIES – Continued**

**Page(s)**

A. Gavil, W. Kovacic & J. Baker, ANTITRUST LAW IN PERSPECTIVE (2002) ..... 28

H. Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005) ..... 13

J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) ..... 28

W. Jones, *Concerted Refusals To Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73 (1989) ..... 29

J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625 (2005) ..... 20

R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005) ..... 27, 42

R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct* (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf ..... 17

R. Posner, ANTITRUST LAW (2d ed. 2001) ..... 24

S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005) ..... 20

R.E. Taylor & Associates, *Wood . . . Where Its Going . . . Where Its Coming From?*, Presentation to the NAWLA Magellan Club (Nov. 9, 2002), *available at* http://tinyurl.com/embv5 ..... 43

## TABLE OF AUTHORITIES – Continued

**Page(s)**

Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Antitrust Enforcement in the Agricultural Marketplace (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testimony/201430.pdf .....27, 30

U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1997).....27

R. Zerbe, *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717 (2005) .....20

## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 411 F.3d 1030. The order of the court of appeals denying petitioner's rehearing petition (Pet. App. 48a) is unreported. The order of the district court denying petitioner's motion for judgment as a matter of law (Pet. App. 28a-46a) is unreported. The order of the district court entering final judgment (Pet. App. 47a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 31, 2005, and a timely petition for rehearing was denied on July 8, 2005. The petition for a writ of certiorari was filed on September 23, 2005, and was granted on June 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

### STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * *."

### STATEMENT

This case involves a claim of predatory *buying*, in which the plaintiff alleges that its competitor violated Section 2 of the Sherman Act by paying too much for raw materials with the goal of forcing the plaintiff out of business by raising its costs. The Ninth Circuit upheld a damages award of nearly $80 million, approving a jury instruction stating that liability may be imposed in a predatory buying case whenever a jury concludes that the defendant purchased more raw materials "than it needed" or paid a higher price for them "than necessary," so as to prevent competitors from obtaining those ma-

terials "at a fair price." The court of appeals refused to apply the standard that this Court has set out to govern predatory *selling* cases, where the plaintiff can prevail only if it proves (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). It did so even though this Court's decisions in other antitrust contexts, and settled economic theory, strongly support applying the same predatory pricing standard to "buy-side" and "sell-side" claims.

*Brooke Group* rests upon this Court's recognition that price competition plays a central role in the robust competition mandated by the Sherman Act, and that legal standards that chill ordinary price competition are therefore anathema to the antitrust laws. Businesses cannot know how to comply with a subjective standard that hinges liability on whether a jury believes that prices paid for inputs are "necessary," let alone whether a price paid is "unfair" to a competitor – a standard that perversely rewards inefficiency. Such an approach will generate pervasive confusion about what bidding and buying practices are permissible, will encourage baseless litigation, and will *diminish* buy-side competition. The Court should make clear that *Brooke Group*'s standards apply to claims of predatory buying as well as those involving predatory selling. As the Solicitor General observed in supporting the grant of certiorari in this case, the Ninth Circuit's contrary holding "threatens to chill procompetitive conduct by companies that bid aggressively in order to ensure access to inputs or to increase their output," and "is inconsistent with this Court's Section 2 decisions more generally, which have emphasized the need for objective standards in order to foster robust competition." U.S. Cert. Am. Br. 7.

1. This case involves a market for red alder sawlogs in the Pacific Northwest. The principal participants in this mar-

ket are timberland owners who supply the logs; and production facilities, including lumber sawmills, that buy and process the logs into finished hardwood lumber and other products that are sold to wholesalers, retailers, and end users. Pet. App. 2a-3a.

Red alder is the predominant species of hardwood sawlog harvested in the Pacific Northwest. J.A. 152a. (Hardwoods are deciduous trees whose leaves fall during the autumn and winter; softwoods are conifers whose "needles" do not fall on a seasonal basis. J.A. 151a.) Hardwood logs typically are taken to production facilities that specialize in processing hardwood logs. The parties stipulated that "[r]ed alder trees are typically, but not always, harvested within 100 miles of the sawmill in which [they are] processed into hardwood lumber, chips, and other products." J.A. 153a. Hardwood lumber is used in a variety of end-products, including furniture, pallets, cabinetry, molding, and specialty wood products such as picture frames and musical instruments. J.A. 152a.

There are many owners of standing timber in the Pacific Northwest, including the state and federal governments, at least seventeen private companies, and numerous individuals. These timberland owners sell their logs through oral bids, sealed written bids, and supply agreements. In order to maximize revenues, they frequently "shop th[eir] wood around the circuit [of potential buyers]" more than once to increase the bidding. J.A. 414a-415a; see also J.A. 190a, 215a-216a, 252a, 361a-365a, 407a-408a, 615a-616a.

Alder is sometimes referred to as a "come-along" species because a tract consisting primarily of softwood trees also may contain a relatively small quantity of alder. J.A. 145a, 293a, 636a-637a. When such tracts are harvested in order to obtain the softwood, the alder is harvested at the same time. *Ibid.* Not all alder is come-along, however: there are some tracts of timber that are predominantly or nearly all alder. Indeed, evidence at trial demonstrated that about 30% of the

alder harvested is not come along at all (see J.A. 750a) and thus is harvested solely by reference to prices in the alder log market. Even "come-along" alder is price sensitive to the extent that timber owners may choose to harvest tracts with higher or lower percentages of alder depending upon then-current alder log prices. See note 24, *infra*; see also J.A. 921a (chart showing variance in annual quantity of alder logs harvested, with variance correlated with prices paid for logs).

2. Plaintiff Ross-Simmons Hardwood Lumber Co., respondent here, operated a hardwood sawmill in Longview, Washington, that went out of business in 2001. Petitioner Weyerhaeuser is an integrated forest products company that also operates hardwood sawmills in the Pacific Northwest.

Ross-Simmons alleged that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing or attempting to monopolize the alder sawlog market in the Pacific Northwest. In particular, plaintiff's theory was that Weyerhaeuser overpaid for alder sawlogs, and occasionally stockpiled those it purchased, with the aim of driving competing sawmills out of business; once free of competition, the claim continued, Weyerhaeuser planned to recoup its overpayments by reducing future prices paid to log suppliers. With respect to the conduct element of its Section 2 claim, Ross-Simmons argued that sawlog prices increased during the alleged predation period, the price of finished lumber decreased during that time, and Weyerhaeuser suffered declining profits due to the high prices it paid for raw materials. Pet. App. 17a-18a.[1]

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[1] Ross-Simmons alleged several other anticompetitive acts, but the court of appeals based its decision upholding the judgment for plaintiff entirely on Ross-Simmons' predatory buying claims. Pet. App. 18a & n.42.

Although Ross-Simmons blamed rising log prices for its failure, there was evidence that it suffered from substandard equip-

Ross-Simmons did *not* allege, however, that Weyerhaeuser paid so much for alder sawlogs in the Pacific Northwest that its revenues from sales of finished alder lumber and other products made from alder sawlogs fell short of its costs of production. Neither did Ross-Simmons allege that, even if Weyerhaeuser succeeded in destroying certain competitors, it had a dangerous probability of reaping monopoly profits for long enough to recoup the losses incurred during the alleged predation period.

The jury found that the market for buying alder sawlogs constituted a relevant product market and that the Pacific Northwest is the relevant geographic market for such purchases. Pet. App. 2a. Ross-Simmons alleged that the predatory conduct occurred between 1996 and 2001. Resp. Ct. App. Br. 17 & 20 (stating that Weyerhaeuser did not acquire monopoly power until 1995). The evidence showed that during that period, Weyerhaeuser acquired approximately 65% of the alder sawlogs available for processing in the Pacific Northwest and sold all of the alder lumber it produced. J.A. 341a, 501a.

Ross-Simmons also alleged that Weyerhaeuser monopolized the downstream market for finished alder lumber in the United States – plaintiff did not contend that there was a smaller geographic market – but the jury found that there is no relevant product market for finished alder lumber. J.A. 967a. Alder lumber competes with other types of hardwood lumber sold throughout North America. J.A. 692a-700a. Weyerhaeuser lacks market power as a seller in the highly competitive market for hardwood lumber; it produces less than 3% of the product sold in the North American hardwood lumber market. J.A. 700a.

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ment, inefficient operations, increased natural gas prices, poor management, and inadequate capital reinvestment. See J.A. 212a, 427a-428a, 431a, 439a-441a, 443a-444a, 485a-487a; see also ER 634-635.

3. Weyerhaeuser sought summary judgment prior to trial, arguing that Ross-Simmons' predatory buying claim was governed by the two-part standard adopted by this Court in *Brooke Group* and that plaintiff failed to show either that Weyerhaeuser sold its products at a loss or that it could have recouped any loses after the period of alleged predation. J.A. 10a, 20a-24a, 31a-33a. The district court denied the motion, holding that proof that Weyerhaeuser operated at a loss was not required: "I see no practical difference between predatory pricing that results in a company purposely selling a product at a loss of one cent per unit, versus selling the same product at a profit of only one cent per unit when the company would have earned a larger profit but for its anticompetitive conduct." J.A. 67a.

At trial, Ross-Simmons did not introduce evidence that Weyerhaeuser's costs of producing alder sawlog products in the Pacific Northwest exceeded its revenues from sales of those products. Indeed, it is undisputed that Weyerhaeuser and its alder sawmills in the Pacific Northwest operated at a profit throughout the alleged predation period. J.A. 704a, 764a-769a, 921a.

Similarly, Ross-Simmons did not introduce evidence showing that Weyerhaeuser would be able to recoup any losses that it incurred as a result of the alleged predation by forcing a reduction in sawlog prices once it stopped engaging in predation. Indeed, the record showed that even during the alleged predation period, although nine hardwood sawmills in the Pacific Northwest closed, four others opened, and still other sawmills expanded their operations. J.A. 161a, 740a, 741a.

Plaintiff instead based its claim on evidence that Weyerhaeuser acted with anticompetitive intent in setting its purchase prices for alder logs. Pet. App. 19a-20a. That evidence consisted largely of statements made by Weyer-

haeuser employees relating to their intent to affect prices and overcome competitors. *Ibid.*

Weyerhaeuser introduced undisputed evidence concerning the quality and efficiency of its hardwood sawmills. Thus, the parties stipulated that Weyerhaeuser invested almost $80 million in improvements to its hardwood sawmills between 1986 and 2000. J.A. 158a, 159a. These improvements increased production capacity significantly. See, *e.g.*, J.A. 160a (lumber production at Longview mill increased from 149.8 million board feet (mbf) to 326.6 mbf).

In addition to expanding mill capacity, Weyerhaeuser undertook a significant effort to increase the amount of lumber that could be extracted from a given volume of logs, seeking to "extract[] higher value [from] the existing log flow and raw materials" during the early 1990s. J.A. 549a-550a; see also J.A. 549a ("[Weyerhaeuser] tried from the smaller logs in particular to extract grade lumber."). Numerous improvements were made at the mill level, such as installing equipment that allowed Weyerhaeuser mills to saw along "the curve of the log" in order to increase yield. J.A. 549a.

Ross-Simmons did not have equivalent productive capabilities. For instance, Wayne Kidd, who was hired in 2000 to help Ross-Simmons turn around its operations, testified on cross-examination that Ross-Simmons' mill was a "tired operation" when he first saw it in 2000-2001 (J.A. 438a), and that, in his opinion, the equipment he saw was "dated 10 to 15 years before 2000" (J.A. 443a). In particular, he stated that the mill's canter (a type of saw) was "atrocious" (J.A. 440a), the mill could not handle a small log "efficiently" (J.A. 440a), and its saws "were no good" (J.A. 441a), among other deficiencies.

At the close of the evidence, Weyerhaeuser moved for judgment as a matter of law on the ground that the *Brooke Group* test governed plaintiff's claim of buy-side predation,

and that Ross-Simmons had not introduced evidence establishing the two elements of that standard. J.A. 719a, 938a, 940a-942a. The district court denied the motion. J.A. 720a.

4. The district court initially proposed a jury instruction regarding the predatory buying claim that did not require comparison of Weyerhaeuser's costs and revenues but did require proof that "Defendant had a reasonable expectation that it could subsequently recoup any losses it had sustained through this conduct, either by paying lower log prices in the future or by charging higher prices for Defendant's products due to a reduction in competition from other saw mills." J.A. 960a.[2]

Weyerhaeuser objected to the instruction on the ground that it did not require proof that Weyerhaeuser had sustained a loss (J.A. 725a); Ross-Simmons, by contrast, objected to the recoupment requirement because "[predatory] bidding is exclusionary conduct regardless of whether or not you can show recoupment." J.A. 728a. The district court overruled Weyerhaeuser's objection but deleted the reference to recoupment as requested by Ross-Simmons. J.A. 729a. Weyerhaeuser again objected to the instruction as modified. J.A. 730a. The court nevertheless instructed the jury as follows with respect to Weyerhaeuser's log buying practices:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.

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[2] Although the parties had submitted various proposed instructions, the district court presented the parties with its own draft instructions and directed them to raise any objections to that proposed draft. J.A. 721a-722a.

Pet. App. 7a n.8; J.A. 978a. The jury returned a verdict for plaintiff, awarding $26,256,406 in damages. J.A. 967a-968a.

Weyerhaeuser renewed its motion for judgment as a matter of law, again raising the *Brooke Group* issue, and the motion was denied by the district court. Pet. App. 28a-46a. The jury's damages award was trebled to $78,769,218. *Id.* at 4a.

5. The court of appeals affirmed. Pet. App. 1a-27a. Weyerhaeuser argued that the jury instruction was wrong and the verdict insupportable because the plaintiff had not been required to satisfy (and could not have satisfied) the requirements of *Brooke Group* by showing both (1) that Weyerhaeuser paid so much for alder logs in the Pacific Northwest that its revenues from sales of products produced from the logs did not cover its costs, and (2) that Weyerhaeuser had a dangerous probability of recouping the losses allegedly incurred during the period of predation. The Ninth Circuit acknowledged that, "to establish liability under *Brooke Group*, a plaintiff ha[s] to show that its competitor operated at a loss and was likely to recoup its losses." *Id.* at 7a. But the court held that standard inapplicable in this case because "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a.

In reaching this conclusion, the Ninth Circuit reasoned that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." Pet. App. 8a. But, the court continued, "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 8a-9a; see also *id.* at 10a. Because the court of appeals accordingly held that "*Brooke Group* does not govern in this case," it ruled that the district court "did not need to instruct the jury that overbidding for sawlogs could

be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." *Id.* at 13a.

The court added that the instructions given – which told the jury to determine whether Weyerhaeuser purchased more logs than "needed," paid a higher price than "necessary," and prevented plaintiff from obtaining logs at a "fair" price" – "provided sufficient guidance regarding how to determine whether conduct was anticompetitive." Pet. App.14a. The court went on to affirm the verdict under this instruction because it found evidence that Weyerhaeuser engaged in predatory conduct, had an intent to monopolize, and had a dangerous probability of achieving monopoly power in the relevant market. *Id.* at 12a-25a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff in this case claims that an efficient competitor's unilateral pricing decisions violated Section 2 of the Sherman Act. That is the sort of improbable assertion that the Court has viewed with the greatest skepticism. The Court's principal insight in this area is that the market generally "knows" much better than judges when a price is too high or too low; as then-Judge Breyer explained, courts and juries are in any event profoundly ill-equipped to determine what is a "reasonable" or "fair" price. See *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 929 (1st Cir. 1984). Judicial intervention when unilateral pricing is challenged is therefore far more likely to discourage robust competition and harm consumers than it is to do any good.

That is especially so in the area of predatory pricing. Addressing claims of predatory pricing by sellers, the Court has recognized that such predation is rarely attempted and even more rarely successful, and that price cuts labeled predatory by rivals often in reality reflect the very essence of desirable competition. To avoid the "false positives" that would impede healthy and aggressive competition, the Court

accordingly articulated the objective, two-part test of *Brooke Group*: a plaintiff seeking to establish injury resulting from a rival's low prices must show (1) below-cost pricing and (2) that the alleged predator had a dangerous probability of recouping the losses incurred during the period of predation. An antitrust plaintiff that fails to make such a showing cannot prevail.

That test should apply with full force to claims of predatory buying, which in all relevant respects are identical to the predatory selling claims addressed in *Brooke Group*. Because the buyer's competitive instinct is to bid up price, the challenged conduct is indistinguishable from core competitive behavior – meaning that in the buying as in the selling context false positives will suppress beneficial and desirable competition. In addition, predatory buying, like predatory selling, is irrational absent the likelihood of recoupment.

Moreover, consumers benefit from competition by buyers, just as they do from competition by sellers: higher prices for the producers of inputs encourages greater production and innovation by those producers, which inevitably leads to lower prices for the ultimate consumer. Getting more inputs into the hands of efficient and innovative producers such as Weyerhaeuser likewise can be expected to lower prices in the downstream consumer market. And sellers, like the timber owners who were the direct beneficiaries of the buy-side competition condemned by plaintiff here, are themselves protected by the Sherman Act. The plaintiff in this case accordingly should have been required to satisfy the *Brooke Group* standard. Its failure to do so requires that the verdict be set aside.

The Ninth Circuit went astray not just in repudiating *Brooke Group*, but in its choice of a substitute test that asked the jury to determine whether Weyerhaeuser purchased more sawlogs "than it needed," paid a higher price for those sawlogs "than necessary," and did so to prevent rivals from ob-

taining sawlogs at a "fair" price. That wholly subjective approach, which provides no real guidance at all, is sure to confuse and punish aggressive competitors. For that reason, the Court has decisively rejected subjective standards like the one applied below in favor of rules that are objective, predictable, and consistent with the goal of encouraging vigorous competition.

The jury's general verdict, which was fatally flawed by the erroneous predatory buying instruction, cannot stand. Having had one bite at the predatory buying apple and failing to offer any probative evidence in support of its predation claim, plaintiff is not entitled to a retrial on that claim. Plaintiff's remaining claims of anticompetitive conduct are manifestly insubstantial, although the Court may wish to remand the case rather than itself determine in the first instance whether these claims should be dismissed rather than retried.

## ARGUMENT

### PETITIONER DID NOT ENGAGE IN PREDATORY BUYING VIOLATIVE OF SECTION 2.

It is "settled law" that an offense under Section 2 of the Sherman Act "requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (citation omitted). Thus, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Ibid.* (emphasis in original).

The Court has recognized in applying Section 2 that "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-59 (1993).

"Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Accordingly, "this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it." *Spectrum Sports*, 506 U.S. at 458-59; see also H. Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 148 (2005) ("A workable definition of exclusionary conduct under [Section] 2 of the Sherman Act must satisfy two criteria. First, it must define anticompetitive exclusionary conduct with tolerable accuracy, in particular, without excessive false positives. Second, it must be administrable by a court, perhaps in a jury trial.").

The claim asserted by plaintiff here – targeting the prices paid by one of its competitors for a key input – presents a very substantial risk of false positives punishing legitimate competitive behavior. Like the predatory selling claim addressed by the Court in *Brooke Group*, predatory buying claims therefore must be assessed against clear objective standards in order to avoid deterring valuable procompetitive behavior.

The Ninth Circuit's contrary approach is starkly inconsistent with these principles. The court of appeals held that a business accused of predatory buying may be held liable for trebled antitrust damages if the jury believes that the defendant purchased more inputs than it "needed" or paid a higher price for those inputs than was "necessary," so as to prevent rivals from obtaining inputs "at a fair price." This is the sort of liability standard that Judge Easterbrook has equated with "[t]hrowing [a] marshmallow at a jury." F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 978 (1986). Under the Ninth Circuit's wholly subjective rule, it is impossible for businesses to know what pricing decisions conform with the law; firms accordingly will be

forced to curb aggressive – and desirable – competitive bidding for fear of triggering unwarranted liability; and baseless litigation will be encouraged. The Court should reject that approach.

### A. *Brooke Group*'s Requirement That A Plaintiff Prove Below-Cost Pricing And A Dangerous Probability Of Recoupment Should Apply To Predatory Buying Claims.

The Court in *Brooke Group* addressed predatory pricing claims in the context of predatory selling, holding that antitrust liability attaches only if the product is sold at a loss – if revenues are below the seller's costs – and only if there is a dangerous probability that the seller may recoup its losses.

When a *buyer* either has monopoly power or a dangerous probability of obtaining monopoly power in a relevant market – a condition that economists term "monopsony" or a dangerous probability of monopsony – the same standard should apply to claims that the buyer has used price as an anticompetitive weapon by engaging in predatory pricing in its purchasing activities.

#### 1. *This Court's Predatory Pricing Decisions, Culminating In* Brooke Group, *Establish That Objective Rules Are Essential To Distinguish Predatory From Competitive Pricing.*

Applying the principles just discussed regarding the conduct element of Section 2, this Court has viewed with great skepticism a plaintiff's allegations that one of its competitors engaged in predatory pricing, sacrificing available profits in an effort to drive competitors out of business. The Court therefore has insisted that antitrust plaintiffs who allege predation satisfy rigorous, and objective, standards of proof.

The Court explained in the context of predatory pricing by sellers that such a scheme "is by nature speculative" because the defendant must "forgo profits that free competition

would offer." *Matsushita*, 475 U.S. at 588. For predatory pricing conduct to be "rational," the defendant

> must have a reasonable anticipation of recovering, in the form of later monopoly profits, more than the losses suffered. * * * [T]he success of such a scheme is inherently uncertain: the short-term loss is definite, but the long-term gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits.

*Id.* at 588-589. "For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." *Id.* at 589.

Moreover, "[s]ince the losses" from a predatory scheme "accrue before the gains, they must be 'repaid' with interest" for the scheme to succeed. *Matsushita*, 475 U.S. at 592. This economic reality tends to make predation "self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly" to the defendant. *Id.* at 595. For this reason, "it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and the disincentives to engage in such a strategy are accordingly numerous." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986) (citation and internal quotation marks omitted).

The Court also has recognized that vigorous pricing conduct that inefficient rivals label predatory "often is the very essence of competition. Thus, mistaken inferences in [such] cases * * * are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Courts "'must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'" *Ibid.* (quoting *Barry Wright*

*Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)); see also *Cargill*, 479 U.S. at 121 n.17 (emphasizing that "[c]laims of threatened injury from predatory pricing must * * * be evaluated with care" for the reasons identified in *Matsushita*).

"There is * * * a general agreement that the antitrust cour[illegible]ajor task" in the context of standards for identifying unla[illegible]l pricing "is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting behavior." *Barry Wright*, 724 F.2d at 231-32 (Breyer, J.). And in doing so, it is emphatically *not* the goal of the antitrust laws to insulate inefficient competitors from the effects of hard competition. See *ibid.*

In response to these fundamental principles, the Court in *Brooke Group* articulated its two-part test for assessing claims of predatory pricing behavior by sellers. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. * * * As a general rule, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." 509 U.S. at 222-23.

If below-cost pricing is established,

> [t]he second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. * * * Recoupment is the ultimate object of an unlawful

> predatory pricing scheme; it is the means by which a predator profits from predation.

*Id.* at 224. Absent such proof that the alleged predator "would likely" recoup its losses, "the plaintiff's case has failed." *Id.* at 226.

The recoupment standard is demanding: the plaintiff must show that the predatory selling would have "the intended effects on the firm's rivals" and "that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it." *Brooke Group*, 509 U.S. at 225. This is not an invitation for unguided speculation by the plaintiff about the circumstances in a hypothetical "but for" world. Rather, such a showing "requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Id.* at 226. When the characteristics of the market show that this standard cannot be met, "summary disposition of the case is appropriate." *Ibid.*

Indeed, as Former Assistant Attorney General Pate explained, "[t]he second part of the [*Brooke Group*] standard is especially important because there are a variety of situations in which it can readily be determined that an alleged predator has no prospect of future monopoly pricing." R.H. Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct*, at 21 (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf; see also *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (Easterbrook, J.). The recoupment test often provides a practical means of screening out insubstantial claims without the expense and other burdens of a full-blown trial.

### 2. *The* Brooke Group *Test Should Govern Predatory Buying Claims Because The Rationale Of The Court's Predatory Selling Decisions Applies Just As Strongly In The Predatory Buying Context.*

Predatory buying allegations rest on assertions substantively identical to those underlying claims of predatory selling. In predatory selling, the plaintiff's contention is that its competitor cut prices in order to drive the plaintiff out of business and obtain or enhance its monopoly power. Similarly, the predatory buying plaintiff's claim – as here – is that its competitor has bid up prices for a key input in order to drive the plaintiff out of business. Once the competitor is eliminated, the defendant supposedly will exercise its monopsony power to decrease what it is required to pay for the input and reap monopoly profits due to the lack of competition from other buyers.

Both types of claim involve the alleged use of unilateral pricing for anticompetitive purposes, and both assert that the defendant is forgoing profits in the short term in order to reap supracompetitive profits in the future. In addition to this strong substantive similarity, claims of predatory buying carry the very same risks of penalizing legitimate competition that led the Court in *Brooke Group* to adopt clear, objective standards for separating lawful and unlawful pricing on the sell-side. Those standards should apply to claims of predatory buying as well.

#### *a. A predatory buying plaintiff must prove that the defendant's costs exceeded its revenues.*

**(i) False positives on the buy side punish desirable competition.** The substantial risk of deterring legitimate procompetitive conduct emphasized by the Court in the predatory selling context is just as significant with respect to predatory buying claims, because here too the conduct chal-

lenged by the plaintiff is indistinguishable from core competitive behavior. Accordingly, the need to avoid false positives and overdeterrence, which may be effected through the use of objective liability standards, means that a predatory buying plaintiff must prove that the defendant's costs exceeded its revenues.

Nothing is more central to the operation of market forces than price competition. Sellers lure customers by reducing price; buyers attract suppliers by increasing price. Indeed, "[p]rice is the 'central nervous system of the economy.'" *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978) (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

A buyer's "competitive instinct is to bid up price," and "[a]ntitrust law rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold." *Kartell*, 749 F.2d at 925 (Breyer, J.). Thus, just as price cuts by sellers generally are desirable, competition by buyers that increases the price paid to suppliers "is almost certainly moving price in the 'right' direction." *Barry Wright*, 724 F.2d at 234 (Breyer, J.). The mechanism by which a firm engages in predatory buying – increasing prices paid to sellers – "'is the same mechanism by which a [bidding] firm stimulates competition,'" which means that "'mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Brooke Group*, 509 U.S. at 226 (quoting *Cargill*, 479 U.S. at 122 n.17) (ellipsis in original).

Certainly, nothing in *Matsushita* and *Brooke Group* indicates that the Court's concern with "false positives" is somehow restricted to situations involving reductions in output price. To the contrary, *Brooke Group* used "legitimate price-cutting" as only one example of the sort of "competition on the merits" that an overly restrictive predatory pricing rule could chill. 509 U.S. at 223; accord *Trinko*, 540 U.S. at 414

(referring generally to need to take into account the risk of false positives in crafting Section 2 standards); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (deterrence concerns arise whenever the applicable legal rule threatens to "'inhibit management's exercise of independent business judgment'") (citation omitted).

A company's decision to purchase an input at prices that one of its competitors believes to be excessive – and thereby obtain a larger quantity of the input – ordinarily has a number of legitimate, pro-competitive explanations. As Professor Salop has explained, "increased purchases could be driven by an increase in demand for the firm's product or a new business plan that involves market share growth," or by "the firm adopting a new production process that uses the input more intensively," or "could reflect changes in inventory policy, such as where the firm chooses to hold more inventories to reduce the likelihood of shortages or to hedge against future input price increases." S. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669, 682-83 (2005) (footnotes omitted).[3]

In addition, "firms should not be forced to make predictions at their peril about future demand in uncertain markets. Subsequent 'surpluses' may reflect prior miscalculations that were quite within reason at the time they were made." IIIA

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[3] We note that Professor Salop acted as a consultant to Weyerhaeuser in this case. On the other hand, two articles relied upon by the Ninth Circuit were written by, respectively, a paid consultant and an expert witness for plaintiffs in this case. See Pet. App. 9a n.14 (citing J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 655 (2005), and R. Zerbe, *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 724 (2005)).

P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 768a4, at 143 (2d ed. 2002).

Here, for example, the record showed that Weyerhaeuser invested in its sawmills to increase efficiency. As a result of those investments, Weyerhaeuser was able to produce a larger amount of saleable lumber per log than some of its competitors. See page 7, *supra*. Because it realized more lumber and more sales revenue from each log than some of its competitors, Weyerhaeuser could afford to pay more for each log and continue to make a profit; its less efficient competitors faced a harder time making a profit at the log prices that Weyerhaeuser could afford to pay. See *ibid.*

Given the numerous legitimate reasons for bidding up the price of an input, there is a very substantial risk that competitive behavior could be captured by a vague liability standard. Such false positives could "'end up [] discouraging legitimate price competition.'" *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright*, 724 F.2d at 234). As the Solicitor General concluded in the government's amicus brief supporting certiorari in this case, "just as lower prices for outputs are often a sign of competition, so too are higher input prices * * *. Antitrust liability premised on such activity, without evidence of losses and a dangerous prospect of recoupment, could chill substantial legitimate competitive activity." U.S. Cert. Am. Br. 12.

**(ii) An objective cost-revenue standard is needed to govern predatory buying claims.** The danger that subjective liability standards will lead to false positives that suppress competition means that buyers need an objective standard for assessing the permissibility of pricing activity, so they can determine easily whether a bid is lawful or unlawful and engage in the hard competition that the antitrust laws encourage. The cost-revenue test – which asks whether the business "can make a profit on its product if it pays the proposed amount for the input" – is an easily-administered

standard that allows businesses to conform their conduct to the requirements of the antitrust laws without chilling essential price competition. At the same time, so long as inputs are not purchased at an unprofitable level, purchases at that level can never exclude an equally efficient competitor.

Moreover, because the barriers to a successful scheme of predatory buying are at least as high as the barriers to successful predatory selling, there can be no concern that application of *Brooke Group*'s objective standard to predatory buying will open the door to significant amounts of anticompetitive activity. As two leading scholars of monopsony have observed:

> Successful monopsony predation is probably as unlikely as successful monopoly predation. First, the predatory firm would have to raise the price not only for the inputs it originally purchased, but would have to be prepared to purchase all of that input currently available in the market at the higher price. * * * In addition, in the long run, input suppliers that could substitute into the production of this input would have an incentive to do so, making the financial burden on the predatory firm even greater.
>
> Second, the firm has the problem of what to do with the input. One possibility is to destroy it; another is to store it. Any effort to process the input into its final output would likely increase the quantity of that output available and depress its price. All of these options create further financial burdens.

R. Blair & J. Harrison, MONOPSONY 66-67 (1993). Predatory buying, like predatory selling, is self-deterring, as "[m]onopoly prices eventually attract entry." F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984). Supracompetitive profits by a monopsonist will attract new buyers into the market.

To be sure, as with predatory selling, application of *Brooke Group*'s cost-revenue test on the buy-side may allow a monopolist to use above-cost pricing strategies that "induce or reestablish supracompetitive pricing" (509 U.S. at 224). In the buying context, however, as in the selling context, application of a standard that would capture 100% of such anticompetitive conduct "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting" (*id.* at 223). As the leading commentators in this area have observed, the problem with imposing liability on predatory pricing schemes where the defendant's revenues exceed costs

> is not that we doubt [such schemes'] existence or even their anticompetitive consequences. Rather, identifying them in the particular case without chilling aggressive, competitive pricing is far beyond the capacity of any antitrust tribunal. Once we cross the threshold and permit prices above cost to be condemned as predatory, we throw the doors open to all kinds of speculation about the pricing strategies of large firms – speculation that judges ordinarily address by opening discovery, including evidence of presumed anticompetitive intent, and making a jury the final decision-maker.

III Areeda & Hovenkamp, *supra*, ¶ 735a, at 364-65; accord *Schor* v. *Abbott Laboratories*, 2006 WL 2062117, at *4 (7th Cir. July 26, 2006) (Easterbrook, J.) (reaffirming price-cost standard even though it might not detect every practice with an anticompetitive effect because "[t]he search itself (and the risk of error in the judicial process) has much more chance of condemning a beneficial practice than of catching a detrimental one").[4]

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[4] Respondent asserts (Br. in Opp. 20-21) that evidence of intent to harm competitors – such as the evidence introduced in this case (see Pet. App. 19a-20a) – is a sufficient substitute for *Brooke Group*'s objective standard. It is well-settled, however, that evi-

Indeed, failing to apply *Brooke Group* here would allow predatory *selling* plaintiffs to avoid *Brooke Group* by recasting their predatory selling claims as predatory buying claims. In many cases in which a seller can allege predatory selling by a larger competitor, the potential defendant also may be a significant participant in the upstream input market Cf. *Cargill*, 479 U.S. at 114 (competitor challenging a merger on the ground that the merged company would both increase the cost of inputs and cut prices in the downstream market). If *Brooke Group* did not apply to predatory buying, the former predatory selling plaintiff could drop its claim regarding the downstream market, focus on the competitor's alleged predatory buying, and thereby avoid the need to satisfy an objective standard. That result would elevate pleading over substance and produce a wave of unjustified predatory buying lawsuits.[5]

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dence of intent to damage competitors is of little value in antitrust analysis – especially when the plaintiff is complaining that it was injured by *hard competition*. After all, "a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition. * * * [S]tatements of this sort readily may be misunderstood by lawyers and jurors, whose expertise lies in fields other than economics." *A.A. Poultry Farms*, 881 F.2d at 1402 (Easterbrook, J.); R. Posner, ANTITRUST LAW 214-15 (2d ed. 2001) (statements of "competitive prowess" are "[e]specially misleading" to judges and juries). Such a standard also would provide no guidance whatever to businesses seeking to comply with the law; it would have precisely the same ill effects as the vague standard endorsed by the court below. See pages 38-44, *infra*.

[5] The government notes that "this case does not involve a claim that the defendant engaged in monopolization or attempted monopolization of the *downstream* market by engaging in predatory bidding in the *upstream* market." U.S. Cert. Am Br. 14-15 n. 6 (emphases in original). We agree. The jury's determination that there is no relevant market for finished alder lumber (see page 5, *supra*) means that Weyerhaeuser lacked market power in the

### *b. Proof of recoupment also is essential to a predatory buying claim.*

In addition, like predatory selling, predatory buying is irrational if the defendant cannot recoup its losses: "the buyer must be able to 'profit' from the lower price for a long enough period of time that it can make up its predatory 'investment.'" Blair & Harrison, MONOPSONY, *supra*, at 67. The Court's determination in *Brooke Group* that "[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation" (509 U.S. at 224) thus applies with full force to predatory buying. Indeed, that is precisely what Ross-Simmons argued that Weyerhaeuser was attempting to do. Br. in Opp. 1-2 ("here a dominant buyer with market power forced competitors out of business by intentionally driving up the costs of and denying competitors access to a limited supply of natural resource inputs essential for production, with the specific intent of driving input prices down after rivals were forced to exit") (emphasis omitted).

Predatory buying without a dangerous probability of recoupment makes no sense. This Court has long recognized that "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 468-69 (1992); *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) ("to survive summary judgment a plaintiff must have evidence that the predation scheme is economically rational"). Here, as in the predatory selling context, without proof of recoupment "the plaintiff's case has failed." *Brooke Group*, 509 U.S. at 226.

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downstream market. This case accordingly provides no occasion for the Court to address how the *Brooke Group* test applies when the defendant may be able to recoup its losses in more than one market.

### *3. Courts Have Recognized In A Variety Of Contexts That Allegations Of Buy-Side Predation Should Be Reviewed Under Standards Equivalent To Those That Apply To Parallel Claims Of Sell-Side Predation.*

The conclusion that similar standards should apply in assessing predatory buying and predatory selling is not surprising. Courts have recognized in a variety of contexts that monopsony and monopoly are mirror images of one another, and that the legal standards used to judge the legality of conduct in one context generally are appropriately applied to judge equivalent conduct in the other. If anything, economic analysis indicates that monopsony should be treated more leniently than monopoly in some circumstances.

The Seventh Circuit, speaking through Judge Posner, has expressly stated that monopsony pricing "is analytically the same as monopoly or cartel pricing and so treated by the law." *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997). Other courts have reached the same conclusion. *Todd* v. *Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001); *United States* v. *Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) ("[m]onopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side"); *Houser* v. *Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1228 & 1231 (3d Cir. 1988) (applying principles of *Matsushita* and *Monsanto* to monopsony claim); *Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1221 (9th Cir. 1982) (applying sell-side tying standard to a buy-side tie).[6]

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[6] To be sure, antitrust standards developed in the buy-side context must take account of the "mirror image" nature of monopsony by, for example, focusing on the characteristics of the market for purchases of the good. *Todd*, 275 F.3d at 202, 211.

This Court has many times examined allegedly anticompetitive uses of buying power without ever intimating that different rules apply depending upon whether buy- or sell-side conduct was involved. See, *e.g.*, *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 593-94 (1965); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959); *FTC* v. *Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 393, 395 (1953); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-04 (1946); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); *Socony-Vacuum*, 310 U.S. at 178, 216, 219-20.

The Department of Justice's Antitrust Division agrees that "[m]onopsony is the mirror image of monopoly." Testimony of R.H. Pate, Assistant Attorney General Antitrust Division, Before the Committee on the Judiciary United States Senate Concerning Antitrust Enforcement in the Agricultural Marketplace, at 3 (October 30, 2003), *available at* http://www.usdoj.gov/atr/public/testimony/201430.pdf. "The exercise of market power by buyers ('monopsony power') has adverse effects comparable to those associated with the exercise of market power by sellers." U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, at § 0.1 (1997).

Finally, "most antitrust scholars" likewise have concluded that "asymmetric treatment of monopoly and monopsony has no basis in economic analysis." R. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 590-91 (2005). The leading antitrust treatise states that "monopsony power generally has harmful effects analogous to those of monopoly." IV Areeda & Hovenkamp, *supra*, ¶ 943e, at 231; see also Blair & Harrison, MONOPSONY, *supra*, at 36 ("Pure monopsony is the demand side analog of monopoly. * * * The economic objections to monopoly and

monopsony are similar: the exercise of market power reduces social welfare"); D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION 107 (4th ed. 2005) ("Monopsony is the flip side of monopoly."); A. Gavil, W. Kovacic & J. Baker, ANTITRUST LAW IN PERSPECTIVE 1106 (2002) (same).[7]

An important practical consideration points toward the same conclusion. Section 2 standards – especially standards relating to price competition – should to the extent possible be capable of application by business people in the ordinary course of running their businesses. Every business both buys and sells. Requiring lay decision makers to take account of different legal standards depending upon whether they are buying or selling would cause paralyzing confusion.

### *4. The Antitrust Laws Protect Aggressive Competition By Buyers Because Buyer Competition Promotes Consumer Welfare.*

The Ninth Circuit opined that *Brooke Group* "established a high liability standard for sell-side predatory pricing cases" because "consumers benefit from lower prices and * * * cutting prices often fosters competition"; in contrast, the court continued, the same benefits "do not necessarily result from predatory bidding the way they do from predatory [selling]." Pet. App. 8a-9a. The court of appeals concluded that "the

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[7] Notably, the single article cited by respondent for the proposition that "monopsony and monopoly are not completely analogous" concludes that the differences the authors perceive between monopsony and monopoly should lead to *less searching scrutiny* of monopsony under the Sherman Act. Br. in Opp. 22 (citing J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 5, 11, 43-44 (1991)). The leading antitrust treatise agrees that mergers producing high concentration among buyers generally are less of a threat to competition than those producing a similar level of concentration among sellers, especially where – as here – the downstream market is competitive. IV Areeda & Hovenkamp, *supra*, ¶¶ 980-82.

standard for liability in this predatory bidding case need not be as high as in predatory pricing cases." *Id.* at 11a.

The court of appeals' rejection of *Brooke Group* thus rests on its determination that the risk of chilling legitimate price competition among buyers is not as deserving of antitrust concern as the risk of chilling legitimate price competition among sellers. This novel assertion[8] is wrong. This Court's decisions make clear that the antitrust laws provide the same level of protection to competition among buyers as to competition among sellers; by doing so, those laws both protect sellers directly and, by promoting buy-side competition, necessarily promote consumer welfare.

To begin with, this Court has squarely rejected the idea that the antitrust laws apply differently to sellers than to buyers:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

*Mandeville Island Farms*, 334 U.S. at 236; see also, *e.g.*, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (1940).

Indeed, "[t]he passage of the Sherman Act was strongly influenced by injuries inflicted upon business firms; they were among the most obvious victims of the trusts. * * * The opportunity to sell at competitive prices has been protected as zealously as the opportunity to buy at competitive prices." W. Jones, *Concerted Refusals To Deal and the Producer Interest in Antitrust*, 50 OHIO ST. L.J. 73, 88, 89 & n.

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[8] The Ninth Circuit cited no authority of this (or any other) Court in support of this observation.

95 (1989) (citing sources). The Antitrust Division agrees: "While we often speak of consumers as the targeted beneficiary of antitrust enforcement, suppliers also benefit, by having healthy incentives to provide the best products and services they can, with the expectation that they will be able to do so free from anticompetitive interference." Pate Testimony, *supra*, at 5.[9]

Moreover, the Ninth Circuit was wrong in simply assuming the absence of any connection between seller welfare and consumer welfare.[10] To begin with, it is well-established that the exercise of monopsony power to depress prices "is as bad as a monopolistic increase in price" because it diminishes the suppliers' incentive to provide goods, thereby decreasing the output available to consumers (and consequently leads to increased prices for consumers). *Ball Mem. Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.); see also Pate Testimony, *supra*, at 5 ("If a buyer obtains market power * * *, and thereby is able to depress prices for the inputs it purchases below competitive

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[9] Acceptance of the Ninth Circuit's approach would create considerable uncertainty about the application of the antitrust laws to buy-side anticompetitive behavior, such as actions against bid-rigging cartels and challenges to mergers based on the threat of buy-side anticompetitive effects. Would application of the *per se* rule against price fixing to buy-side conduct require proof that such conspiracies virtually always harm consumer welfare? And would merger challenges depend upon proof of the risks posed to consumer welfare by the particular merger?

[10] Inexplicably, the Ninth Circuit indicated that an impact on consumer welfare was critical, but did not engage in any analysis of the ways in which consumers actually are benefited by competition among buyers – either generally or in the context of this case. Notwithstanding Weyerhaeuser's lack of market power in the downstream market (see page 5, *supra*) – the court below seemed to assume an adverse effect on consumers from the alleged predatory conduct.

levels, then producers of those inputs will have depressed incentives to produce, which will result in too few resources utilized to produce the inputs compared to what would be available in a competitive market. This is likely to harm both suppliers and consumers.").[11]

Settled economic principles also establish that the converse is equally true: protecting vigorous buy-side competition that raises prices *for* sellers necessarily benefits the ultimate purchaser by encouraging innovation and increased production *by* sellers. That point is forcefully made by the *amici* in this case. See, *e.g.*, Business Roundtable Cert. Am. Br. 12 ("Because the price paid for the input is higher, any suppliers that can substitute into the production of the input will have an incentive to do so. More inputs will result in more finished products for sale to consumers, and more finished products on the market will result in lower prices.") (citation omitted); BellSouth Cert. Am. Br. 10.

In addition, as we have discussed (see page 21, *supra*), to the extent a buyer engaging in vigorous price competition obtains more inputs to process at its more efficient facility, the greater resulting output will mean an increase in supply in the downstream consumer market – which in a competitive market should produce a correspondingly lower price to consumers purchasing goods in that market. That effect is visible in this case: it is undisputed that Weyerhaeuser's greater efficiency allowed it to make more productive use of logs (see page 7, *supra*), and thus to provide more lumber per log to consumers than could a less efficient rival like plaintiff.

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[11] See also R. Blair & J. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 299 n. 17 (1991); *Telecor Communications, Inc.* v. *Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1135-36 (10th Cir. 2002) (suppressing buy-side competition leads to reduced production and quality, and higher prices for consumers), cert. denied, 538 U.S. 1031 (2003).

It is possible that the court of appeals was motivated by a different concern: it might have concluded that *Brooke Group*'s focus on protecting procompetitive conduct rested solely on the fact that predatory selling initially produces "lower aggregate prices in the market" (509 U.S. at 224). Because predatory buying involves higher prices, the Ninth Circuit may have believed *Brooke Group* to be inapplicable. But this Court in *Brooke Group* linked its observation about lower prices to enhancement of consumer welfare (*ibid.*), and – as we have discussed – the conduct here is likely to increase consumer welfare.

It is a fundamental tenet of our economic system that prices fall and consumers benefit when the most efficient producers are able to obtain all the inputs they need. See *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958) ("[the Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources"). The court of appeals accordingly was wrong in its view that application of a legal standard that chills vigorous price competition among buyers does not implicate the core concerns of the antitrust laws to the same extent as one that chills competition among sellers.

### 5. *The Ninth Circuit's Elasticity Exception Makes No Legal, Economic, Or Factual Sense.*

The Ninth Circuit also stated that regardless of the general standard governing predatory buying claims, the *Brooke Group* standard should not apply here because what the court termed the "relatively inelastic" nature of the alder log market "does not readily allow for market expansion." Pet. App. 11a. Because higher log prices supposedly would not increase supply, the court concluded consumers could not benefit from increased price competition among log buyers. That analysis was wrong in every respect.

For one thing, there is no factual basis for the court's assertion. The jury was not asked to make any finding on the matter, and the Ninth Circuit's characterization of the alder log market was based on highly implausible extra-record material – a law review article by plaintiff's expert (see Pet. App. 11a n.20) – and not on anything in the evidentiary record in this case.

The record actually shows that, while some alder is harvested on a "come-along" basis (see pages 3-4, *supra*), a substantial amount is not. Indeed, the record indicates that nearly one-third of alder is harvested on an independent basis (J.A. 750a) and that alder yields accordingly can be expected to rise as price increases. Even the remainder of the alder supply is sensitive to price: higher prices lead timber owners to market logs that they otherwise would have withheld from sale. See Campbell Cert. Am. Br. 12-14; see also *id.* at 13 n.5 (the timber market is "quintessentially elastic").

The lower court also erred in assuming that expansion of the supply of logs is the only way that buy-side price competition can enhance consumer welfare. As we have discussed, increased purchases by more efficient processors leads to expanded supply in the downstream market, which leads to lower consumer prices. Any higher log prices paid by more efficient producers to expand their more efficient production thus directly benefit consumers. Elasticity of supply is simply irrelevant to this beneficial effect upon consumers.[12]

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[12] The government pointed out, moreover, that "it is precisely when supply is inelastic that efforts by relatively efficient firms to expand will lead to an increase in input prices. Thus, the Ninth Circuit's rule will apply the greatest antitrust scrutiny in those markets in which procompetitive expansion is likely to increase input prices and injure competitors (but not competition)." U.S. Cert. Am. Br. 15 n.8.

More fundamentally, superimposing an elasticity of supply test on top of the *Brooke Group* standard would eliminate all of the benefits of the objective rule adopted in that case. As the Solicitor General explained, "the court of appeals' suggested approach would necessitate a complex and costly market-by-market assessment of supply elasticity, frustrating the compelling need for clear and easily administrable rules to govern pricing behavior." U.S. Cert. Am. Br. 16. No business person would be able to know in advance whether a jury might determine that a market was relatively inelastic; accordingly, every buyer in every sector of the economy would have to take account of the possibility that the objective *Brooke Group* standard would not govern the legality of its pricing decisions.[13] The uncertainty produced by the "relative inelasticity" test would reintroduce the precise chilling effect that the *Brooke Group* standard was designed to eliminate.

### *6. There Is No Separate "Overbuying" Claim In This Case.*

Ross-Simmons argued in the court of appeals that it had proven that Weyerhaeuser engaged in "overbuying" – a claim allegedly distinct from its contentions regarding predatory overbidding. Resp. Ct. App. Br. 53-56. The claim apparently encompasses assertions that "Weyerhaeuser bought substantially more alder sawlogs than it needed for its Long-

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[13] See American Meat Institute Cert. Am. Br. 10 ("We cannot know what the jury would have found about the elasticity of alder sawlogs, but more importantly, we cannot know what a future jury would do if called upon to second-guess – under the subjective 'higher than necessary' standard – the thousands of individual pricing decisions AMI's members and innumerable other companies make each year. Faced with the prospect of treble damages for pricing 'too high,' some companies will likely be unwilling, at least on the margin, to bid as high as they otherwise might in a competitive market.").

view mill" as well as intimations that some of these logs were not usable. *Id.* at 53, 54.

A separate overbuying claim makes even less sense than a predatory buying claim. What objective standard could a court apply in determining whether a business purchased "too much" of a particular input? Purchasing decisions depend upon a host of factors, such that identifying "overbuying" "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate" purchasing. *Brooke Group*, 509 U.S. at 223.[14]

Moreover, plaintiff's distinction between predatory buying and overbuying makes no economic sense. "Buying too much" will produce higher prices, at least in the short term, until sellers increase output. And paying "too much" inevitably results in purchases of a greater quantity of goods, as sellers are motivated to increase their output and the alleged overbuyer must increase the quantity it purchases so as to maintain the higher price. The claims therefore are economically identical; in each case, the defendant will have paid more and bought more.

As a consequence, recognizing a separate claim of "overbuying" without clearly-defined objective characteristics would enable every predatory buying plaintiff to avoid the *Brooke Group* standard simply by recasting its predatory buying allegations as "overbuying" – targeting the quantity of input purchased by the defendant rather than the purchase price. That would render *Brooke Group* a dead letter in the buying context, and threaten to do so in the selling context as well, where predatory selling plaintiffs would no doubt begin

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[14] At a minimum, any claim of overbuying would necessarily require proof of recoupment. Like "paying too much," "buying too much" involves incurring deliberate losses; it therefore would not be rational absent a dangerous probability that the buyer could recoup its "predatory investment."

to assert "overselling" claims targeting the alleged "dumping" of large quantities of product into a market in order to "push out" small competitors.

In all events, any "overbuying" is accounted for fully in *Brooke Group*'s cost-revenue comparison. Here, for example, the total cost of all of Weyerhaeuser's purchases of alder logs in the Pacific Northwest would be included on the cost side of the ledger. To the extent "overbuying" led to production that could not be sold, or was sold at a low price because of oversupply in the downstream market, those lower revenues would adversely affect the cost-revenue comparison. And if Weyerhaeuser stockpiled logs, its increased costs without any compensating revenues would have an even more drastic adverse effect, especially when – as here – the cost of the input is a large percentage of the cost of the downstream products.

This would be true even if the defendant made no use of some of the inputs that it purchased (something that did not occur here).[15] There are any number of legitimate reasons that might occur: the defendant might miscalculate its needs; there might be a change in demand for the defendant's product; it might be necessary for the defendant to buy more inputs than it will use so as to guarantee a source of supply.

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[15] The district court referred to evidence "that [Weyerhaeuser] was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard." Pet. App. 34a. But there is no evidence whatever that during the alleged predation period Weyerhaeuser purchased logs that later spoiled or otherwise were not put to productive use. Rather, the only evidence of spoilage related to incidents in 1989 and 1993 (see J.A. 185a-186a, 253a-254a), a time that, in plaintiff's view, Weyerhaeuser did not have monopoly power and that was long before the 1996-2001 predation period alleged by plaintiff. See page 5, *supra*. Indeed, Ross-Simmons earned record-level profits in 1989 and 1993. J.A. 153a-155a.

But whatever the explanation, the cost of the unused inputs would have to be taken into account in the cost-revenue analysis. To the extent a defendant purchased and discarded a significant amount of an input, those costs likely would have a significant impact on this analysis. But there is no basis for advocating a separate standard to assess such claims.

There also is no evidence here that Weyerhaeuser's purchases made it impossible for the plaintiff to obtain the input at any price – that Weyerhaeuser both "cornered the market" and failed to make productive use of the inputs it purchased. Cf. III Areeda & Hovenkamp, *supra*, ¶ 702, at 151 (monopolist's hiring of all available individuals with particular expertise is per se legal as long as the defendant actually uses the acquired employees). The record leaves no doubt that Ross-Simmons always was able to obtain alder logs to process at its mill. J.A. 181a, 218a, 406a-407a, 409a-412a.[16] Its complaint was only that Weyerhaeuser was buying "too many" logs. That provides no basis for a separate "overbuying" claim.

### B. The Ninth Circuit's "Fair Price" Test Penalizes Legitimate Competition And Provides No Guidance For Juries Faced With Predatory Buying Claims.

Having rejected *Brooke Group*, the court below determined that a defendant should be held liable for predatory buying whenever a jury concludes that the defendant "purchased more [product] than it needed or paid a higher price for [the product] than necessary," and that it did so "to pre-

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[16] Ross-Simmons did begin to have trouble obtaining logs in 2000, but only because it was not paying timber owners on a timely basis. J.A. 406a-407a, 427a, 430a-431a, 521a-523a. That fact obviously does not suggest that Weyerhaeuser had "cornered the market" on alder logs.

vent the Plaintiffs from obtaining the [product] they needed at a fair price." Pet. App. 7a n.8. That conclusion cannot be correct. It would be hard enough for an expert administrative agency to determine what price was "necessary" or "fair"; it is quite impossible for "a generalist antitrust court" (*Trinko*, 540 U.S. at 414) – let alone a jury – to make sense of that test.

The Ninth Circuit standard invites the jury to punish legitimate price competition and imposes a standard that offers no guidance whatever for companies seeking to comply with the law. It does not provide an acceptable alternative to the *Brooke Group* test; rather, the test formulated by the Ninth Circuit would inflict significant harm upon the nation's economy. Indeed, even if the Court were to disagree with our view that both elements of the *Brooke Group* standard apply in the buy-side context, it should reject the wholly vacuous standard adopted below.

*First*, this Court has emphatically rejected use of a closely analogous "reasonableness" test under Section 1 of the Sherman Act. Then-Judge Breyer has explained:

> As the Supreme Court stated * * *, "[w]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organizations and a choice between rival philosophies."

*Kartell*, 749 F.2d at 929 (quoting *United States* v. *Trenton Potteries Cos.*, 273 U.S. 392, 397-98 (1927)); see also *United States* v. *Trans-Missouri Freight Ass'n*, 166 US. 290, 331-32 (1897); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898) (Taft, J.), aff'd, 175 U.S. 211 (1899). Any contrary conclusion would "require judicial estimation of free market forces" (*Trinko*, 540 U.S. at 410 n.10), an approach this Court has decisively repudiated.

The Ninth Circuit's approach is wholly inconsistent with this Court's rejection of a reasonableness test. The question whether a price is "fair" or "necessary" is, if anything, *more* subjective and indeterminate than that whether it is "reasonable." See *Kartell*, 749 F.2d at 927-28 (rejecting antitrust claim based on allegation that buyer's payments were "too low" because of courts' inability to determine reasonableness of prices).

*Second*, the court of appeals' standard inevitably will lead to wholly arbitrary and unpredictable results – precisely the opposite of what this Court has required of legal standards governing allegedly anticompetitive pricing. Indeed, if the Ninth Circuit had set out to maximize capricious judicial outcomes with respect to the central issue of price, it could not have done better than the standard it announced in this case. Again quoting then-Judge Breyer, writing in the context of an alleged "price squeeze":[17]

> [H]ow is a judge or jury to determine a "fair price"? * * * Is it the price the competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to determine the proper size of the price "gap"? Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And

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[17] A "price squeeze" may arise when a firm operates at two levels of an industry and its competitors at one level are its customers at the other. "[A] price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 18 (1st Cir. 1990) (Breyer, J.).

> how should the court respond when costs or demands change over time, as they inevitably will?

*Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990). The impossibility of giving consistent (or even intelligible) answers to these questions makes it inevitable that the outcomes in individual cases decided under a "fair" and "necessary" standard will be unpredictable and often erroneous. As Judge Easterbrook has put it, a "fog-bound instruction * * * ensures that confusion and random results will emerge," along with "false positives and false negatives." Easterbrook, *On Identifying*, *supra*, at 978.[18]

*Third*, the Ninth Circuit held that a firm may be found liable whenever it cuts into a less efficient competitor's profits by moving aggressively to safeguard a supply of essential inputs, if a jury concludes that the competitor was deprived of a "fair" price. But "this conception of fairness is, of course, antithetical to both competition and economic efficiency." I Areeda & Hovenkamp, *supra*, ¶ 111d, at 103. The Court repeatedly has indicated that the antitrust laws do not "protect competitors from the loss of profits" caused by a rival's aggressive competition, explaining that a contrary approach would have the "perverse" effect of "render[ing] illegal any decision by a firm to cut prices in order to increase market share." *Cargill*, 479 U.S. at 116.

The holding below *rewards* inefficiency; under the Ninth Circuit's rule, the more inefficient a competitor is, the more solicitous its rivals must be. But businesses that take advan-

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[18] Compounding the problem, juries that are asked whether the price paid by a defeated rival for inputs was "fair" may not fully appreciate that "[c]ompetition is a ruthless process. A firm that reduces costs and expands sales injures rivals – sometimes fatally. * * * These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors." *Ball Mem. Hosp.*, 784 F.2d at 1338 (Easterbrook, J.).

tage of their low cost structures and efficient operations to out-compete their less-efficient rivals are engaging in conduct that is *encouraged* by the antitrust laws: when, as in this case, the nature of the complaint is that the plaintiff was damaged by aggressive competition, "[i]t is inimical to the purposes of these laws to award damages for the type of injury claimed." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

*Fourth*, the practical implications of the Ninth Circuit's rule are dramatic. "Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984). After all,

> antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. * * * They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

*Town of Concord*, 915 F.2d at 22.

As then-Judge Breyer explained in similar circumstances, "we ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a client considering procompetitive [bidding] in a concentrated industry." *Barry Wright*, 724 F.2d at 235. And the answer to that question is that no lawyer can give confident advice on what a jury will think is an "unnecessary" purchase or an "unfair" price. Indeed, *amici* representing a broad spectrum of the economy have provided the Court with concrete examples that illustrate the ways that the ruling below "create[s] widespread uncertainty for significant portions of the American economy" and "casts a shadow over many routine, day-to-day purchasing decisions." American Meat Inst. Cert. Am. Br. 3;

see *id.* at 2-3; Campbell Cert. Am. Br. 18-20; Business Roundtable Cert. Am Br. 7.[19]

If subjected to the Ninth Circuit's rule, businesses accordingly would err on the side of less aggressive competition. The harm from this outcome would be felt not only by the buyers, who would be constrained in obtaining necessary inputs, but also by the sellers, including small businesses, that would be denied the benefit of aggressive buy-side competition for their products. The court of appeals' rule thus would "prove counter-productive, undercutting the very economic ends [it] seek[s] to serve." *Barry Wright*, 724 F.2d at 234.

This effect would occur throughout the economy: on its face, the Ninth Circuit's ruling applies to procurement decisions of every kind of business purchasing every kind of input, including produce, natural resources, livestock, sophisticated components, even skilled employees – and there are many concentrated input markets. See Noll, *supra*, at 589-90.

There is no doubt that a readily-available pool of potential plaintiffs would be willing to take advantage of the opportunity to bring suit under such a standard. Then-Judge Breyer recognized this threat with respect to predatory selling: "if private plaintiffs are allowed to attack [above-cost prices], we are unlikely to lack for plaintiffs willing to make the effort. After all, even the most competitive of price cuts

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[19] Because the Ninth Circuit's "fairness" standard turns on the impact of the defendant's purchase price on that defendant's competitors, it seems to require a company to ascertain its competitors' cost structures – an obligation that itself gives rise to antitrust concerns about exchanges of information among competitors. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 459 (1978) ("exchanges of price information – even when putatively for purposes of [complying with the antitrust laws] – must remain subject to close scrutiny under the Sherman Act").

may hurt rivals; indeed, such may well be its object. And those rivals, if seriously damaged, may well bring suit." *Barry Wright*, 724 F.2d at 235.

The same is true of buy-side competitors. Any competitor that is losing in the marketplace and unable to compete effectively for inputs can argue that its larger competitors have driven up input prices; without an objective standard, such a claim would go to the jury. Moreover, as we have discussed (at 24), the Ninth Circuit's approach allows a plaintiff to repackage its predatory selling claims as predatory buying claims.

*Fifth*, the chill of legitimate price competition resulting from the Ninth Circuit's approach will adversely affect the global competitiveness of American manufacturers.

The situation of the lumber industry is typical. Domestic processors compete with foreign producers for sales to the largest U.S. retailers. Those foreign producers typically pay substantially lower wages and may have much lower raw material costs than U.S. lumber producers. See, *e.g.*, R.E. Taylor & Associates, *Wood . . . Where Its Going . . . Where Its Coming From?*, Presentation to the NAWLA Magellan Club (Nov. 9, 2002), *available at* http://tinyurl.com/embv5 (comparing global whitewood labor and stumpage costs in 2000). American producers are able to remain competitive only by making substantial investments in technology, implementing the resulting efficiencies, and operating at peak volume.

The Ninth Circuit's holding severely handicaps that effort, raising questions about the legitimacy of efforts to guarantee the supply of raw materials; the court of appeals' decision thereby discourages capital investment and the implementation of economies of scale. In addition to inefficient domestic competitors, low-cost overseas manufacturers, which are not subject to the competitive drag of the Ninth Circuit's rule, are the principal beneficiaries of this ruling.

The paradigm visible in the lumber industry is repeated in industry after industry where American companies in the middle of the supply chain are competing with foreign entities that have significantly lower input costs. In each case, the Ninth Circuit rule would deter investments designed to produce efficiencies as well as legitimate competition for the inputs that more efficient producers need to operate at maximum efficiency.

### C. Respondent Is Not Entitled To A Retrial On Its Predatory Pricing Claim And Its Remaining Claims Cannot Support The Verdict.

The jury's verdict cannot stand in light of the flawed instruction in this case. Because plaintiff did not introduce sufficient evidence to satisfy the *Brooke Group* standard, it is not entitled to a retrial on its predatory buying claim. Given the trial's focus on that claim, there is no credible argument that the jury necessarily based its verdict on plaintiff's other allegations of anticompetitive conduct. Although those remaining claims also are wholly insubstantial, the Court may wish to remand the case rather than itself determine in the first instance which of the two permissible dispositions, dismissal or retrial of these non-price claims, is appropriate.

1. The jury entered a general verdict on the monopolization and attempted monopolization counts. J.A. 967a. Plaintiff's presentation at trial, and its closing argument, focused heavily on the predatory buying instruction, urging the jury to find Weyerhaeuser liable for bidding up alder sawlog prices to harm competing sawmills.[20] In such circumstances,

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[20] See, *e.g.*, J.A. 731a ("Let's just briefly cover some of the key evidence. * * * Weyerhaeuser was deliberately pushing up the costs, and we saw [one witness state] that, yes, we were projecting we would get log costs down in the future."); *id.* at 736a ("Rhetorical question. Does that [testimony] infer that we have given up some $40- to $60 million in the last three years? The three years is right there. That's $20 million a year over three years.").

where much of the jury's attention was focused on an invalid theory of liability, the verdict cannot stand.[21]

In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the plaintiff alleged a conspiracy in violation of Section 1, and supported that claim with several different conspiracy allegations. This Court held that certain of the defendants could not be considered independent entities for purposes of Section 1. The Court did *not* remand the case for assessment of the sufficiency of the evidence on the plaintiff's remaining conspiracy theories. Rather, the Court stated:

> Since we hold erroneous one theory of liability upon which the general verdict may have rested * * * it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884), '[I]ts generality prevents us from perceiving upon which plea [the jurors] found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld * * * .'"

370 U.S. at 29-30.

Similarly, in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), this Court noted that "the jury's general verdict against [defendant] cannot be permitted to stand [] since it was based on instructions that erroneously permitted [antitrust] liability" to be premised on an imper-

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[21] As the government explained (U.S. Cert. Am. Br. 17-18), respondent is wrong in asserting that the general instructions defining anticompetitive conduct somehow cured the flaw in the specific instruction governing the predatory buying claim.

missible ground; the erroneous instruction warranted at least a new trial. *Id.* at 384 (citing *Sunkist*, 370 U.S. at 29-30).[22]

These holdings are dispositive here. Because the instructions on plaintiff's primary theory of liability were defective, the jury's general verdict must be set aside.

2. Plaintiff is not entitled to retry its predatory buying claim. This Court has made clear that "[i]f the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated [standard], judgment could properly be entered * * * at once, without a new trial." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988)); cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 215 (1976) ("Throughout the lengthy history of this case respondents have proceeded on a theory of liability premised on negligence, specifically disclaiming that [defendant] had engaged in fraud or intentional misconduct. In these circumstances, we think it inappropriate to remand the action for further proceedings.") (footnote omitted).

Plaintiff made no attempt to satisfy the *Brooke Group* test – it did not try to prove, and could not have proven, either that the prices charged by Weyerhaeuser failed to cover its

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[22] Cf. *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 312 (1986) ("When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, '[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict.'") (quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 n. 12 (1981)); *Greenbelt Coop. Pub'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) ("The erroneous instructions to the jury would, therefore, alone be enough to require the reversal of the judgment before us. For when 'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or an impermissible ground 'the judgment must be reversed and the case remanded.'") (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284 (1967)).

costs or that there was a "dangerous probability" the company could recoup its allegedly excessive payments for raw materials.

On costs, plaintiff has never even alleged Weyerhaeuser paid so much for alder sawlogs that it sold its finished lumber at a loss. In fact, it is undisputed that Weyerhaeuser's alder sawmills in the Pacific Northwest operated at a profit throughout the alleged predation period. See page 6, *supra*. Thus, Weyerhaeuser's prices were not merely above average variable cost, the usual measure in predatory pricing cases, but they were also above average total cost. That means that Weyerhaeuser's revenues were sufficient to cover not only the prices paid for logs and other variable costs, but its capital investments as well.[23]

Ross-Simmons' evidence of recoupment is insufficient as well. While Ross-Simmons introduced some general testimony that some Weyerhaeuser employees believed that Weyerhaeuser would have the ability to lower log prices if competitors left the market, it made no objective showing whatever that Weyerhaeuser would be able to recoup all of its losses incurred during the period of predation. See generally *Brooke Group*, 509 U.S. at 225 ("The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level *that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.*") (emphasis added).

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[23] Although there is some disagreement about the appropriate measure of costs when determining whether a predatory scheme (on either the sell or the buy side) resulted in the defendant selling its product below cost (see *United States* v. *AMR Corp.*, 335 F.3d 1109, 1118-19 (10th Cir. 2003)), Weyerhaeuser unquestionably sold its products at a profit throughout the period of the alleged predation under any standard.

The critical question is whether Weyerhaeuser would be able to drive *down* alder log prices after the predation period ended and keep prices at those low levels for a period of time sufficient to allow recoupment of all of its alleged losses. Ross-Simmons did not introduce any evidence to that effect. Indeed, the entry of new mills and expansion of existing mills *during the period of predation* provides strong evidence that if Weyerhaeuser reduced its prices for logs, thereby seeking to obtain monopsony profits, it would be met by competition from other log buyers, a decline in supply, or both:

> Particularly damaging to the predatory pricing plaintiff's case is entry that occurred during the predation campaign itself. These prices are alleged to be nonremunerative to the defendant and so low as to inflict serious injury on the plaintiff and perhaps others. As a general proposition, no rational firm would enter a market where incumbents are already losing money and where the addition of its own output will lower prices even further. Presumptively, therefore, entry during the alleged predation period defeats any predatory pricing claim.

III Areeda & Hovenkamp, *supra*, ¶ 729c2, at 351.[24]

The Ninth Circuit's determination that plaintiff had established a dangerous probability of *successful monopolization* does not suffice to establish a dangerous probability of *recoupment*. "[I]t is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new

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[24] Even Ross-Simmons' former general manager acknowledged that "[e]very time you have a drop in prices, the marginal supplier says, I'm not willing to sell at that price. Availability drops off." J.A. 631a. The timber sellers' amicus brief confirms that observation. Campbell Cert. Am. Br. 12-14 & nn.4-5. This decrease in supply in response to any price decrease would thwart any attempt at recoupment.

competitors eager to share in the excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 589-90; see *id.* at 590 ("These observations apply even to predatory pricing by a single firm seeking monopoly power.").

The total absence of proof on the key elements of the *Brooke Group* standard precludes a retrial on the predatory buying claim.

3. Plaintiff's remaining Section 2 conduct allegations are insubstantial. For example, plaintiff introduced evidence that Weyerhaeuser entered into some exclusive contracts with alder log suppliers, but did not even attempt to demonstrate that a substantial amount of the market was foreclosed – a fatal flaw in an exclusive dealing allegation. XI Areeda & Hovenkamp, *supra*, ¶ 1821d, at 183 ("low foreclosure percentages are decisive for the defendant"). Similarly, plaintiff cited Weyerhaeuser's acquisition of several sawmills as alleged anticompetitive acts, but did not provide any basis for that assertion. Plaintiff's potpourri of other claims of anticompetitive conduct are equally devoid of merit; indeed, plaintiff itself recognized the insubstantial nature of these allegations by offering absolutely no proof of damages related to *any* claimed misconduct by Weyerhaeuser other than the asserted overpayment for logs.[25] As we have shown (at pages 44-47), the judgment may not be upheld on the basis of these non-price claims; because the general verdict may not stand, the only permissible options are to dismiss or to retry

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[25] See J.A. 298a-302a, 320a-326a, 457a-469a, 476a; see also Pet. App. 26a; *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572-73 (1990) ("a plaintiff may not recover damages merely by showing a violation of the Act; rather, the plaintiff must also 'make some showing of actual injury attributable to something the antitrust laws were designed to prevent'") (citations omitted).

these claims. Although we believe it is apparent that plaintiff should not prevail on the non-price claims, the Court may wish to remand the case rather than itself address in the first instance whether dismissal rather than retrial of these claims is appropriate.

## CONCLUSION

The judgment of the court of appeals should be reversed; if the case is remanded, it should be with directions that any further proceedings be limited to respondent's non-predatory pricing claims.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## QUESTIONS PRESENTED

1. Whether the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), price-cost test applicable to predatory selling should be extended to immunize bidding conduct by a dominant buyer that is part of a multi-pronged monopolization scheme?

2. Whether petitioner preserved any objection, other than *Brooke Group*, to the jury instructions below defining anticompetitive conduct?

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Ross-Simmons Hardwood Lumber Company, Inc. states that it has not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

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Fed. R. Civ. P. 49(a) ..... 49

Fed. R. Civ. P. 51(c) ..... 48

Fed. R. Civ. P. 51(d) ..... 48

**MISCELLANEOUS**

ABA, *Model Jury Instructions in Civil Antitrust Cases* (2005) ..... 47, 48

ABA, *Sample Jury Instructions in Civil Antitrust Cases* (1999) ..... 22, 47

Darius M. Adams & Richard W. Haynes, *The 1993 Timber Assessment Market Model: Structure, Projections and Policy Simulations*, U.S.D.A. Forest Service, Pacific Northwest Research Station, PNW-GTR-368 (1996), available at www.alderantitrust.com.....20

III Phillip E. Areeda & Donald F. Turner, *Antitrust Law* (1978).....47

4C Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2002).....30

Roger D. Blair & Jeffrey L. Harrison, *Antitrust Law and Economics* (1993).....29

Roger D. Blair & Jeffrey L. Harrison, *Monopsony* (1993).....50

Patrick Bolton, et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239 (2000).....35, 36

Justice Stephen Breyer, Joint Center's 2003 Distinguished Lecture to the American Enterprise Institute-Brookings Joint Center for Regulatory Studies, *Economic Reasoning and Judicial Review*.....46, 47

Richard G. Eccles, *The Transfer Pricing Problem* (1985).....42

The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....38

Albert Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505 (2005).....37

Irma Gomez, et al., *Alternative Price Expectations Regimes In Timber Markets*, 5 J. Forest Econ. 235 (1999).....19

Oliver Wendall Holmes, Jr., *The Common Law* (1881) ..... 32

Alfred E. Kahn, *Telecommunications, the Transition from Regulation to Antitrust*, American Enterprise Institute – Brookings Joint Center For Regulatory Studies Publication 06-21 (rev. Aug. 14, 2006) ..... 35

Alfred E. Kahn, *Telecommunications, the Transition from Regulation to Antitrust*, 5 J. on Telecomms. & High Tech. L. 159 (2006) ..... 35

John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 Antitrust L.J. 625 (2005) ..... 28, 37

David N. Newman & David N. Wear, *Production Economics of Private Forestry: A Comparison of Industrial and Non-Industrial Forest Owners*, 75 Amer. J. Agr. Econ. 674 (1993), available at www.alderantitrust.com ..... 20

Richard A. Posner, *The Federal Courts* (1996) ..... 32

Richard A. Posner, *Antitrust Law: An Economic Perspective* (1976) ..... 35

Jeffrey R. Prestemon & David N. Wear, *Inventory Effects on Aggregate Timber Supply, Proceedings of the 1998 S. Forest Econ. Workshop* (1999) ..... 19

Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 Antitrust L.J. 669 (2005) ..... 37

William Schwarzer, *Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges* (1982) ..... 21

Joni Sensel, *Traditions Through The Trees, Weyerhaeuser's First 100 Years* (1999) ..... 42

David N. Wear & Peter J. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199 (1994).....19

Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717 (2005).....29

## BRIEF OF RESPONDENT
## COUNTERSTATEMENT

**Introduction: Weyerhaeuser Employed a Multi-Tactic Scheme to Monopolize the Alder Industry.**

The version of the facts and issues presented by petitioner is so misleading and materially incomplete that respondent is compelled to restate the case from start to finish.

In 1980, Weyerhaeuser entered the alder lumber business with the purchase of two sawmills in Washington. In 1985, after Ross-Simmons Hardwood Lumber Company, Inc. (Ross-Simmons) rejected its purchase offer, Weyerhaeuser converted a softwood mill to manufacture alder lumber on a site immediately adjacent to Ross-Simmons in Longview, Washington. By 1995, with a market share of 50%, petitioner's alder division managers devised a multi-pronged plan to consolidate the industry in Weyerhaeuser's hands and to amass an 85% market share. The primary components were competitor acquisitions, exclusive supply agreements and exclusionary bidding practices.

By 1998, Weyerhaeuser controlled 65% of the alder sawlog market in Oregon and Washington; a position achieved primarily through non-price tactics including three recent acquisitions. In Oregon, for example, a 1997 Weyerhaeuser supply projection showed petitioner controlling over 60% of supply through a variety of oral and written exclusive arrangements and that only 33% of supply was subject to competitive bid. J.A. 901a. In this constrained "open market," Weyerhaeuser used manipulative bidding practices to push log costs up for the purpose of either depriving competitors of needed raw materials or saddling them with high cost inputs.

This antitrust case arose at a point when Weyerhaeuser, having just acquired control over alder sawlogs in British Columbia, was forging ahead with plans to eliminate most of its remaining competition in Oregon and Washington and then to reduce raw material prices across the region. One of defendant's primary targets was Ross-Simmons, an alder

industry pioneer in the 1960s that grew to become the industry's no. 2 producer before succumbing to Weyerhaeuser's massive consolidation and closing its doors in 2001.

This is *not* a predatory pricing case. With one exception, it was pled and tried as a garden-variety monopolization case in which the defendant was accused of multiple acts of anticompetitive conduct. Despite what its brief suggests, Weyerhaeuser did not defend this case as if all exclusionary conduct allegations could be collapsed into a single predatory pricing theory. In fact, Weyerhaeuser never submitted a predatory pricing jury instruction, either before or during trial.

Instead, Weyerhaeuser's counsel in opening acknowledged that respondent's claims were "serious charges" that would be answered by evidence showing that each was false. The factual issues in this case, many of which turned largely on credibility, were decided against petitioner. No doubt recognizing the futility of challenging a jury's assessment of witness credibility, petitioner has tried to recast this case as nothing other than a predatory pricing case that founders on the shoals of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), because symmetry and logic purportedly dictate that a bright line rule applicable to predatory selling must also apply to predatory buying.

This antitrust case generated four others (involving 11 plaintiffs),[1] which revealed a mass of relevant materials withheld by Weyerhaeuser in this case that were subsequently unsealed over Weyerhaeuser's vigorous objections. In finding

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1 *Westwood Lumber Co. v. Weyerhaeuser*, Civil No. 03-0551-PA (D. Or.); *Coast Mountain Hardwoods v. Weyerhaeuser*, Civil No. 03-0552-PA (D. Or.); *Washington Alder v. Weyerhaeuser*, Civil No. 03-073-PA (D. Or.); and *Smith Street Mill, Inc. v. Weyerhaeuser*, Civil No. 04-1049-PA (D. Or.). *Westwood Lumber*, involving four alder sawmill plaintiffs, settled for $34.5 million, *Coast Mountain Hardwoods* settled for $14 million, and *Smith Street Mill*, including five plaintiffs, was settled for $13.1 million. *Washington Alder* proceeded to trial in June 2004 and concluded in a jury verdict for $5.2 million, which was trebled to $15.6 million, and is now on appeal.

that the public interest strongly outweighed Weyerhaeuser's confidentiality claims, the district judge declared:

> To the extent these exhibits furnish a "window" that lets the public peer inside Weyerhaeuser's alder business and observe years of conduct that a jury has pronounced illicit, that result is consistent with the intent of the antitrust laws notwithstanding that Weyerhaeuser might prefer to keep that window shuttered.

*Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 340 F. Supp. 2d 1118, 1124 (D. Or. 2003).

The evidence that Weyerhaeuser withheld below but disgorged in later cases is now in the public domain and cited here where appropriate to fill out the factual history of Weyerhaeuser's deliberate multi-tactic scheme to monopolize the alder industry.[2] Weyerhaeuser's own strategic plans, resource studies and associated communications stand on no different footing than the hundreds of empirical data sources cited in the original Brandeis brief[3] or, for that matter, Weyerhaeuser's citation to "facts" from a single slide in a PowerPoint presentation by a wood products consultant in 2000. Pet. Br. 43. These materials are germane, particularly in an antitrust context where this Court needs a complete understanding of the relevant marketplace before deciding a case addressing the rules of competitive engagement in that sector of the U.S. economy. Further, although not necessary to support the jury's verdict, this information helps demonstrate that the inferences drawn and the conclusions reached by this jury were in fact reasonable. This case is no false positive.

**A. Industry Structure and Relevant Markets.**

In the western United States, where softwoods predominate, the only concentration of hardwood trees sufficient to support a hardwood lumber industry is in the

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[2] All extra record documents including unpublished opinions in the follow-on cases are available at www.alderantitrust.com.

[3] Citation to extra record facts is common in this Court dating back to the first so-called "Brandeis brief" in 1907. *Muller v. Oregon*, 208 U.S. 412 (1908).

Pacific Northwest. This region is often referred to as the alder region because approximately 95% of the hardwood manufactured in western Oregon, Washington, and British Columbia is alder. This is in considerable contrast to the hardwood lumber regions east of the Mississippi where the forests contain a highly varied mix of commercial hardwoods.

The significance of alder to the hardwood industry in the Pacific Northwest was undisputed at trial. Multiple Weyerhaeuser executives conceded that the region's hardwood industry would disappear if alder were suddenly declared off-limits and unavailable for harvest. J.A. 584a; Tr. 5B at 109. The parties stipulated that there was virtually no movement of hardwood logs into or out of the Pacific Northwest. J.A. 153a. That is a function of two factors: the substantial transportation costs and the fact that alder suffers significant degradation in the form of discoloration within several weeks after harvest, depending upon weather conditions. J.A. 184a. Alder therefore cannot be shipped long distances without a significant decline in sawlog value, and the parties stipulated that alder sawlogs typically are processed within 100 miles of harvest. J.A. 153a.

The overall market structures of the U.S. hardwood regions also vary dramatically when comparing the alder region in the Pacific Northwest to the hardwood lumber regions east of the Mississippi. As a result of acquisitions by Weyerhaeuser and the closure of dozens of alder sawmills since 1970, the existing number of market participants in Oregon and Washington has dropped by 75% from more than 60 in 1970 to 15 by 2001 (all single mill operations plus six mills owned by Weyerhaeuser). J.A. 741a, 744a. In contrast, the hardwood lumber industry in the East is characterized by scores of sawmills of widely varying capacities in every state with a substantial hardwood inventory.

Weyerhaeuser understood these structural differences. In a 2001 strategic planning document, defendant noted that the outlook for its eastern hardwood lumber operations was "for

consistent margins due to a rational market."[4] In support of this conclusion, the document notes that the relationship between "raw material and product realizations" was consistent "due to large number of landowners, brokers, manufacturers and low entry costs." *Id.* The market dynamics for alder in the Pacific Northwest were considerably different, a condition defendant sought to exploit. According to its own studies, over 80% of the alder log supply was inelastic, which meant that this harvest volume would flow into the market if the price was above the costs of logging and transportation.[5] In the alder region, Weyerhaeuser considered barriers to entry to be high[6] and the opportunity for further consolidation to be considerable. J.A. 744a-745a.

The company pursued a policy of participating only in those markets where Weyerhaeuser was one of the top three players, and CEO Steve Rogel and his lieutenants promoted the benefits of industry consolidation in multiple speeches.[7] Alder competitors were not the only acquisition target. In 1999-2002, Weyerhaeuser bought up British Columbia's largest forest products company, the largest U.S. producer of trusses and I-joists, and successfully executed a hostile takeover of Willamette Industries, a company with sizable alder holdings in the Pacific Northwest.[8]

The market structure that Weyerhaeuser pursued through its ongoing consolidation efforts was not a free and competitive market. Rather, Weyerhaeuser coveted oligopoly through consolidation, a point made abundantly clear by Mr. Rogel in a speech in 2001 in which he criticized the pace of paper industry consolidation in Europe and noted the unfortunate continued existence of "small or medium-sized family firms," whom he characterized as "marginal producers" who made it hard "to avoid price wars when demand for

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4 *Westwood* Ex. 2640 at 36.

5 J.A. 750a; *Westwood* Ex. 2740 at 1.

6 *Westwood* Ex. 2685 at 1.

7 *See generally* Exs. 466, 469-475, 477.

8 Ex. 477 at 5.

paper has fallen." J.A. 823a. Clearly, Weyerhaeuser craved the supra-competitive profits that come with oligopoly, which Mr. Rogel also considered the key to superior returns in U.S. equity markets. *Id.*

**1. Alder sawlog market.** Weyerhaeuser disputed at trial but now concedes that alder sawlogs are a relevant product market geographically confined to the Pacific Northwest, specifically the western thirds of Oregon, Washington, and British Columbia. Even within the Pacific Northwest, the alder sawlog market is distinct from other log markets. Alder sawlogs are segregated from other species during harvesting in the woods and trucked to specialized production facilities that utilize different technology than that of the softwood industry. J.A. 152a. While most of the softwood lumber generated from Pacific Northwest forests goes into structural applications like two-by-four studs, alder is an appearance wood resawn by remanufacturers into a host of different products. Common uses include furniture parts (for cabinets, tables and chairs), electric guitar blanks, paint brush handles and hangers. *Id.* Alder is generally referred to as "come-along volume" because it is almost always harvested as a by-product of the region's much more dominant softwood harvest.[9]

Weyerhaeuser forest inventory experts used satellite technology, harvest records and other data to inventory the standing alder throughout the Pacific Northwest by owner and location. Defendant classified alder log suppliers into four categories: Weyerhaeuser fee lands; large private or industrial landowners; small private landowners; and public timber sales. J.A. 747a. As explained below, Weyerhaeuser used a variety of tactics to lock up most of the supply from large industrial landowners and the supplies from public lands. With control of the harvest from its own lands and most industrial landowners at rational prices, Weyerhaeuser then concentrated its overbidding strategies in that fraction of the market where it

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9 J.A. 145a, 750a; *Westwood* Ex. 2740 at 1.

faced competition from its rivals, sourced primarily from small non-industrial log suppliers.

Within six years of its 1980 entry, Weyerhaeuser's share of the Pacific Northwest alder sawlog market was 50%. J.A. 260a. By 1996, this share was 65% and by 2001, it had reached 75%. J.A. 921a. At trial, two former top executives for defendant's hardwood division acknowledged that Weyerhaeuser had substantial market power in the alder sawlog market. J.A. 259a, 341a. A single firm market share of 75% was unprecedented in the forest industry; no other wood products company had amassed more than a 50% market share in any other U.S. wood products market. J.A. 663a-664a.

**2. Finished alder lumber market.** Weyerhaeuser and its amici treat Ross-Simmons' failure to carry its burden of proof on the question whether there was a relevant market for finished alder lumber in the U.S. as *establishing* that defendant had no power in the output market. In fact, the jury made no such finding and the record evidence shows that this was a very close issue. Weyerhaeuser in 2000 listed its alder lumber market share at 75% and that of all other species at less than 1%. J.A. 753a. Even the district judge noted, "The jury ultimately didn't find for the Plaintiffs on the finished lumber claim, but there was evidence from which it could have."[10]

**B. Purchasing Conduct Was Only Part of a Complex Monopolization Scheme.**

**1. Acquisitions.** Weyerhaeuser used strategic acquisitions in 1996-2000 to increase its then 50% alder sawlog market share to over 75%, eliminating three major competitors and extending Weyerhaeuser's reach to every corner of the relevant geography for standing alder. Defendant's acquisition in 2000 of British Columbia's "dominant" and only significant alder producer exemplifies the anticompetitive character of these acquisitions. J.A. 422a. The target, Coast Mountain

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10 *Coast Mountain*, Opinion and Order denying motion to dismiss at 17, available at www.alderantitrust.com. This was also the opinion of four experts whose conclusions were substantiated by a price correlation analysis. J.A. 384a-392a.

Hardwoods, purchased 90% of the alder log supply in the province.[11] Much of this volume was generated by the company's five exclusive alder-specific forest licenses with terms of 15 to 20 years. J.A. 158a-159a. Provincial regulations also allowed Coast Mountain to block the export of alder sawlogs harvested under forest licenses held by other companies. J.A. 429a. In B.C., where over 95% of the timber supply is on public lands, the power to block exports to interested buyers in Washington could be a potent anticompetitive weapon. The 90% control enjoyed by Coast Mountain resulted in dramatically different and much lower market prices for alder sawlogs in British Columbia compared to northern Washington. *Compare* J.A. 845a ($299 in B.C.) *with* J.A. 865a, 895a ($504-$524 in Washington).

In an effort to gain access to that low cost resource, Ross-Simmons made a bid for Coast Mountain in early 2000, but needed a number of months to raise the capital.[12] Weyerhaeuser immediately proposed an all cash deal and a quick closing, which is what occurred. As it proceeded toward that closing, Weyerhaeuser sought to maintain the combination of exclusive long-term supply agreements *and* the power to block alder log exports out of the province. Weyerhaeuser sought[13] and received a clarification of existing regulations that it would be able to block alder log exports despite its status as a softwood log exporter.[14] The net result is Weyerhaeuser's powerful control over the alder sawlog resource in British Columbia. Weyerhaeuser enjoys log costs in British Columbia that are only 60% of its average log costs in Oregon and Washington. J.A. 832a-896a.

In early 2001, Weyerhaeuser projected that its growing monopsony power would enable it to reduce log costs in Oregon/Washington, and that every $10 per 1,000 board foot

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11 *Westwood* Ex. 2538 at 1.

12 Stip. Certifying Supp. Record, Ex. B at 24 (G. Boyd testimony).

13 *Smith St.* Exs. 15440, 15441.

14 British Columbia Ministry of Forests letter dated September 28, 2000, available at www.alderantitrust.com.

drop in log costs would add $2 million in profits to the division's bottom line. J.A. 903a. If that scheme had not been disrupted by this litigation, there is every reason to believe that Weyerhaeuser would have succeeded in pushing alder sawlog prices in Oregon and Washington down to the levels prevailing in British Columbia. Based upon the 2001 data, this increase in profits was close to $40 million annually. J.A. 832a-896a, 903a.

**2. Exclusive contracts (written and oral).** Weyerhaeuser locked up most of the alder sawlog market through a variety of exclusive arrangements: 15 to 20-year exclusive forest licenses in British Columbia; exclusive log supply contracts; quasi-tying arrangements; and oral agreements. A 1997 action plan following a meeting of the division's log buyers lists "lock up more wood" as the objective and identifies long-term arrangements as a primary means using "money, log trades, chip for logs or any combination."[15] The memo also lists 12 of the largest industrial landowners in the region, including five of Weyerhaeuser's *amici*,[16] for this approach. Weyerhaeuser eventually attracted most of these companies into exclusive agreements of one kind or another or oral arrangements where the parties agreed to sit down each quarter and negotiate a price for that quarter's volume. Evidence in the follow-on cases ultimately established conclusively that Weyerhaeuser generally paid less to these industrial sellers than the prices paid in that smallest segment of the market where Weyerhaeuser competed for and/or manipulated prices to higher levels.[17]

For forest landowners in western Oregon or Washington, the highest value and volume on any stand of timber is

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15 *Westwood* Ex. 2657 at 2.

16 These include five of eight companies signing on to the Timberland Owners and Managers *amicus* brief supporting petitioner, including The Campbell Group, Hampton Resources, Inc., Hancock Natural Resources Group, Inc., Menasha Forest Products Corp., and Plum Creek Timber Company as successor-owner of Georgia-Pacific's Pacific Northwest timberlands. *Id.*, J.A. 829a, 901a.

17 *Smith St.* Exs. 15951-15954.

softwood. In this region, Weyerhaeuser was the "dominant" exporter of the high grade Douglas fir that qualifies for the Asian markets. J.A. 332a. During its drive to monopolize the alder industry, log buyers in Weyerhaeuser's timberlands division, which purchased export grade softwood logs as part of its export business, were told to assist the alder division by tying their willingness to buy a logger's export grade softwood logs to that logger's commitment to deliver alder sawlogs from the stand being harvested to Weyerhaeuser's alder division on an exclusive basis. J.A. 330a-331a. Weyerhaeuser denied this quasi-tying tactic, but once again likely lost the credibility contest.

**3. Exclusionary bidding practices.** To listen to petitioner's "factual" account, Weyerhaeuser was nothing more than an innocent (but large) buyer of alder sawlogs, competing vigorously for its share of a limited supply of inputs. The impression advanced by petitioner and its *amici* is that prices were established in a transparent market by competitive bid. In fact, the market was anything but transparent. Weyerhaeuser engaged in manipulative buying procedures calculated either to push prices up or hold them at high levels while minimizing the volume of high-priced logs it actually bought.

With most of its supply already controlled through exclusive written and oral agreements, Weyerhaeuser needed only to focus on pricing in the fractional remainder of the market to impose higher costs on its rivals. It did buy some of that volume at high prices, but generally used two tactics to push prices up (or hold them up) while strategically avoiding the actual purchase of these higher cost inputs. Its competition, however, was forced to fill most of its needs from this so-called "open" share of the market.

Bear in mind that this log market, like most in the U.S., lacks transparency, depends largely on oral communications, and is therefore highly susceptible to manipulation. As the dominant buyer throughout the region, Weyerhaeuser had the power to set log prices through its bidding. Multiple witnesses

testified at trial that alder sawlog prices were set at whatever price Weyerhaeuser was paying in the market. J.A. 231a-233a, 343a, 661a. But in this high-priced segment, Weyerhaeuser sought to minimize its purchasing while maximizing the harm inflicted on its competitors. It employed two tactics: "last look" oral bidding and market-making sealed bids.

In 1999, Weyerhaeuser further undermined market transparency by adopting a proprietary log grading system adding high, medium, and low classifications to each diameter class and different pricing for each. J.A. 789a-790a. This classification system was very subjective, enabling defendant, which graded its customers' logs delivered to its mills, to mitigate high costs quoted to suppliers by manipulating the subjectivity in its grading system. J.A. 135a, Tr. 6A at 105.

The geographic market proved in this case was the Pacific Northwest, specifically the temperate marine zone west of the Cascade Mountains in Oregon, Washington, and British Columbia. Log market competition, however, was focused in smaller "sourcing areas," consistent with the location of mills and their 100-mile radius supply zones. J.A. 153a, 677a.

By 1998, there were five or fewer bidders in each of these areas (J.A. 740a, 741a; Exs. 16, 17) and each bidder participated in the market through a log buyer whose job was to talk to potential suppliers, primarily landowners and loggers, about the price the mill was willing to pay for delivered logs. The pricing was generally by diameter and quoted on a per thousand board foot basis. The larger the diameter of the sawlog, the higher the price. *See, e.g.*, J.A. 781a. Within this market segment, some larger landowners who had not been enticed into written or oral exclusive agreements with Weyerhaeuser put up their volume for sale quarterly by sealed written bid. But most of the selling in this "open" market segment was oral, through bids over the phone, with the seller ultimately asking the high bidder to issue a purchase order that was valid for deliveries over 30 to 60 days. Tr. 6A at 112.

Weyerhaeuser used the "last-look" buying practice to minimize its own purchases and impose high prices on its

competition, which was relatively easy. Once having received a commitment from a supplier to give it the opportunity to bid last, it was Weyerhaeuser's choice following multiple rounds of upward bidding to stop and let the competitor have the volume at the elevated price.[18] The sellers profited in the short term from a process that appeared to generate higher pricing compared to securing just one set of independent bids from each log buyer.

Sealed written bidding in this market was also subject to manipulation. Because of the largely oral nature of market information and the easy access to the prices being quoted by competitors, Weyerhaeuser was in a position to submit sealed bids just below what it expected its competitors to bid, knowing that the losing (but high) bid would continue to signal a high-priced market to sellers while shifting that volume to Weyerhaeuser's competitors. Weyerhaeuser carefully monitored its competitors' alder log inventories with regular drivebys and aerial reconnaissance and surreptitiously gained access to Ross-Simmons' planned bids through an employee. Tr. 2A at 61-65. This facilitated more precise "market-forcing" but *losing* bids on quarterly volume sold by sealed bid.

The above behavior is far different from predatory output pricing by sellers in a highly competitive market with many buyers. In *Brooke Group*, Brown & Williamson had no ability to drop its price for generic cigarettes and avoid the cost of this strategy in terms of lower revenue. Here, in contrast, Weyerhaeuser manipulated input prices upward and then, rather than pay the full consequences of that manipulation in that fraction of the market where it faced competition, largely avoided those costs.

**4. Overbuying.** Weyerhaeuser's overbuying, which the jury instructions referred to as "purchas[ing] more logs than it needed . . . in order to prevent plaintiffs from obtaining the logs they needed at a fair price," was accomplished in two

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[18] *See* Tr. 1B at 120-127 (explaining the process, with a historical example).

ways. First, Weyerhaeuser attempted on several occasions to force shutdowns or curtailments of Ross-Simmons by stockpiling huge volumes of sawlogs which then rotted in the log yard, suffering enormous devaluation from sawlog to pulp log. Major episodes of this tactic occurred in 1993 and 1989, causing Ross-Simmons to suffer curtailment or to shift its purchasing into lower grade logs which were not the focus of Weyerhaeuser's overbuying. Tr. 2A at 32, 38-44.

The second type of overbuying occurred in 1997-2000, a time of declining lumber prices brought on by the Asian economic crisis which greatly reduced demand for hardwood lumber in Asia. The result was an excess of supply in the U.S. and lower prices. Weyerhaeuser's CEO pointed out the financial impact of the declining Asian market on the company's overall results in its 1998 annual report and noted that defendant had taken "downtime to balance inventory levels with market conditions." Ex. 458 at 4. But not Weyerhaeuser's alder division. It continued to run at capacity and built up staggering all-time high lumber inventories, which exerted downward pressure on the market for finished alder lumber. J.A. 547a, 922a.

In a case like this, where defendant is largely manipulating input prices up (as opposed to purchasing inputs at prices set in a genuinely competitive market) while simultaneously and irrationally building inventories that push output prices down, how does one extract the pricing conduct and apply the *Brooke Group* price-cost test?

**5. Transfer Pricing.** Late stage discovery in this case revealed that defendant, contrary to company policy and repeated representations at depositions, was transferring up to half of the raw material needs of its Longview alder sawmill from company lands at below market prices. At trial, one Weyerhaeuser witness after another had no explanation for records showing that the prices for identical grades of sawlogs from defendant's Longview tree farm delivered to its Longview mill were substantially below identically graded logs delivered to other mills from other Weyerhaeuser tree

farms. J.A. 897a-900a; Tr. 6B at 142, 7A at 81-82, 7B at 19. If the average price of this volume is adjusted to the average price paid for sawlogs from all third party suppliers, the financial impact was a multi-million dollar subsidy to the Longview plant in 1997-2001. J.A. 831a ($14.7 million in total). For part of this period, eliminating a subsidy not enjoyed by any of Weyerhaeuser's other alder plants caused the Longview mill – located directly adjacent to Ross-Simmons – to run at a loss.

Judge Panner held:

> Among other things, the jury could have found that Defendant was internally transferring lumber [*sic.*, logs] to its Longview mill, at below cost, to conceal or compensate for the fact that Defendant's Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep Ross-Simmons from obtaining those logs. This might also support an inference that Defendant was deliberately trying to evade the antitrust laws and to conceal possible antitrust violations, *i.e.*, that there was willful misconduct, and that Defendant's course of conduct described at trial was designed to be anti-competitive and to further its dominance in the relevant market and went far beyond ordinary means of competition.

Pet. App. 33a.

**6. False representations to state governments.** The new interpretation of British Columbia forestry regulations in 2000 that empowered Weyerhaeuser to block alder log exports out of the province was not the first time that defendant had secured regulatory change that enhanced its market power over alder sawlogs. Weyerhaeuser is the largest private forest landowner in Oregon and Washington and the largest exporter of softwood logs to Asia. Weyerhaeuser's status as a log exporter disqualifies it from purchasing public timber from U.S. National Forests and, until it secured special exemptions from state regulators, disqualified Weyerhaeuser from purchasing logs (softwood or hardwood) generated from the sizable state forests in Oregon and Washington.

In both states, however, Weyerhaeuser successfully leveraged false representations into special exemptions allowing it to purchase alder sawlogs from state forests, provided it did not export hardwood (as opposed to softwood) logs from its own lands. The Oregon example is the most egregious. In public testimony before Oregon's state forester, Weyerhaeuser grossly exaggerated the levels of its Eugene and Garibaldi mills' dependence on alder sawlogs from Oregon's state forests. Defense witnesses weakly contended at trial that a major upward change in the relevant figures between draft and final versions of public testimony was an inadvertent error.[19] In disposing of defendant's post-trial motions, the district judge said the following on this issue:

> The Plaintiffs pled, and presented evidence, that Defendant knowingly made false statements to the Oregon Department of Forestry to obtain an exemption from log export regulations that allowed Defendant to obtain alder from state lands and, by design, also had the effect of denying those same logs to the Plaintiff mills. There was evidence from which the jury could readily conclude that the misstatements were deliberate, the deviation from the truth was substantial, and the misstatements were intended to and did influence the outcome of that proceeding. The jury could also have found that these actions were not undertaken for legitimate business reasons but rather as part of a pattern of deliberate anti-competitive conduct.

Pet. App. 42a.

### C. Weyerhaeuser Unquestionably Sought Monopoly Power in a Vulnerable Market.

It is no surprise that Weyerhaeuser lost the credibility contest below. Defendant's own planning documents exposed its strategy: acquire competitors and expand plants to become the dominant buyer in every part of the region; control most of the raw materials supply through exclusive arrangements; and

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[19] Documentation produced by Weyerhaeuser in follow-on cases shows this to be utterly false. *Compare Westwood* Exs. 2651, 2652, 2653 *with* J.A. 784a.

manipulate the balance of the so-called "open" market to levels that killed off competition. Each element of the strategy was deployed through multiple complementary means, all the while focused on the opportunity to restructure a largely inelastic, regionally constrained raw material market into a dominant Weyerhaeuser monopsony.

In its acquisitions, Weyerhaeuser sought market control. In aggressively fending off its competitors to acquire British Columbia's 90% consumer of alder sawlogs, Weyerhaeuser knew that future market entry in B.C. was unlikely[20] and that denying its Washington competitors access to the low-cost provincial resource likely would cause one of those competitors (not Ross-Simmons) to go out of business.[21] Defendant's hostile takeover of industry giant Willamette Industries, an effort that began in 2001 and closed in 2002, was parallel in tactic to its entry into the alder business in Oregon in late 1995. When its friendly negotiations to acquire privately-owned Diamond Wood Products and its major presence in Oregon stalled, Weyerhaeuser division chief Arnold Curtis threatened to use available Weyerhaeuser land in close proximity to Diamond's Oregon plants to construct competing mills if the deal was not finalized soon. The deal promptly closed. J.A. 247a-248a.

In its exclusive supply arrangements, Weyerhaeuser sought market power. Defendant developed a massive database of standing alder by owner classification and then focused its exclusive contracting efforts on the most promising of those classes - large industrial owners who could be attracted into exclusive oral or written arrangements with special cash advances, trades of other species, or other incentives.[22] Weyerhaeuser's clear objective was, in its own words, to be "the consolidator" in the Pacific Northwest, the only hardwood region west of the Mississippi. J.A. 745a. Significantly, defendant had no such plans for the eastern U.S.

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20 *Smith St.* Ex. 15406 at 3.

21 *Westwood* Ex. 2426 at 1.

22 J.A. 747a, 750a, *Westwood* Exs. 2657 at 2, 2682 at 20.

because the rationality of that marketplace with its large number of competitors of varied size at every market level made such a strategy impractical.

In its bidding behavior, Weyerhaeuser sought market power. In that smallest segment of the market not controlled by Weyerhaeuser through fee ownership or exclusive contracts, its bidding behavior was primarily designed to manipulate log prices upward to eliminate competition rather than to compete on fair terms for a share of a limited resource. There is no other explanation for Weyerhaeuser's tracking of every competitor's profit margin and the directive in its planning documents that log prices "be such that the highest cost competitors drop from the market."[23]

At trial, two former Weyerhaeuser executives admitted that manipulating log prices upward was part of Weyerhaeuser's consolidation strategy. Weyerhaeuser could not execute this strategy in the "open" market segment without buying some of that volume, which eroded the division's profit margins. When a Weyerhaeuser senior business analyst, who prepared a financial model showing the "disconnect" between rising log prices and declining lumber prices, questioned the division's finance director about this market development, she twice stated, "that was the business strategy, to price logs up to deal with competition." J.A. 357a. This same analyst participated in a series of early 2001 high level meetings in which division head Robert Taylor candidly admitted that Weyerhaeuser "had given up about $20 million in potential log cost opportunity within the last year." J.A. 354a. Another former Weyerhaeuser executive testified that the wisdom of incurring higher log costs had been questioned in senior management meetings, but division chief Arnold Curtis repeatedly brushed them aside with the statement that Weyerhaeuser would "recoup the costs manyfold" once competition was eliminated. J.A. 260a.

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23 *Westwood* Ex. 2725 at 21.

Notably, as the dramatic difference between 2001 log price levels in British Columbia compared to Oregon and Washington shows, Weyerhaeuser had its eyes on log prices that would reduce its costs by nearly $40 million annually. Any doubt about Weyerhaeuser's perceived ability to drive log costs down is belied by a planning exhibit, J.A. 903a, and an email issued when the closure of Ross-Simmons was imminent. In that 2001 email, division head Rob Taylor directed his management team that the time had come in the year's "strategic plan" to push log prices down. His specific language was: "We are in position to accelerate lower log prices AGGRESSIVELY."[24] This was obviously to be accomplished by Weyerhaeuser reversing its previous pattern of manipulative bidding and exercising its market power to drive prices downward.

**D. The Alder Sawlog Market, Like Most Timber Markets, Is Inelastic.**

Relying largely on the Campbell Group/Timberland Owners' amicus briefs, Weyerhaeuser argues that timber markets are "quintessentially elastic," and that the Ninth Circuit was wrong in concluding that the market here is "relatively inelastic." Pet. Br. 33. In its merits amicus brief, the Timberland Owners expand on this point, claiming that "[e]conomists have long recognized that the supply of timber is highly price-sensitive," citing four articles from forest economics literature. Timberland Owners Br. at 15. Close examination of these authorities reveals that this amicus brief both mischaracterizes the appropriate conclusions and inexplicably ignores more relevant literature on the elasticity issue, some of it by the federal government and by the very authors of the articles cited.

In two of the most glaring overstatements, the Timberland Owners quote the highly generalized first sentence or two from the introductions to these articles as if the quotations

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24 *Westwood* Ex. 2688 at 2.

represented the authors' ultimate conclusions.[25] When read in the context of the full article, each quote stands for no more than the general proposition that timber markets respond to price. Most significantly, these vague statements do not stand for the proposition urged - namely, high elasticity in timber markets - because of what distinguishes these markets from most natural resource markets: the time period for production. The time to produce commercially merchantable sawtimber is 30 to 50 years. This is far different from resource markets for minerals and most agricultural products, which can be produced at least seasonally and often year round. In fact, Wear and Parks make this point in the summary and conclusions section of one of the other cited articles:

> It is this essential role of *time in production* that sets forestry apart from most other applications of resource economics. Accounting for the resulting age structure of forest capital remains one of the most substantial challenges for timber supply modelers.[26]

Weyerhaeuser and its amici ignore other literature co-authored by Wear estimating sawtimber log supply elasticities for industrial and non-industrial private timberland owners in

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25 Timberland Owners Br. at 15-16 n.8, specifically the quotations from Irma A. Gomez, et al., *Alternative Price Expectations Regimes In Timber Markets*, 5 J. Forest Econ. 235 (1999); and Jeffrey R. Prestemon & David N. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 S. Forest Econ. Workshop 26 (1999).

26 David N. Wear & Peter J. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199, 217 (1994) (emphasis added). The Timberland Owners' brief creates a misimpression by quoting half of one sentence from this article from a section analyzing one of seven different timber supply models. The entire sentence, contained in a section discussing "engineering supply" models, is as follows: "Supply in the short and medium runs may be highly variable in response to market fluctuations and the most obvious criticism of this approach is that the long run is typically so far off in forestry as to be irrelevant to the supply problems at hand." *Id.* at 211; *compare with* Timberland Owners Br. at 15-16 n.8.

the U.S. South.[27] In a 1993 article, the stumpage supply was found to be highly inelastic in the short-run (0.273 for forest industry and 0.224 for non-industrial private land owners; less than 1.0 is inelastic) and more elastic in the long-run.

Weyerhaeuser and its amici also ignore a highly relevant government study showing low elasticity for all timber markets in this country. The Forest Service Pacific Research Station maintains an econometric model of the forest products sector of the U.S. economy. This model makes heavy use of elasticities of supply and demand, both for stumpage and end-products in various regions of the U.S. A 1996 publication lists the stumpage price elasticities of private timber supply by region, all of which are low, ranging from 0.145 to 0.784, with most well below 0.500.[28] In fact, supplies tend to follow the cycle of optimal crop rotation, which is measured in decades, not days, months, or years. It is this focus on a long-term production cycle that underlies the recognition by forest economists that both industrial and non-industrial forest owners - *in the long run* - "will alter their management behavior to take advantage of changed market conditions."[29]

Sustained periods of high stumpage prices will stimulate more investment in replanting and more intensive volume-enhancing management. Those same forest landowners, however, respond to a monopsonized log market with replanting decisions that drop the affected species. In its complaint, Ross-Simmons alleged that Weyerhaeuser's monopolization of the alder sawlog market was "causing industrial and small woodland owners not to plant alder seedlings because of the expectation that alder sawlog prices will fall as Weyerhaeuser gains complete control of the alder

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[27] David N. Newman & David N. Wear, *Production Economics of Private Forestry: A Comparison of Industrial and Nonindustrial Forest Owners*, 75 Amer. J. Agr. Econ. 674 (1993), available at www.alderantitrust.com.

[28] Darius M. Adams & Richard W. Haynes, *The 1993 Timber Assessment Market Model: Structure, Projections and Policy Simulations*, U.S.D.A. Forest Service, Pacific Northwest Research Station, PNW-GTR-368 at 23 (1996), available at www.alderantitrust.com.

[29] Newman & Wear, *supra* note 27 at 683.

manufacturing capacity in the region." J.A. 142a. Witness statements in the follow-on cases from a tree farmer and a consulting forester advising small woodland owners made exactly this point.[30] Even Weyerhaeuser's forest inventory experts estimated the byproduct or come-along component of the alder log market at 83% and "less sensitive to alder log price."[31]

In sum, the Ninth Circuit was clearly correct in concluding that the alder sawlog market at issue here is inelastic. Any market that is predominantly a byproduct of another market is classically inelastic, and that is particularly true when supply is largely a function of planting decisions made decades before.

**E. Proceedings Below.**

**1. The district court proceedings.** This case was litigated over 28 months. Following a nine day trial, the jury returned a verdict of $26 million, which was trebled to $78 million. Utilizing a number of the time-saving methods long advocated by jurists like Judge Schwarzer,[32] the district judge used eight pretrial conferences to rule on all objections to documentary evidence before trial and prodded the parties to hammer out extensive stipulated facts, a glossary of terms and list of key persons. Each member of a highly educated jury[33] received a notebook containing these materials as well as 10 exhibits selected by each party.

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30 George S. Fenn and James Wick witness statements, *Westwood*, available at www.alderantitrust.com.

31 Westwood Ex. 2740 at 1. Petitioner mistakenly cites to an exhibit as showing that annual alder harvests correlated strongly with alder log prices. Pet. Br. 4 *citing* J.A. 921a. In fact, that chart shows only average log prices and contains no information regarding volumes. Rather, the undisputed data is consistent with alder's "byproduct" character: In 1997-2001, alder sawlog harvest was strongly correlated to the level of softwood harvest; supplies were the same or slightly down year-to-year in that period showing *no* correlation with rising log prices. *Compare* J.A. 923a *with* Ex. 80.

32 William Schwarzer, *Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges* (1982).

33 The jurors included a Ph.D. in physics, an accountant, an engineer, a grocery chain store manager, a banker, a retired farmer, a bookkeeper, and a mechanic.

In the district court, Weyerhaeuser argued that Ross-Simmons' conduct allegations amounted to nothing more than a novel "raising rivals' costs" theory which was not a recognized or cognizable antitrust theory. This was defendant's primary argument in summary judgment, trial and post-trial motions. In the Ninth Circuit and now this Court, it has shifted grounds to generalizing Ross-Simmons' proof of 15 separate conduct categories into "essentially predatory pricing" that must be measured by *Brooke Group*. Neither this case nor *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), the only other comparable case in American jurisprudence involving log markets, can be pigeonholed into the "predatory pricing" rubric.

In contemplation of potentially asserting a predatory pricing claim in the event Weyerhaeuser had no explanation at trial for the subsidy to its Longview mill, Ross-Simmons submitted a standard *Brooke Group*-type predatory pricing instruction. J.A. 91a-96a. The district court's first draft of the jury instructions included a paragraph that addressed plaintiffs' contentions regarding overbuying and log pricing, which followed the standard instructions regarding the purpose of the Sherman Act, the elements of monopolization and how to define anticompetitive conduct, modeled after the American Bar Association's *Sample Jury Instructions in Civil Antitrust Cases*, C-2 to C-24, C-80 to C-89 (1999). J.A. 954a-963a. These ABA model instructions had been submitted in very similar forms by both sides. *Compare* J.A. 70a-87a *with* J.A. 99a-114a.

The judge's original draft of the paragraph of the instructions specifically addressed to overbidding included a sentence regarding the recoupment requirement in a predatory pricing claim, but no discussion of the price-cost test. J.A. 960a. Defense counsel had no objection to the standard instructions which preceded it, but did object to this paragraph because it was "akin to a predatory pricing instruction" and *Brooke Group* required plaintiffs to show "below-cost pricing or that the defendant operated at a loss." J.A. 725a. In an

extended colloquy, the district judge first inquired whether there was evidence to support a predatory pricing instruction. Ross-Simmons' counsel reviewed that evidence and advised the judge that the paragraph needed substantial change because, without the price-cost test, the original draft "as it stands it is really not a predatory pricing paragraph." J.A. 726a. The district judge and plaintiffs' counsel then discussed how to add that element to the draft instruction. The net result was to be two paragraphs: one for predatory pricing including the price-cost test and recoupment requirement and a second that "bidding to exclude a competitor can be an anticompetitive act." J.A. 729a.

Ultimately, however, because the log subsidy to the Longview mill complicated plaintiffs' proof of a region-wide market geography, Ross-Simmons' counsel withdrew its request for a predatory pricing instruction. J.A. 730a. The district judge then substantially reworded the original draft instruction to eliminate the recoupment sentence, reducing the original draft text from 108 to 58 words. At this point, Weyerhaeuser's counsel, without citing any ground, stated only that defendant took exception to that instruction "as modified." *Id.* Weyerhaeuser did not object to the general instructions on anticompetitive conduct and also failed to make any specific objection to the overbidding instruction after it was read to the jury and before the jury retired to deliberate. Tr. 8B at 153. Thus, except for inconsistency with *Brooke Group*, Weyerhaeuser lodged no other objection to the instruction on overbidding that has now become the centerpiece of its appeal in this Court.

**2. The court of appeals' affirmance.** The unanimous Ninth Circuit panel affirmed, concluding that *Brooke Group*'s price-cost test should not apply to the bidding and overbuying behavior of Weyerhaeuser in this inelastic input market and that substantial evidence supported the jury's finding of anticompetitive conduct on the issue of Weyerhaeuser's bidding behavior. Although it was unnecessary for the Ninth Circuit to consider the alternative grounds for affirmance, the

factual discussion above exposes the baselessness of Weyerhaeuser's argument that Ross-Simmons' "remaining Section 2 conduct allegations are insubstantial." Pet. Br. 49. Each allegation is, in fact, an alternative basis for affirming the general verdict invited by Weyerhaeuser. J.A. 931a-932a; Pet. App. 18a n.42. If the complexity and character of Weyerhaeuser's conduct is taken into proper account, this case cannot be shoehorned into the "predatory pricing" box urged by Weyerhaeuser and its amici.

Because Weyerhaeuser's sole contention below was that *Brooke Group* must apply, the Ninth Circuit rejected Weyerhaeuser's claim for JMOL on the overbidding issue and further held:

> Our conclusion that *Brooke Group* does not apply here *disposes* of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions *in its entirety*.

Pet. App. 5a (emphasis added).

The Ninth Circuit noted in dictum that the jury instructions were consistent with Supreme Court precedent, stating that a defendant violates the Sherman Act by using monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Id.* at 14a-15a. Thus, in the Ninth Circuit's view, the jury instructions "fairly and adequately cover[ed] the issues presented, correctly state[d] the law, and [we]re not misleading." *Id.* at 15a.

## SUMMARY OF ARGUMENT

The Counterstatement demonstrates that by any measure, other than perhaps a *Brooke Group* standard, the jury properly could have found Weyerhaeuser liable for its anticompetitive conduct. Weyerhaeuser engaged in a multifaceted, long-term, intentional course of conduct to monopsonize the inelastic natural resource market for alder sawlogs. Weyerhaeuser acted on its own to drive a leading competitor for those inputs out of business so that it could both control the resource and secure and maintain its monopsony power.

The posture of this case thus presents this Court with a stark choice, whether or not to superimpose the *Brooke Group* requirements for a predatory pricing claim onto the existing requirements for Section 2 liability for any and all claims of anticompetitive conduct by an input buyer engaged in predatory bidding. Yet, none of the conditions that produced *Brooke Group* exists here:

- Unlike with *Brooke Group*, there is no history of case law, data, economic analysis, and concordant professional antitrust literature from which the Court may reason and on which the Court may rely.

- Unlike with the common problem of predatory low pricing by sellers, where the Court relied heavily on the conclusion that the price-cutting mechanism for the predation promotes a core purpose of the Sherman Act, *viz.*, low prices for consumers, here the relatively uncommon circumstance of predatory overbidding for limited natural resource inputs promotes no such value.

- Unlike the concern of the Court in *Brooke Group* for a high risk of false positives that could chill otherwise manifestly procompetitive behavior, here there is no such risk; indeed, adoption of *Brooke Group* in this context is far more likely to create a high risk of anticompetitive false negatives while doing little to stem an already low risk of false positives.

- Unlike in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Brooke Group*, this case concerns the conduct of a single business, engaged in a multifaceted course of anticompetitive conduct. This is not a multi-firm, pricing-only case as those cases were, and it would be particularly inappropriate to impose a *Brooke Group* predatory pricing rule to pigeonhole the overbidding claim in this case.

The briefs of Weyerhaeuser, the Solicitor General and the Federal Trade Commission, and Weyerhaeuser's various amici all share some incorrect fundamental assumptions. They start from the premise that *Brooke Group* is so correct that it only

makes sense to extend it to buy-side transactions. However, they ignore the modern consensus view of economic and legal scholarship that has undermined *Brooke Group*'s central economic assumptions that predatory pricing is economically irrational, rare, and rarely successful. The proper exercise of judicial restraint would not impose the *Brooke Group* requirements on yet other markets when its economic foundation in its own context is so uncertain.

Although the position of Weyerhaeuser and its amici is predicated transparently on their own disputed view of favorable economic policy, the legal question presented in this case ultimately is one of statutory interpretation. This Court has provided incremental guidance for decades in interpreting Section 2 by balancing factors that have become a part of the fabric of that law. The Court requires a "special justification" to depart from established statutory interpretation and has consistently preferred reliance on the rule of reason to creation of fixed and absolute standards of antitrust liability. There is nothing in the general terms of Section 2 or in the intent of the Sherman Act to support the proposition that Congress intended to carve out a safe harbor for all monopsonists, for whatever intentional and otherwise anticompetitive bidding conduct they engage in, so long as they do not lose money while in the act.

The Ninth Circuit correctly refused to accept Weyerhaeuser's invitation to create a large class of exempt conduct applicable to a broad range of purchasing transactions. In so doing, the Ninth Circuit properly distinguished Weyerhaeuser's conduct and the market in this case from the rationales that animated the decision in *Brooke Group* and thus concluded, in an explicitly narrow holding, that *Brooke Group* did not apply on the facts of this case. That holding resolved both Weyerhaeuser's claim for JMOL and also its objection to the jury instructions "in its entirety." In *dictum* after the holding, the Ninth Circuit discussed the jury instructions and correctly concluded that they were consistent

with Supreme Court precedent and acceptable in this case when considered as a whole.

## ARGUMENT

### The Court of Appeals Correctly Decided that *Brooke Group* Does Not Apply.

*Brooke Group* started from the premise, based on the then-current economic literature, that predatory pricing schemes by sellers, in which they cut prices to consumers for the purpose of acquiring or maintaining monopoly power, are economically irrational, "rarely tried, and even more rarely successful." *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, 475 U.S. at 589). That premise provided the springboard for the two central analytic conclusions drawn by the Court, that lawsuits alleging predatory pricing have a very high likelihood that they cannot prove a violation of Section 2 and that there is a consequently high risk of false positive results that will chill price-cutting behavior that is manifestly procompetitive. *Id.* at 223-24, 226-27. Indeed, the opinion states that the "mechanism by which a firm engages in predatory pricing - lowering prices - is the same mechanism by which a firm stimulates competition." *Id.* at 226 (quotation marks omitted). The Court concluded that those circumstances warranted a departure from established Section 2 balancing principles and imposition of a strict, bright-line test for plaintiffs to meet in a predatory pricing case, *i.e.*, they must establish that the defendant's products were sold below "an appropriate measure of its rival's costs" (the generally-accepted cost tests being either average variable cost or marginal cost), and that there was a "dangerous probability" that the defendant would recoup its losses. *Id.* at 222-24.

The Ninth Circuit here, faced with Weyerhaeuser's single contention that the two-prong *Brooke Group* test should be extended to apply to all monopsony pricing cases, systematically analyzed the applicability of the rationales underlying *Brooke Group*. Pet. App. 6a-13a. In an opinion by

Circuit Judge Thomas G. Nelson, joined by Circuit Judge Johnnie Rawlinson and Senior District Judge William Schwarzer, the Ninth Circuit concluded:

> [T]he concerns that led the *Brooke Group* Court to establish a high standard of liability in the predatory pricing context do not carry over to this predatory bidding context with the same force. Therefore, the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases.

*Id.* at 11a. When presented with this "legal question of first impression" (*id.* at 5a), the court was careful to repeat throughout its opinion that its holding was limited to the facts of this case, which involved predatory overbidding that artificially raised the cost of a limited supply of alder sawlogs, a natural resource that was necessary for competing mills to survive.

The court addressed itself specifically to the core concerns of *Brooke Group* regarding low prices and false positives. After a lengthy analysis of the comparative effects on consumers and the market of raising input prices in what it labeled a "relatively inelastic" natural resource market, the Ninth Circuit stated that "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." Pet. App. 8a-11a. The court's analysis went well beyond the most obvious differences, which are that Weyerhaeuser's behavior does not save consumers money (thereby distinguishing "the concerns that *Brooke Group* expressed about depriving consumers of the temporary benefit of low prices," *id.* 10a), and that the temporary enrichment of a few sellers is not a manifest goal of the Sherman Act. *See, e.g., id.* 9a & n.14, citing, *inter alia*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 Antitrust L.J. 625, 655, 667 (2005).

Notwithstanding the manufactured complaint of Weyerhaeuser and its amici that the Ninth Circuit's analysis fails to take account of the purportedly salutary economic

effect on competition of short-term higher prices for suppliers/sellers, the opinion does, in fact, recognize that the expected benefits to competition from high prices to suppliers/sellers in some markets do not exist here:

> Although in some situations rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements, this is not such a situation. The nature of the input supply at issue here does not readily allow for market expansion. The evidence shows that, during the alleged predation period [when prices for alder sawlogs soared], the supply of alder sawlogs remained relatively stable or declined. Nothing suggests this situation will change - alder sawlogs are a "natural resource of limited annual supply in a relatively inelastic market."

Pet. App. 11a (quoting Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717, 722 (2005), and noting that Professor Zerbe also characterizes the market here as "highly inelastic," Pet. App. 11a n.20.)

Weyerhaeuser's conduct poses clear harms and risks of harm to consumers and competition. Short-term monetary gains to sellers will be more than offset by Weyerhaeuser aggressively forcing prices down once it effectively eliminates its competition, which also will decrease the value of standing alder and will not result in lower prices for consumers downstream. Faced with the prospect of Weyerhaeuser's control over price, woodland owners will curtail or eliminate planting alder, which ultimately will result in decreased supplies and higher prices to consumers. There will be fewer loggers and sawmills, thereby eliminating competition, decreasing consumer choice, and creating market inefficiencies, unused capacity, and "monopsonistic welfare losses." *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Law and Economics* 39, 49 (1993).

The Ninth Circuit thus considered the evidentiary record and the specific characteristics of this market, consistent with the historic admonition of this Court reiterated most recently in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004), that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." And in so doing, the Court not only concluded that the pricing concerns of *Brooke Group* do not apply "with the same force" here but also that *Brooke Group*'s concern with a high risk of false positives was not present in this market. The court recognized that Weyerhaeuser could effectively target cost-price squeezes aimed at lower margin competitors (while costing Weyerhaeuser extra only in that slice of the market), Pet. App. 9a-10a, and that recoupment was a viable strategy in a market with limited supply, *id.* 10a-11a.

The Ninth Circuit also found significant barriers to entry: high capital costs, limited raw materials, Weyerhaeuser's bidding practices and its dominance in the market. Pet. App. 24a. The court rejected Weyerhaeuser's argument that the entry of four new mills during the predation period demonstrated a lack of barriers to entry because these entrants failed to "take *significant* business away from the predator," 31 rivals exited, and Weyerhaeuser's market share actually increased during the relevant time frame. *Id.* at 23a. As Professors Areeda and Hovenkamp have noted, the likelihood of entry in this context means "profitable" entry for considerable time, not merely a "cycling, small fringe" of entering rivals. 4C Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 422a, 422c (2nd ed. 2002).

**A. *Reid Bros.* Demonstrates that this Scheme Has Worked Before. It Is No False Positive.**

The Ninth Circuit had another important reason to understand that this case did not produce a false positive result. The Ninth Circuit relied on its prior decision in *Reid Bros.*, where an almost identical combination of price and non-price anticompetitive conduct enabled dominant buyers to monopsonize the sawlog market in Alaska. In *Reid Bros.*, the

defendants combined captive long-term raw material supplies, aggressive use of acquisitions and expansions, and exclusionary bidding practices. The bidding behavior was designed either to deprive competitors of access to raw material or to inflict irrationally high input costs on that competition.

In *Reid Bros.*, two large wood products companies conspired to restrain trade and to monopolize the softwood log market in southeast Alaska. That log market was geographically confined to the harvest from the Tongass National Forest, which contained 97% of all woodland in southeast Alaska, and was highly inelastic because the annual harvest was limited by statutory sustainability requirements. National Forest Management Act, 16 U.S.C. § 1611. As a result, timber sale offerings by the U.S. Forest Service were fixed annually; stumpage prices paid to the federal government in one year had no impact on the level of timber sales in the next.

The "two giants of the southeast Alaska lumber industry" divided the Tongass National Forest between them and agreed not to bid against each other in these "spheres of influence." 699 F.2d at 1296-97. The two defendants also pursued "well-orchestrated and successful" efforts to "eliminate independent mills and prevent the establishment of new operations through control of the timber supply," including one "well-documented example" that is the equivalent of Weyerhaeuser's use of "last look" bidding. *Id.* at 1297. Knowing that a competitor was "desperately in need of timber," one *Reid Bros.* defendant suggested to the other that it "run [the bidding] up on [the competitor] to the point it will really hurt," noting, however, to beware of "the danger of making one bid too many." *Id.* In little more than one year, the targeted competitor was "unable to acquire a timber supply" and eventually sold out to one of the defendants. *Id.* The Ninth Circuit also affirmed the district court's finding that defendants blocked entry of new mill competitors by bidding "preclusively" on federal timber sales.

After eliminating its sawmill competition and combining to possess over a 90% market share, defendants conspired to pay artificially low prices for logs and logging services. In paying loggers on the basis of the loggers' cost rather than log value, defendants "created a network of 'captive' loggers heavily indebted to the defendants." 699 F.2d at 1298. With such financial control, defendants systematically eliminated contract loggers. By the time *Reid Bros.* reached trial, 23 loggers had been eliminated and Reid Bros. was the "only remaining independent purchase logger in southeast Alaska." *Id.*

In their appeal, the *Reid Brothers* defendants raised the very issue Weyerhaeuser presents in this case by arguing that the district court erred in its finding of predatory bidding because there was no evidence that the high prices paid for standing timber would prevent the defendants from recovering their marginal costs on the ultimate sale of the processed timber. The Ninth Circuit rejected the application of this "rigid objective test" with the following statement:

> Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, the blind application of a numerical test would only frustrate the intent of the Sherman Act.

699 F.2d 1298 n.5.

Heedless of the relevant facts and unwilling to so much as cite to *Reid Bros.*, petitioner's argument here mischaracterizes this case with a "predatory pricing" label[34] and then proceeds to trumpet logic and symmetry in urging the imposition of *Brooke Group's* price-cost test. The law, however, is no slave to symmetry. As Justice Holmes has written, in what has been characterized as "the most famous sentence in American legal

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[34] Judge Schwarzer has warned that proper analysis "requires one to escape the tyranny of labels which is so often destructive of sound reasoning, particularly in the antitrust field." *In Re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 574 (N.D. Cal. 1981), *aff'd*, 693 F. 2d 84 (9th Cir. 1982).

scholarship:"[35] "The life of the law has not been logic: it has been experience."[36]

*Reid Bros.* underscores the general importance of experience in antitrust law and, in particular, of focus on a fact-specific, industry-sensitive approach to Section 2 liability. Moreover, this Court has recognized that the combination of conduct—the "constituent elements of an unlawful scheme"—should entitle plaintiffs to receive "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 707 (1962). *Reid Bros.* is a potent reminder that geographically-constrained natural resource markets are especially susceptible to coordinated predatory schemes involving price and non-price conduct. *See American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (finding Section 2 liability for a combination of price and non-price conduct in a tobacco market).

In fact, the federal government, which is a significant timber seller primarily from the national forests, has acted in the past out of a concern that large businesses with huge private timber holdings were bidding preclusively against small companies and moving the industry toward an oligopolistic structure. In 1958, Congress amended the Small Business Act to require a "fair proportion" of total sales of government property go to small business "to preserve free competitive enterprise." 15 U.S.C. § 631(a). When the Small Business Administration and the Forest Service adopted regulations in 1971 establishing defined standards for how and when to reserve sales for exclusive bidding by small business, big business filed suit. That legal challenge was rejected, based in part on testimony from a top SBA official showing that the previous program had been ineffective at preventing preclusive bidding by large companies and their "increasing quasi-monopoly." *Duke City*

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35 Richard A. Posner, *The Federal Courts* 304-05 (1996).

36 Oliver Wendall Holmes, Jr., *The Common Law* 1 (1881).

*Lumber v. Butz*, 382 F. Supp. 362, 367, 370 (D.D.C. 1974), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976).

The Solicitor General acknowledges that a predatory bidding scheme is more readily accomplished in a natural resource market with limited supply, *see* U.S. Br. 24, which translates into a far lower risk for false positives than the highly accentuated apparent risk that triggered the Court's concern in *Brooke Group*. Indeed, this Court has recognized in another monopsony case involving a natural resource market that the plaintiff does not need to prove that the monopolist controls the entire industry so long as "control is exercised effectively in the area concerned," and that such control is "magnified" in a regionally-constrained market. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Generally, one would expect that supply elasticity for inputs would be significantly lower than demand elasticity in cases of monopoly power. Input markets also tend to be more geographically local, due to the cost of shipping relative to value. In addition, input markets are more likely to be bidding markets than output markets. Thus, when discrimination is possible, a dominant firm that overbids for inputs in an effort to exclude competitors can target cost increases at rivals. That imposes an exacting toll on the target, while limiting the cost increase to the predator to only the targeted slice of the market. That dynamic can be amplified when, as in this case, the dominant buyer has locked up a substantial part of the market other than the piece that is subject to bidding with its competitors, so that the dominant buyer already has a substantial supply in hand and its competitors are bidding and competing on the open market for only the small remaining piece of the overall market.

The Ninth Circuit's conclusion that a strict numerical test for antitrust liability in this context would "frustrate the intent" of Section 2 of the Sherman Act is assuredly correct.

### B. Recent Scholarship Has Undermined *Brooke Group's* Underlying Economic Assumptions.

The economic assumptions underlying *Brooke Group* have been subject to reconsideration and serious criticism from modern economists. The briefs of amici curiae American Antitrust Institute and the Forest Industry Participants detail the professional literature that not only has contradicted the factual premises but also has undermined the theoretical premises that had led economists and the Court, relying on those economists, to conclude that predatory pricing was economically irrational, rare, and rarely successful. Those conclusions expressly provided the basis for the position that imposition of a restrictive *Brooke Group* test was appropriate and necessary to protect against the threat of a spate of false positive results that would chill procompetitive conduct in the form of lower prices for consumers. *Brooke Group*, 509 U.S. at 226-27.

As early as 1976, however, Judge Posner correctly warned that the literature on predatory pricing had been "excessively" influenced by a 1958 "pathbreaking" article on the Standard Oil Trust. Richard A. Posner, *Antitrust Law: An Economic Perspective* 185 (1976). As recently as August 2006, eminent regulatory economist Alfred Kahn stated:

> [O]nly the economically brainwashed can deny that price discrimination has also been used as a means of predation, to the ultimate injury of consumers. . . .[37]

Summarizing the evolution of economics since the professional literature that was relied on in *Brooke Group*, three other noted economists, Professors Bolton, Brodley, and Riordan recently concluded:

> [It] is now *the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy*. In addition, several sophisticated empirical studies

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[37] Alfred E. Kahn. *Telecommunications, the Transition from Regulation to Antitrust*, 5 Journal on Telecommunications & High Technology Law 159, 171 (2006); also published at American Enterprise Institute - Brookings Joint Center For Regulatory Studies Publication 06-21, 13 (rev. August 14, 2006).

> have confirmed the use of predatory pricing strategies. The courts, however, have failed to incorporate the modern writing into judicial decisions, relying instead on earlier theory that is no longer generally accepted.

Patrick Bolton, et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2241 (2000) (emphasis added; footnote omitted).

Indeed, according to Professors Bolton, Brodley, and Riordan, "perhaps the most striking development" since *Brooke Group* has been the recognition by the government in regulating the airline industry that there are effective industry-specific predatory strategies, including "reputation effects," the ability "to discriminate between customers with great precision," and the ability to mobilize assets based on 'real-time' information about rivals that warrant utilizing a rule of reason approach to regulation rather than a strict cost-based approach. *Id.* at 2261-62.

The assumptions of complete information that underlie *Brooke Group* and the work it relied upon, and the dated theoretical world of partial equilibrium that focused strictly on static and direct effects, have been overtaken since *Brooke Group* by materially more sophisticated general equilibrium analysis that takes into account long and short run effects in a broad range of markets in a world of incomplete and often asymmetric information. *See, e.g.*, Brief of Amicus Curiae American Antitrust Institute at 11-13 (citing a large number of economic and legal analyses).

Indeed, although there has been a recent surge of interest in the general subject of exclusionary conduct under Section 2 (most of it focused on monopoly, with only very recent and preliminary attention paid to the buy-side), neither Weyerhaeuser nor the Solicitor General can cite to a single journal article or empirical study that actually has analyzed the matter at issue here and recommended adoption of a bright-line *Brooke Group* test for buy-side anticompetitive conduct.[38]

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[38] Even Professor Salop, who served as a consultant to Weyerhaeuser in this case, contends in his most recent law review article on the subject that

*See* Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505, 508 (2005) (summarizing the symposium and concluding that "[w]hat is plainly needed is a good deal of additional work ... that begins with empirical studies of particular industries."); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. at 656 (2005) ("As any antitrust expert knows, predatory pricing has generated an enormous literature . . . .In contrast, there is little legal or economic analysis of predatory bidding.")

By contrast, in addition to the position rejecting application of *Brooke Group* in the Kirkwood and Zerbe articles relied on by the Ninth Circuit, Alfred Kahn has criticized *Brooke Group* for the economics it relied upon and for its over-emphasis on the supposed risk of false positives. He has proposed a test for price predation that not only would take market realities into account but also would require, as a clear guide for potential monopolists, that they maintain their predatory prices for a period of time "following the departure of the object of the predation." Alfred Kahn, *Telecommunications, the Transition from Regulation to Antitrust*, 5 J. on Telecomms. & High Tech. L. at 171-73 & n. 45.

### C. Judicial Restraint Counsels Against Imposing *Brooke Group* in this Context.

In antitrust, where the Court has acquired a role that places it in the position of directly setting national economic policy through statutory interpretation, the fundamental importance of judicial restraint and 'getting it right' is most apparent. Although one might miss the point altogether from reading the briefs of petitioner and its amici, this is a case of statutory interpretation. Weyerhaeuser is asking this Court to replace the rule of reason balancing test that has prevailed for a century in Sherman Act Section 2 purchasing cases and to impose in its stead the fixed and absolute requirements of *Brooke Group*.

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a "consumer welfare rule of reason standard," coupled with a *Brooke Group* test, is the appropriate rule of law. Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 704-705 (2005).

This Court repeatedly has reaffirmed the proposition that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," and that a party that seeks a departure by the Court from established interpretations bears a greater burden, to provide a "'special justification.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (quoting *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984)) (Kennedy, J.). *Patterson* is a leading decision for this proposition, and *Patterson* relied in turn on *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (application of the principle in antitrust: "[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction"). The principle goes back at least as far as The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and it not only respects the judgment and wisdom embodied in prior judicial decisions, but it also promotes important values including stability and the integrity of the judicial process.

*Brooke Group* could and did 'specially justify' its departure from rule of reason balancing in the context of predatory pricing by sellers for several important reasons. The case law in the lower courts had been given a chance to develop and the Court itself had signaled its readiness to consider the departure. Circuit conflicts required resolution. There was a large body of generally harmonious economic and legal literature that had analyzed the matter empirically and theoretically and that provided the underpinnings for the decision's conclusion that the rarity and general economic irrationality of a true predatory pricing scheme translated into an unacceptably high risk of false positives. Moreover, the underlying behavior of sellers cutting prices for consumers was so manifestly pro-competitive and at the core of the Sherman Act itself, that a special rule was deemed necessary to protect against the apparently high risk of false positives.

None of those preconditions exists in this case of first impression. In the quest to assure the right result and to avoid the adoption of a rule with unknown and potentially deleterious consequences, the expansion of a precedent to its

outer limits based on a grand theory of "symmetry" is not advisable. *Compare State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997) (the Court will reconsider its prior decisions when a "serious question" is raised concerning its theoretical underpinnings); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538-39 (1994) (Thomas, J., concurring) (recognizing the inadvisability of expanding an uncertain precedent to its "outer limits").

This Court has emphasized the historic importance of market realities in antitrust law. *E.g., Verizon Communications v. Trinko*, 540 U.S. at 411. That recognition is coupled with a concomitant general distrust of rigid rules that would cement the Court to a fixed theoretical position that cannot evolve: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992).

Indeed, those considerations recently caused this Court to abandon an absolute and fixed rule of *per se* antitrust liability for vertical maximum price fixing as anticompetitive conduct in restraint of trade. *State Oil v. Khan*, 522 U.S. at 20-22. Disavowing the prior rule of *per se* liability in favor of a return to the rule of reason, Justice O'Connor's opinion for the Court recognized the generality with which the antitrust laws express liability and interpreted the law as follows:

> It would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.

522 U.S. at 21 (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731-32 (1988)).

The Court in *State Oil v. Khan*, in justifying its decision to retreat from the preexisting *per se* rule, also stated that:

> [V]ertical maximum price fixing, *like the majority of commercial arrangements subject to the antitrust laws*, should be evaluated under the rule of reason.

*Id.* at 22 (emphasis added). That statement by the Court, interpreting and applying the antitrust laws to a claim of anticompetitive conduct, makes clear just how unsupportable petitioner's position is here. Weyerhaeuser seeks the exact reverse of *State Oil*, *viz.*, imposition of a set of fixed and absolute requirements, based on nothing express in the text of the statute and contrary to its general terms, that would extend the reach of *Brooke Group* to a vast range of other "commercial arrangements" (witness the scope of transactions engaged in by Weyerhaeuser's business amici who are so eager for the safe harbor) that currently are subject to the rule of reason. The proper exercise of judicial restraint would reject Weyerhaeuser's position.

**D. The Price-Revenue Test Is Unworkable.**

Although there are several accepted methodologies to analyze the cost of a product in an ordinary sale transaction, *e.g.*, average variable cost and marginal cost, there is no comparable, symmetrical cost test to apply in an input market. It is notable that Weyerhaeuser and its amici presume the existence of a test but do not fix on a specific test and explain how the test actually would be applied. The Solicitor General breezily assumes that the existing tests from predatory pricing could serve in monopsony cases, without providing an analysis that does more than scratch the surface. Thus, this Court has no basis to conclude that a generally-accepted, reliable, workable cost test actually exists.

**1. There is no test for multiple input products.** In the most common circumstance, a product that a buyer manufactures and sells is comprised of more than one constituent part (*e.g.*, computers, trucks, beverages produced by the members of Weyerhaeuser's amici curiae the Business Roundtable and the National Association of Manufacturers). In a predatory pricing case, the parties are able to prove both the cost of producing and marketing the finished product by one of a number of well-accepted cost methodologies and the price at which the finished product then was sold, compare the

cost and the price, and thereby determine whether the seller sold the finished product at a loss.

On the buy-side, the plaintiff ordinarily can prove the price at which the defendant's finished product was sold, and the plaintiff *may* be able to establish an objective cost for manufacturing and marketing the product (including the purchase cost of various inputs). But unlike in a predatory pricing case where the predatory act of selling is a unitary event with an ascertainable sale price for the transaction, on the buy-side the predatory act of purchasing an input is only one of the many constituent input purchases and other costs – including labor, marketing, and overhead costs that cannot feasibly or reliably be allocated among the various component input parts – that typically go into the overall cost of manufacturing a finished product.

Thus, unlike in a predatory pricing case, one *cannot* compare the purchase price of the targeted component input with the sale price of the finished product in any meaningful manner to determine whether there has been a "loss" on the purchase of the input that can subject the buyer to antitrust liability. If monopsony were merely the mirror image of monopoly, then why the fundamental, critical disconnect? And if *Brooke Group* nonetheless were imposed on buy-side transactions despite the obvious *lack* of symmetry, then the asymmetric result should not be a surprise: a dominant buyer could readily monopsonize the market for an input component and still sell the end product for a profit, without ever having to face antitrust liability for its anticompetitive conduct in the targeted input market.

**2. There is no workable test for this market.** In the forest products industry, large vertically integrated companies own raw materials (fee timber) and converting facilities (sawmills). Some of this fee timber, acquired decades ago, may be an unusually cheap source of supply. For example, much of Weyerhaeuser's large timber holdings in Washington was

purchased over a century ago for $6 per acre.[39] In this case, Weyerhaeuser's alder sawmill in Longview, Washington was the single largest beneficiary of defendant's fee alder, accounting for one-third to over one-half of that mill's annual log supply in 1997-2001. J.A. 831a. On average, these fee logs were supplied at a 32% discount to the average cost of logs purchased from third parties. *Id.*

As detailed above (pages 13-14, *supra*), Weyerhaeuser claimed to utilize a transfer pricing mechanism to set "market" prices on sawlogs delivered from its timberlands division to its alder division, as determined quarterly from transaction evidence. Whereas arbitrarily low transfer prices will inflate division profits and impede efficiency, a market-based approach is designed to stimulate the most efficient allocation of resources. In a leading text on the subject, Professor Eccles describes the economic theory underlying transfer pricing as follows:

> In economic theory, the role of prices is to allocate resources in the market. Similarly, the role of transfer prices is to allocate resources within the firm, under the assumption that managers are motivated to maximize the profits of their division because at least some of their rewards are tied to divisional financial performance. The objective is to find the price that will lead both the selling and buying divisions to choose output levels that maximize the total profits of the firm.[40]

In this case, Weyerhaeuser was proven to have deviated from its market-based transfer pricing on deliveries to the Longview mill as part of its drive to eliminate competitor Ross-Simmons. At trial, Weyerhaeuser had no explanation for setting transfer prices on logs delivered to the Longview mill at levels significantly below the prices for identically graded logs delivered to defendant's five other mills in Oregon and

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39 Weyerhaeuser purchased 900,000 acres of Washington forest land in 1900, at the time the largest private land transaction in U.S. history. Joni Sensel, *Traditions Through The Trees, Weyerhaeuser's First 100 Years* 16 (1999).

40 Robert G. Eccles, *The Transfer Pricing Problem* 21 (1985).

Washington. If this below-market subsidy is eliminated, the Longview mill experienced periods of loss in 1998-2001. J.A. 831a. However, if this case is remanded for a new trial with direction that Ross-Simmons must meet a new buy side price-revenue test, Weyerhaeuser can be expected to contend that the proper inquiry is into the profitability of its alder division not just its mill that competed head-to-head with Ross-Simmons, and that transfer pricing is not *cost*-based and is therefore irrelevant. Defendant also will no doubt present evidence that the actual cost of the fee timber delivered to Longview from alder trees acquired for pennies decades ago was substantially below even the subsidized below-market rates actually utilized.

The economic rent associated with low-cost, long-held timber, which may be a function of luck rather than superior foresight or skill,[41] should not be readily available to fund "above revenue" bidding in a resource market. Were it otherwise, the antitrust law would greatly under-deter predatory bidding behavior while impeding the most efficient allocation of scarce resources.

A second administrability problem with Weyerhaeuser's proposed objective safe harbor is the confusion that would result, in a multi-tactic antitrust case, when a jury must be told that bidding behavior is judged by a cost-revenue test while closely associated conduct is measured by a balancing test. Here, Weyerhaeuser's region-wide presence through competitor acquisitions and its market foreclosure through varied exclusive agreements, along with other anticompetitive conduct, were major contributors to the creation of market conditions that both set up and enhanced the effectiveness of defendant's bidding behavior in the "open" fraction of the

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[41] This is particularly so in the case of alder, which was considered a weed species in Pacific Northwest forests until the 1960s when Ross-Simmons pioneered its emergence as a source of high quality milled lumber. Like everyone else in the first half of the 20th century, Weyerhaeuser purchased forest land in Oregon and Washington for its softwood value and likely assigned no portion of the purchase price to the alder inventory.

market. How can a judge or jury sort out the liability issues in a multi-conduct case if the bidding conduct is immunized with a price-revenue test, while related conduct, which facilitated the effectiveness of that bidding behavior, is measured by a rule of reason analysis?

*Brooke Group* involved only a pricing claim and presented no such problem. One need only look back to *Reid Bros.* to understand the potency of the combination of pricing and non-pricing conduct and to recognize the wisdom of the Ninth Circuit's conclusion, as a matter of statutory interpretation, that to segregate the overbidding allegation and make it subject to a strict numerical test "would only frustrate the intent of the Sherman Act." Pet. App. 12a (*quoting Reid Bros.*, 699 F.2d at 1298 n.5). *See also* Brief of Amicus Curiae American Antitrust Institute 17-23 (discussing why cost-based tests are particularly inappropriate for claims involving closely-connected combinations of price and non-price conduct).

A third administrability problem is associated with the fact that the relevant inputs (alder sawlogs) are used to produce many products. The three main product categories are chips, pallet lumber and kiln-dried, finished lumber, but Weyerhaeuser's finished lumber product mix included 25-50 lumber grades annually and 117 different products between 1990 and 2000. Ex. 94 at 2. Each sawlog produces some of all three major product categories, but larger diameter logs yield a higher percentage of the highest value item, finished lumber. Accurate cost allocations and revenue projections in this complicated input/output environment are extremely difficult. There is no comparable corollary to the commonly utilized average variable cost or marginal cost formulations used in sell-side predatory pricing cases.

In sum, especially in resource market cases where purchasing conduct is part of a multi-tactic integrated scheme, the cost-revenue test is not only unworkable, but is inconsistent with sound economic policy. Indeed, no rule of law, including *Brooke Group*, reasonably would permit a region-wide, multi-plant division to eliminate its single mill

competition with a predatory march through submarkets and be insulated from any liability because the company as a whole or the relevant operating division was making money.

### E. The Jury Instructions, Read as a Whole, Provided Adequate Guidance to the Jury on the Facts in this Case.

For each of the reasons detailed above, the *Brooke Group* test should not be imposed on monopsony bidding cases.[42] That conclusion should be the end of the adjudication regarding the proper rule for assessing anticompetitive conduct in this case. In the event, however, that the Court nonetheless decides to discuss the propriety of the jury instructions on anticompetitive conduct in this case, then it is respondent's position that the Ninth Circuit correctly stated, in dictum, that "the instructions as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive," "consistent with Supreme Court precedent." Pet. App. 13a-14a.

The pertinent jury instructions on anticompetitive conduct and predatory overbidding are set forth in full at Pet. App. 14a n.30. The most concern that the United States can muster

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[42] Recoupment, properly, has received very little separate attention in the parties' analyses. Weyerhaeuser objected to and never sought a separate recoupment instruction as an alternative to its request for a *Brooke Group* instruction, and thus the Ninth Circuit did not consider such an instruction. Moreover, there was ample evidence, including the direct testimony of former Weyerhaeuser senior staff, that Weyerhaeuser drove prices for alder sawlogs up in the short term with the full expectation and plan that they would recoup any profits sacrificed manyfold once they could firmly control the market and aggressively drive the price of sawlogs back down. In addition, the general instructions to the jury on anticompetitive conduct and the Ninth Circuit's recognition that there was substantial evidence to support a conclusion that the jury could have found the existence of barriers to entry, Pet. App. 14a n.30, 23a-24a, all make clear that a separate recoupment instruction would not have been required or warranted. *See, e.g.*, Brief of Appellant 31-32 (Weyerhaeuser recognizes that entry barriers and recoupment are part and parcel of the same inquiry and contends accordingly that it is entitled to JMOL because entry barriers were so low that recoupment was not possible).

regarding the jury instructions is the government's unsupported belief that the instructions "will tend to discourage at least some firms from increasing their output (especially in markets with relatively inelastic supply)." U.S. Br. in Support of Certiorari 20. That carefully-phrased statement is so shot full of qualifiers as to be essentially meaningless. The government's carefully-constructed statement of the universe of potentially affected businesses also makes clear how readily distinguishable the market facts and the conduct are in this case from the vast range of other buy-side transactions that would be granted immunity by the imposition of a *Brooke Group* rule. Put differently, no significant percentage of Weyerhaeuser's amici would be covered by the terms of the Ninth Circuit's decision, yet all of Weyerhaeuser's amici would be granted safe harbor immunity by the adoption of the *Brooke Group* rule that they seek.

The principal authority that Weyerhaeuser cites for the proposition that clear objective rules are important for the administration of the antitrust laws are opinions that were crafted by Justice Breyer when he was writing as a judge of the First Circuit. On close examination, however, the opinions engage in a careful balancing of operative principles to reach a reasoned decision that is far from the "symmetrical" application of a bright-line, absolute test such as the one proposed by Weyerhaeuser here. That is not surprising, since Justice Breyer subsequently stated his general views on this matter in a lecture entitled "Economic Reasoning and Judicial Review," delivered to the American Enterprise Institute-Brookings Joint Center for Regulatory Studies, as the Joint Center's 2003 Distinguished Lecture:

> In general, I tend to disfavor absolute legal lines. Life is normally too complex for absolute rules. Moreover, a more open, less definite approach to interpretation is likely to prove more compatible with the law's incorporation of knowledge drawn from other disciplines, particularly disciplines that themselves reason by way of "a little more, a little less," such as economics.

*Id.* at 7.

The briefs of amici curiae American Antitrust Institute and Forest Industry Participants contain extensive analysis as to why the existing rule of reason analysis is valid generally and in this case. Ross-Simmons is in full accord with and adopts by reference the position they advocate. The instructions here recognize the "necessarily broad principles of the [Sherman] Act," *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993), and the substantial body of case law spanning many decades whose principal defining characteristic is a rejection of *per se* rules and a concomitant recognition of the need for a fact-specific, industry-sensitive approach to antitrust liability.

In this instance, the general instructions to the jury on anticompetitive conduct were derived largely from the then-current American Bar Association's *Sample Jury Instructions in Civil Antitrust Cases* C-20 (1999). The ABA has recently revised its model antitrust instructions, and courts will look to those in the future. ABA, *Model Jury Instructions in Civil Antitrust Cases* C-26 to C-30 (2005).

The Ninth Circuit quoted from this Court's decisions in both *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985) and *Eastman Kodak*, 504 U.S. at 482-83, to define anticompetitive conduct. Pet. App. 14a-15a, 17a. Indeed, *Aspen's* definition of exclusionary conduct as conduct that "tends to impair the opportunities of rivals" and that "impaired competition in an *unnecessarily* restrictive way," *Aspen*, 472 U.S. at 605 & n.32 (quoting III Phillip E. Areeda & Donald F. Turner, *Antitrust Law* 78 (1978)), is echoed in the general instructions here on anticompetitive conduct, *e.g.*, "you should consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials." Pet. App. 14a n.30. And that formulation is then recaptured and developed through the more specific instruction on overbidding, which refers to paying "a higher price for logs than *necessary, in order to prevent Plaintiffs from obtaining the logs they needed* at a fair price." This instruction is not about abstract concepts like

'necessity' and 'fairness,' it is about Weyerhaeuser's intent and the anticompetitive consequences of its actions - paying more than necessary 'in order to prevent plaintiffs from obtaining the logs they needed to survive.'[43] That is entirely consonant with the recognition in *Aspen*, 472 U.S. at 605 n.32, 610-11, and *Trinko*, 540 U.S. at 409, that intent matters when ascertaining whether conduct should be deemed to be anticompetitive.

The only relevant contention that Weyerhaeuser raised and preserved in this case was that *Brooke Group* should apply. Weyerhaeuser sought judgment as a matter of law (JMOL) and objected to the jury instruction on overbidding on that ground. Accordingly, after concluding that *Brooke Group* did not apply, the Ninth Circuit held that this conclusion "disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety." Pet. App. 5a.

Although Weyerhaeuser and its amici clamor now about the precise terms of the jury instruction on overbidding, their objections come three-and-one-half years too late. Weyerhaeuser never made any such objections to the trial court, thereby failing to comply with Fed. R. Civ. P. 51(c) (requiring an objection to state "distinctly the matter objected to and the grounds of the objection").[44] Weyerhaeuser thus is precluded from raising that issue as a claim of error subsequently on appeal. Fed. R. Civ. P. 51(d). Accordingly, if this Court concludes that the two-prong test of *Brooke Group* does not apply, then it must affirm the decision of the circuit court. Even correction by this Court of the Ninth Circuit's

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[43] The 2005 ABA instructions no longer contain the term "fair" in the section on anticompetitive conduct, suggesting that the term, which formerly was used by the instructions as the complementary concept on the other side of "wrongly preventing or excluding competition" is unlikely to gain any more currency than it already has.

[44] This requirement insures that the opposing party has a fair opportunity to confront the objection and that the trial court has an adequate opportunity to rule. *See, e.g., Palmer v. Hoffman*, 318 U.S. 109, 119 (1943) (fairness to the trial court and to the parties requires an objection to a jury instruction to be "sufficiently *specific* to bring into focus the *precise nature* of the alleged error") (emphasis added).

*dictum* concerning the acceptability of the jury instructions would not be a basis for reversing its *holding*, which properly was limited to adjudicating Weyerhaeuser's contention that *Brooke Group* must apply.

If *Brooke Group* applies, however, then the decision of the Ninth Circuit should be reversed, and the case should be remanded to the Ninth Circuit for further proceedings to consider the alternative bases for affirming the jury's general verdict, based on sufficient evidence of other actionable anticompetitive conduct. Notwithstanding its apparent recognition that a remand to the Ninth Circuit for further proceedings would be appropriate, Weyerhaeuser asserts in the alternative that the Court could reverse outright the jury's general verdict. Weyerhaeuser fails to apprise this Court that the Ninth Circuit already has ruled on this dispositional issue. The Ninth Circuit considered only the allegation of anticompetitive bidding and pertinently held:

> We need not analyze whether substantial evidence supports the other alleged anticompetitive acts because the evidence of predatory overbidding sufficiently supports the finding [by the jury in the general verdict] that Weyerhaeuser engaged in anticompetitive conduct.

Pet. App. 18a & n.42.[45] The question presented by Weyerhaeuser's petition for certiorari does not challenge that

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[45] The Ninth Circuit correctly applied the distinction (a distinction that Weyerhaeuser fails to note) between cases where there is (a) a general verdict based on multiple *factual specifications* of liability (here, various acts like overbidding and market foreclosure each of which is alleged to be anticompetitive under Section 2 of the Sherman Act) and (b) a general verdict based on different *legal theories* of liability (like conspiracy to restrain trade and monopolization under Sections 1 and 2 of the Sherman Act, as in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the cases cited by Weyerhaeuser.) In the former category, if the defendant eschews its opportunity to seek a special verdict under Fed. R. Civ. P. 49(a), as was the case here (another material consideration that Weyerhaeuser neglects to mention), then the general verdict will be affirmed if any one of the factual specifications for liability is deemed to be supported by substantial evidence on appellate review. Pet. App. 18a & n.42 (citing

distinct dispositional holding on review, thus foreclosing review pursuant to Sup. Ct. Rule 14(1)(a).

Finally, it bears mention that Ross-Simmons' claim based on overbidding for sawlogs was distinct from its claim based on overbuying of sawlogs.[46] Pet. App. 18a n.42. The district court thus gave an instruction that covered, in the disjunctive, liability for overbidding *or* overbuying. Weyerhaeuser did not challenge at trial the sufficiency of evidence for overbuying[47] or the jury instruction as it related specifically to overbuying, which could never be subject to a *Brooke Group* standard since overbuying is not a cost-based claim. Thus, reversal by this Court of the Ninth Circuit's decision on *Brooke Group* would result in remand to the Ninth Circuit to consider whether to affirm the jury's verdict based on the viability of other factual bases for liability, including overbuying.

## CONCLUSION

Respondent respectfully submits that the judgment should be affirmed.

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*Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 736 (9th Cir. 1999)); *see also McCord v. Maguire*, 873 F.2d 1271, 1273-74 & n.3, *amended, rehearing denied*, 885 F.2d 650 (9th Cir. 1989), (discussing the importance of Rule 49(a) and distinguishing cases involving different factual specifications from cases involving separate legal theories).

[46] Overbuying need not depend on cost and is a well-recognized basis for a claim of anticompetitive conduct since the potential for waste and allocative inefficiency is obvious. *American Tobacco Co. v. U.S.*, 328 U.S. at 809; Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 155-56 (1993).

[47] In its appeal to the Ninth Circuit from the jury's general verdict, Weyerhaeuser recognized that in order to prevail it needed to attack the factual sufficiency of the evidence on *all* of the specifications of anticompetitive conduct. *See* Pet. App. 18a & n.42 (any one viable specification of anticompetitive conduct will support the jury's general verdict on appeal); Brief of Appellant 2-3 (Weyerhaeuser is not entitled to JMOL unless "*none* of the . . . conduct challenged by Ross-Simmons was actionable under Section 2 of the Sherman Act." (Emphasis added.)). Weyerhaeuser's brief thus included challenges, *inter alia*, to the specifications of overbuying and anticompetitive acquisition of competitors. Weyerhaeuser, however, did not raise and preserve in the district court factual sufficiency challenges to those specifications, and the Ninth Circuit did not need to address the import of those failures.

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No. 05-381

IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## SUPPLEMENTAL BRIEF FOR RESPONDENT

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## SUPPLEMENTAL BRIEF

The Solicitor General's amicus brief devotes a scant two pages to discussing whether there are "compelling reasons" sufficient to justify a grant of certiorari. *See* S. Ct. Rule 10. Such cursory treatment is, to put it mildly, remarkable, given the government's concession that there is no circuit conflict, and that "successful challenges to predatory bidding have to date been rare." U.S. Br. 19-20.[1] Indeed, the government's carefully phrased concession overstates the case. Monopsony bidding cases -- successful and unsuccessful -- are exceedingly rare. There are no more than a half dozen reported in the past century, and only one (the instant case) in the thirteen years since *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The reality is that "predatory bidding" issues simply never arise outside the context of an inelastic natural resources market (because the necessary preconditions are virtually never present outside that context), and arise only rarely even with respect to such markets.

As a result, the most the Solicitor General can offer is tepid speculation that the Ninth Circuit's decision "will tend to discourage *at least some firms* from increasing their output (especially in markets with relatively inelastic supply)." U.S. Br. 20 (emphasis added). Even that halfhearted contention lacks any basis. The Ninth Circuit reached the same result as here for the same reasons twenty-three years earlier in *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983). That decision caused none of the problems about which the government warns and there is no reason to think the instant decision will do so. The Ninth Circuit was careful to limit its holding to situations involving inelastic

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[1] The Federal Trade Commission authorized the filing of a joint amicus brief with the Department of Justice by a vote of 3-2, with Commissioners Jon Liebowitz and J. Thomas Rosch voting no. *See* http://www.ftc.gov/opa/2006/05/fyi0630.htm (FTC Press Release, 5/31/06).

supply -- situations in which the government concedes that predatory bidding can be a successful strategy because the initial rise in input prices will not attract new supply.

Casting further doubt on the government's speculative concerns is the fact that no court has cited the Ninth Circuit's decision in support of a predatory bidding allegation in any context in the more than one year since the decision was rendered. Nor (to respondent's knowledge) has anyone even filed a case alleging "predatory bidding" based on the Ninth Circuit's decision. In the exceedingly unlikely event that courts apply the Ninth Circuit's rationale outside the context of inelastic natural resource markets -- or that empirical or other scholarly analysis demonstrates a chilling effect like that posited by the government -- this Court can address the issue then. There is no reason for review now. And the extreme rarity of "predatory bidding" cases cuts decisively against review for a second reason: there is no developed body of case law or scholarly commentary upon which this Court can draw to decide the case.

At bottom, the Solicitor General's brief is an inappropriate plea for error correction. In view of the salient differences between a buy-side and a sell-side pricing case, the lack of a single false positive result in the handful of reported cases over the last century thereby indicating a virtually nonexistent risk of false positives today, and the absence of developed law or scholarly analysis of the issue, the Ninth Circuit prudently declined to extend the special predatory pricing rule of *Brooke Group* to a broad range of quite different transactions. Instead, the Ninth Circuit applied the general standards for Section 2 liability to this unusual factual situation. Although the government takes issue with one sentence in the jury instructions explicating those general standards, Weyerhaeuser raised no challenge to the jury instructions apart from its contention that the *Brooke Group* test should apply,

and thus any broader question regarding the jury instructions is not before this Court. Moreover, the recent issuance of new ABA model jury instructions for Section 2 cases (which courts almost invariably follow) renders the government's concern about the instructions here academic.

## I. NO COMPELLING REASONS SUPPORT FURTHER REVIEW.

1. The government acknowledges the absence of any circuit split; indeed, this is the first case in the thirteen years since *Brooke Group* to consider its applicability to the buy-side.[2] The government also admits that predatory bidding cases are "rare" and fails to point to even one example of a false positive result in such litigation. U.S. Br. 19-20. In view of these realities, one would expect the government to identify some powerful alternative reason to support its recommendation that certiorari be granted. Yet the most the government can muster is groundless speculation that some businesses with market power might decline to bid as aggressively for inputs (in inelastic natural resources markets) as they might otherwise have done.

2. Even worse, the government's professed concern arises not from the Ninth Circuit's unwillingness to replace standard Section 2 instructions with a *Brooke Group* instruction (the issue on which certiorari is sought), but arises instead from a single sentence of the specific jury instruction on overbidding. According to the government, the instruction's

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[2] While acknowledging the "apparent absence of a square circuit conflict," the government's brief nonetheless states in footnote that the Fifth Circuit's analysis in *In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (1990) is "in tension" with the Ninth's Circuit's decision here. U.S. Br. 18-19 & n.12. The footnote acknowledges that the one relevant sentence in *In re Beef* contains no actual analysis and is ambiguous at best, and that the case was decided three years *before Brooke Group*.

reference to "paying a higher price for logs than necessary" may "*tend to discourage*" "*at least some* firms," "*especially* in markets with *relatively inelastic supply*," and "*particularly*" in the Ninth Circuit, from increasing their output for fear of antitrust liability. U.S. Br. 20 (emphasis supplied).[3] That attenuated concern does not warrant certiorari, for multiple reasons.

Wholly apart from the fact that Weyerhaeuser never challenged that instruction language below,[4] the single sentence accurately reflected evidence showing that Weyerhaeuser's own executives thought they were spending each year $20 million more than necessary in order to execute their strategy. Pet. App. 19a. That sentence also was part of a lengthy instruction that followed the ABA's then-applicable model instructions for Section 2 cases, and those instructions made clear that Weyerhaeuser could not be held liable on the basis of superior efficiency or on the basis of competition on the merits. *Id.* at 14a n.30 (setting forth instruction). Contrary to the

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[3] As a matter of economics, a dominant firm's increase in inputs and corresponding increase in outputs (assuming no waste, which would be an incorrect assumption in this case), is matched by a decrease in competitors' outputs in an inelastic market. Contrary to the government's contention, a general procompetitive effect from the dominant firm's conduct is not clear in this context.

[4] Notably, the Question Presented -- does *Brooke Group* apply -- does not include an inquiry into the validity of the specific terms of the jury instruction here on overbidding. Weyerhaeuser did not raise such a challenge below, and the Ninth Circuit accordingly made clear that any discussion of the specific terms of the jury instruction is *dictum*:

> Our conclusion that *Brooke Group* does not apply here *disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety.*

Pet. App. 5a (emphasis added). Review of *dictum* is not ordinarily a basis for certiorari.

suggestion of the United States, it is hornbook law that jury instructions must be read as a whole. *E.g. California v. Brown*, 479 U.S. 538 (1987).

More generally, the government also contends that "to the extent" the court of appeals' decision may have "approved" a jury instruction that "dispensed with any objective standard," it may propagate an unruly breed of "vague and standardless" jury instructions in other Section 2 cases. U.S. Br. 20. That concern is even more speculative than the preceding one.[5] If any such problem comes to pass, the Court can intercede. There is no reason to do so now.

In this regard, it is significant that the American Bar Association's *Model Jury Instructions In Civil Antitrust Cases* (2005) ("2005 ABA Model Jury Instructions") with respect to anticompetitive conduct also have changed in material ways since this jury was instructed in 2003. Terms such as "*fair* competition" were used in the ABA's 1999 *Sample Jury Instructions In Civil Antitrust Cases* but are not in the ABA's 2005 Model Jury Instructions. 2005 ABA Model Jury Instructions C-26 to C-30; 1999 ABA Sample Jury Instructions C-20 to C-22. The 2005 instructions have adopted a stricter formulation, and require proof that a defendant had *no legitimate business reason* for its conduct in order to make out a claim of anticompetitive conduct. *Id.* Thus, the government's concern about the use of the terms "*fair* price" and "higher price *than necessary*" in the instruction here is highly unlikely to present itself again in the same manner.

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[5] A district court in the Ninth Circuit already has distinguished the decision below because it addressed "attempted monopolization of a single market based on predatory buy-side overbidding ... and [did] not address attempted monopolization in a two-market (wholesale and retail) context, as was alleged in this case." *Standfacts Credit Services, Inc., et al. v. Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141, 1151 (C.D. Cal. 2005).

2. The absence of any development in the lower courts is significant for another reason: this Court has no body of informed opinion on which to draw to decide whether a special rule is needed for "predatory bidding" cases, or to flesh out the specifics of any such rule. The government suggests (in a footnote) that there is a "growing body of academic literature" that discusses predatory bidding, but fails to note that the issue had received essentially no academic attention before this case was decided just one year ago. U.S. Br. 19 n.13. One clear theme of a recent symposium on buyer power (whose principal contributors were the retained experts in this very case) was that "[w]hat is plainly needed is a good deal of additional work that begins with empirical studies." Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505, 508 (2005); *see also* John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 656 (2005) ("there is little legal or economic analysis of predatory bidding"). These competing preliminary analyses hardly provide a basis for formulating a sound rule at this juncture.

The absence of any track record in the lower courts and the extremely limited scholarly treatment create a particularly severe problem for the government's argument that "predatory bidding" should be actionable only when a defendant incurs a "loss." Weyerhaeuser has not proposed a test for what "loss" means in this context. The government, for its part, notes that *Brooke Group* left open the meaning of "loss" in predatory pricing cases, and then asserts that the Court simply could do the same here. U.S. Br. 14 n.5.

But there are critical differences between the two situations. At the time *Brooke Group* was decided, two alternative tests were well-established in the professional literature and the case law – marginal cost and average variable cost – and the Court elected not to choose between them. 509

U.S. at 222 n.1. In this instance, by contrast, there is no corresponding accepted way to measure loss. A court would have to determine whether "loss" is measured by reference to the particular product the defendant makes with the input at issue. If (as is often the case) an input is used for multiple finished products, a court would have to determine whether a defendant had incurred a loss in all of those products or in the specific product at issue. And courts would have to fix upon a definition of "loss" in this context. No court or commentator has even begun the process of setting forth a test. It is no answer to suggest, as the government does, that the issue can be left to the lower courts to decide. Such an approach would spawn significant confusion. It would be imprudent to consider adopting a rule requiring a showing of loss in that circumstance.

## II. THE DECISION BELOW IS LIMITED AND CORRECT.

1. Legal and scholarly analysis of what the government calls "predatory bidding" is nascent and grossly underdeveloped, in sharp contrast to the body of legal and scholarly predatory pricing analysis extant when *Brooke Group* was decided. The Ninth Circuit's narrow, case-specific focus in this case of "first impression" was the appropriate judicial response to Weyerhaeuser's request for the court to extend the special Section 2 rule for predatory pricing cases to the quite different situation presented by the range of buy-side transactions.

2. The government's criticism of the Ninth Circuit's analysis is misplaced. The government asserts that the Ninth Circuit failed to consider the effect of higher prices on the sellers of alder sawlogs. U.S. Br. 12-13. That is incorrect. The Ninth Circuit focused primarily on effects in the downstream market because it was responding to Weyerhaeuser's contention that there could be no Section 2

claim absent injury to *downstream consumers* who paid more for the end product. Weyerhaeuser did not raise the issue of effects on sellers until its petition for *en banc* rehearing. *See* Opp. Cert. 25 n.10.

Once the Ninth Circuit determined that there were material differences in the "benefit to consumers and stimulation of competition" between aggressive price-cutting by sellers (*Brooke Group*) and input price-raising by buyers for a "natural resource of limited annual supply in a relatively inelastic market" (this case), there was a sufficient basis for its conclusion that a key underlying premise for *Brooke Group* either did not apply or did not apply with the same force in this case. Pet. App. 9a-11a.

Nonetheless, the court did, in fact, also consider the effects of Weyerhaeuser's conduct on sellers. The decision recognizes that this inelastic natural resource market had no capacity to self-correct by virtue of the relatively fixed amount of supply. Pet. App. 11a. The court thereby recognized that Weyerhaeuser's conduct could have no salutary effect on supply for sellers (which ordinarily in other markets can expand to meet demand) or the ability of new sellers to enter the market. The court also recognized that log sellers would be harmed in the recoupment phase because the monopsonist "would likely pay less for its materials." *Id.* at 10a. This is precisely what happened in the inelastic log market at issue in *Reid Brothers*, a decision that the Ninth Circuit expressly reaffirmed.

3. The government is utterly unconvincing in its suggestion that the Ninth Circuit's decision threatens to create "false positives" either in unusual settings like the one here or more broadly. There is not a single example of a false positive involving alleged predatory overbidding among the small handful of cases that ever have considered the issue over the last century, which suggests that the risk of false positives here

is either nonexistent or extremely low. Moreover, unlike in *Brooke Group*, there is an empirical vacuum here that makes it impossible to assess any risk.

The government nonetheless urges this Court to adopt a bright-line "one size fits all" rule for predatory overbidding without any support in the prior case law. In fact, there are only two cases in the last quarter century to have analyzed this issue -- *Reid Brothers* and this case. Neither is a false positive.

Both cases arose in the context of an inelastic natural resources market in the Ninth Circuit. Both cases involved direct testimony showing specific intent to monopolize. Here, for example, Cliff Chulos, a former Weyerhaeuser manager, testified that Arnold Curtis, the president of Weyerhaeuser's alder division, acknowledged in senior management meetings that Weyerhaeuser had a "strategy of raising log costs" and buying logs for "the purpose of ... keep[ing] logs from competitors," and that Weyerhaeuser expected to "recoup the costs manyfold" once competition was eliminated. TR 3A at 15-16 (SER 157-158); TR 3A at 19 (SER 161).

Both cases involved interlocking combinations of tactics involving pricing and non-pricing conduct. In the instant case, Weyerhaeuser not only *overbid* to push log prices up, but also *overbought*. During the period of predation, this overbuying was designed both to push log prices up in what otherwise would have been a falling market and to deprive its competitors of access to that raw material. In cases involving a complementary relationship between price and non-price conduct, established Section 2 analysis is preferable to adopting special rules applicable to single categories of conduct. *See* Pet. App. 13a-14a (the instructions "as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive").

Extending the *Brooke Group* safe harbor to defendants in predatory overbidding cases in inelastic markets would be especially inappropriate. The annual harvest in the Pacific Northwest of alder trees that take *30 years or more* to mature is a *byproduct* of the much larger softwood harvest. In this classically inelastic market, the cost to Weyerhaeuser of driving up log prices was relatively low because higher prices would not, and did not, increase the amount of logs which Weyerhaeuser would have to buy to keep input prices high and squeeze rivals from the market. Weyerhaeuser's cost of predation was made even lower by controlling a significant share of the alder log supply through a battery of other exclusionary tactics including acquisitions of competitors, exclusive supply contracts and misrepresentations to state officials to secure special access to the alder harvested from the State of Oregon's public forests.

The Ninth Circuit correctly concluded that the same pronounced risk of false positives that animated the Court's decision in *Brooke Group* did not exist here and that an extension of *Brooke Group* therefore would not be warranted.

## CONCLUSION

The petition for certiorari should be denied.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## SECOND SUPPLEMENTAL BRIEF FOR RESPONDENT

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# TABLE OF AUTHORITIES

## CASES

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## SECOND SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent files this second supplemental brief pursuant to Rule 15.8 to respond to incorrect assertions in Petitioner's Supplemental Brief regarding the record below. Petitioner attempts to distort the record below regarding the single sentence in the jury instructions that has become the focus of petitioner and amici in this Court. To put the record on this sentence into its proper perspective, three points are appropriate.

First, despite its clever weaving of record excerpts, the fact remains that Weyerhaeuser *never* submitted a *Brooke Group* instruction, passing up the opportunity both in its 32-page pretrial submission and in a supplemental set of requested instructions filed during trial. Instead, Weyerhaeuser pursued an all-or-nothing strategy in which it unsuccessfully contended that *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) entitled it to judgment as a matter of law in summary judgment, trial and post trial motions.

Second, consistent with the foregoing, Weyerhaeuser made only a generalized, blanket "*Brooke Group* should apply" objection to a predecessor of the disputed instruction formulated by the district court, which at that point totaled 108 words. TR 8B at 6 (ER 419). In a colloquy that consumes over seven transcript pages, the district judge first proposed a major expansion of the instruction, dropped that proposal when respondent withdrew one of its requested instructions and then substantially reworded the original draft instruction down to 58 words. TR 8B at 5-12 (ER 418-425) (corrected at ER 630). At this point, Weyerhaeuser's counsel, without citing any ground, stated only that defendant took exception to that instruction "as modified." *Id.* at 12 (ER 425). Weyerhaeuser also failed to make any specific objection to this instruction after it was read to the jury and before the jury retired to deliberate.

Given the major evolution of this instruction in a discussion largely between the district court and respondent's counsel, Weyerhaeuser's unspecified objection failed to meet the Rule 51 requirement that trial counsel specify the *grounds* for objection to a jury instruction. This Court has long held that "a general exception is not sufficient," and that, in fairness to the trial court and the parties, "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943).

To be sure, the procedural posture of any challenge to this now-disputed jury instruction is most peculiar. Weyerhaeuser submitted no instruction on the issue that is the primary basis for its petition in this Court and made no particularized objection to an instruction that underwent considerable evolution between the time of its inclusion in draft instructions submitted to the parties and its adoption in a far different form by the district court. On this record, Weyerhaeuser utterly failed to comply with the letter or spirit of Rule 51 which is designed to "bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." *See, e.g., Voorhies-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001) (quotation marks omitted); *id.* (noting with approval that the Ninth Circuit "has long enjoyed the 'reputation as the strictest enforcer of Rule 51,' as we have consistently declared that there is no 'plain error' exception in civil cases in this circuit") (citation omitted).

Finally, precisely because Weyerhaeuser raised no challenge to the specific terms of the overbidding instruction either at trial or in its direct appeal, the Ninth Circuit was clearly accurate and correct when it held:

> Our conclusion that *Brooke Group* does not apply here disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety.

Pet. App. 5a.

Accordingly, Weyerhaeuser's challenge to the overbidding instruction on grounds other than that *Brooke Group* should apply is not properly before this Court. Indeed, neither Weyerhaeuser nor the government contests the point made by respondent in opposition to certiorari and again in the supplemental brief that the Ninth Circuit's short discussion of the jury instructions, which are addressed "as a whole," is mere dictum, rarely a basis for certiorari. Relatedly, neither Weyerhaeuser nor the government has refuted the fact that there have been material changes in the ABA's model jury instructions since the jury was instructed in this case, changes that make the recurrence of the instruction in this case highly unlikely, which is yet another reason why certiorari is inappropriate.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S SUPPLEMENTAL BRIEF

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## PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner files this supplemental brief pursuant to Rule 15.8 of the Rules of this Court to respond briefly to an erroneous assertion in Respondent's Supplemental Brief regarding the state of the record. Respondent tries to create the impression (Supp. Br. 3-4) that the Solicitor General's only objection to the jury instruction in this case is "the instruction's reference to 'paying a higher price for logs than necessary.'" Respondent goes on to assert that this issue is not before this Court because petitioner supposedly did not challenge this aspect of the jury instruction in the court below (*id.* at 4 & n.4). Respondent is wrong on both counts.

To begin with, the government's disagreement with the jury instruction is not limited to the single phrase quoted by respondent. The government's position is that "[b]ecause the court of appeals held that a plaintiff need not satisfy either prong of the *Brooke Group* standard in order to prevail on a predatory-bidding claim, its decision was erroneous" (U.S. Br. 14-15 (footnote omitted)). The language respondent quotes – from the penultimate paragraph of the Solicitor General's amicus brief – explains the anticompetitive effects of the Ninth Circuit's ruling, not the government's position regarding the appropriate jury instruction.

The *Brooke Group* issue is properly before this Court. The issue was squarely raised in the district court, where petitioner raised the *Brooke Group* issue in pre-trial briefing and objected to the proposed instruction (including the language quoted by respondent)[1] on the ground that it was "akin

[1] The district court itself originally proposed a jury instruction that permitted a finding of liability based on a determination that "the Defendant purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price" if the jury also found

to a predatory pricing instruction," which petitioner argued was governed by the objective two-part test of *Brooke Group*. Volume 8A, April 17, 2003, at 6:2-3; *id.* at 6:3-8 ("The U.S. Supreme Court test for predatory pricing as announced in the *Brook Group* [sic] case in 1993 is that plaintiffs must show below-cost pricing or that defendant operated at a loss. This is a bright-line test announced in the *Brook Group* [sic] case. Defendant takes exception to that entire paragraph.").

The district court rejected petitioner's objection because it agreed with respondent that "the *Reid Brothers* case makes it very clear that preclusive bidding is exclusionary conduct regardless of whether or not you can show recoupment" (*id.* at 9:21-24) and "this is not a predatory pricing paragraph" (*id.* at 12:7-8). The court accordingly eliminated the recoupment language from the last sentence of the proposed instruction. See Final Jury Instructions at 10. Weyerhaeuser objected again. Volume 8A, April 17, 2003, at 12:10-11 ("So the record is clear, defendant does take exception to that instruction * * * as modified."). The court of appeals squarely addressed the *Brooke Group* issue, as respondent acknowledges. Supp. Br. 4 n.4; see also Pet. Reply Br. 2 n.2.

The remainder of respondent's supplemental brief simply recycles arguments from its brief in opposition in an attempt to dispute the Solicitor General's conclusion that this Court should grant review because the court of appeals' erroneous decision "threatens to chill procompetitive conduct by firms in a wide variety of markets" (U.S. Am Br. 19). The Solici-

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that "Defendant had a reasonable expectation that it could subsequently recoup any losses it had sustained through this conduct, either by paying lower log prices in the future or by charging higher prices for Defendant's products due to a reduction in competition from other saw mills." Draft Jury Instructions at 10.

tor General's neutral assessment of that question surely is more credible than respondent's self-interested assertions.

The Solicitor General is not reluctant to recommend against certiorari in cases in which he concludes the issue presented is not sufficiently important or review by this Court is not warranted for other reasons – as in No. 02-1865, *3M Co.* v. *LePage's Inc.*, cert. denied, 124 S. Ct. 141 (2004), a filing relied upon by respondent in its brief in opposition (at 18-19).[2] The government's recommendation in this case is strongly supported by amicus briefs reflecting the views of individual companies and associations from every segment of the economy – including the very sellers of timber that the Ninth Circuit's rule supposedly is designed to protect – as well as by the views of legal scholars. See U.S. Am. Br. 19 n.13.

For the foregoing reasons, and those stated in the petition and reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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[2] For other amicus briefs filed by the Solicitor General this Term recommending against certiorari, see, *e.g.*, Brief for the United States as Amicus Curiae, *Nielson v. Private Fuel Storage*, No. 04-575 (Sept. 2005); Brief for the United States as Amicus Curiae, *Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc.*, No. 04-607 (Aug. 2005); Brief for the United States as Amicus Curiae, *Carpenters' Health & Welfare Trust for S. Cal. v. Vonderharr*, No. 04-1049 (Oct. 2005); Brief for the United States as Amicus Curiae, *Vines v. EEOC*, No. 04-1615 (Dec. 2005); Brief for the United States as Amicus Curiae, *FTC v. Schering-Plough Corp.*, No. 05-273 (May 2006); Brief for the United States as Amicus Curiae, *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation Dev. Comm'n*, No. 05-331 (May 2006); Brief for the United States as Amicus Curiae, *Empresa Cubana Del Tabaco v. General Cigar Co., Inc.*, No. 05-417 (May 2006); Brief for the United States as Amicus Curiae, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (May 2006); Brief for the United States as Amicus Curiae, *SmithKline Becham Corp. v. Apotex Corp.*, No. 05-489 (May 2006).

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# In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

*v.*

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether a plaintiff alleging that a defendant engaged in "predatory bidding" constituting exclusionary conduct for purposes of Section 2 of the Sherman Act, 15 U.S.C. 2, must prove that the defendant suffered a loss in the short term and that it had a dangerous probability of recouping its loss in the long term.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and share a strong interest in the proper application of those laws. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

### STATEMENT

1. Petitioner and respondent operated sawmills in the Pacific Northwest. The predominant hardwood species in that region is alder. Petitioner and respondent purchased alder sawlogs from landowners or loggers and processed them into hardwood lumber, which is used in consumer goods such as furniture and cabinetry. Sawlogs represent as much as 75% of an alder sawmill's total cost in producing finished lum-

ber. Because alder sawlogs degrade quickly and are expensive to transport, alder sawmills typically obtain their sawlogs from no farther than 100 miles away. J.A. 152a, 153a, 169a; Pet. App. 2a-3a.

Respondent operated a single alder sawmill in Longview, Washington, starting in 1962. Petitioner entered the Pacific Northwest alder lumber business in 1980, and now operates six alder sawmills in the region. During the relevant period, petitioner's share of the Pacific Northwest market for alder sawlogs was approximately 65%; petitioner's share of North American sales for all hardwood lumber, however, was less than 3%. J.A. 700a; Pet. App. 3a.

From 1998 to 2001, the price of alder sawlogs increased while the price of hardwood lumber decreased. As the margin between those prices narrowed, 31 alder sawmills in the Pacific Northwest, including respondent's, became unprofitable and closed. During that same period, however, four new alder sawmills opened. Pet. App. 3a, 23a n.57.

2. After closing its plant, respondent brought suit against petitioner in the United States District Court for the District of Oregon, contending, *inter alia*, that petitioner had engaged in monopolization and attempted monopolization of the Pacific Northwest alder sawlog market, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[1] Specifically, respondent alleged that petitioner had engaged in four types of exclusionary conduct to reduce or eliminate competition in the alder sawlog market: "(1) predatory overbidding (i.e., paying a higher price for sawlogs than necessary); (2) overbuying (i.e., buying more sawlogs than it needed); (3) entering [into] restrictive or exclusive agreements with sawlog suppliers; and

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[1] Two other alder sawmill owners, Confederated Tribes of Siletz Indians of Oregon and Smokey Point Hardwoods, Inc., were also plaintiffs in the original lawsuit. Their claims were either dismissed or rejected by the jury. J.A. 2a, 3a.

(4) making misrepresentations to state officials in order to obtain sawlogs from state forests." Pet. App. 3a-4a.

The case was tried before a jury. At the close of the evidence, the district court instructed the jury that, in order to prevail on its monopolization and attempted-monopolization claims, respondent was required to prove that petitioner had engaged in anticompetitive (or exclusionary) conduct. J.A. 973a, 979a. The court defined "anticompetitive conduct" in general as "conduct that has the effect of wrongly preventing or excluding competition[] or frustrating or impairing the efforts of other firms to compete for customers within the relevant market." J.A. 977a. The court noted, however, that "[n]ot everything that enables a company to gain or maintain a monopoly is anti-competitive," *ibid.*, and that "[a]nti-competitive conduct does not include ordinary means of competition," J.A. 977a-978a. The court advised the jury that, in determining whether conduct is anticompetitive, it should consider "whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition." J.A. 977a.

With reference to respondent's "predatory bidding" and "overbuying" claims, the district court gave the jury the following, more specific instruction:

> One of [respondent's] contentions in this case is that [petitioner] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

J.A. 978a. Petitioner objected to that instruction, reasoning that respondent's claim that it had engaged in predatory *bid-*

*ding* was analogous to a claim that the *seller* of a product had engaged in predatory *pricing*. Under this Court's decision in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a plaintiff alleging predatory pricing must show (1) that the defendant had engaged in below-cost pricing in the short term and (2) that the defendant had a dangerous probability of recouping its losses in the long term. Petitioner contended that a plaintiff alleging predatory bidding must make the same showing. The district court, however, ultimately overruled that objection. J.A. 725a-730a.

The jury found that petitioner had engaged in monopolization and attempted monopolization of the market for alder sawlogs and awarded respondent approximately $26.3 million in damages, which the district court trebled to approximately $78.8 million. Pet. App. 4a.[2] The district court then denied petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 28a-46a.

3. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court of appeals framed the relevant question as "whether the prerequisites set forth in [*Brooke Group*] for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs." Pet. App. 5a. The court concluded that "*Brooke Group* does not control in the buy-side predatory bidding context at issue here." *Ibid.*

The court of appeals acknowledged that the antitrust laws are "concerned with competition on the buy-side of the market as much as on the sell-side of the market," because "[b]oth sides of the market affect allocative efficiency, and hence con-

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[2] The jury rejected, however, respondent's claim that petitioner had engaged in monopolization or attempted monopolization of the market for finished alder lumber, finding that there was no distinct market for finished alder lumber (as opposed to finished hardwood lumber more generally). J.A. 967a.

sumer welfare." Pet. App. 6a. The court of appeals explained that, in *Brooke Group*, this Court had "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." *Id.* at 8a. The court of appeals further recognized that, "in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon." *Ibid.*

The court of appeals nevertheless concluded that claims of predatory bidding were distinguishable from claims of predatory pricing because "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a. With regard to the benefit to consumers in the downstream market, the court reasoned that, in the short term, when a firm "pays more for materials * * * and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases," "[n]o consumer benefit results * * * if the firm raises or maintains the same price level for its finished products." *Id.* at 9a-10a. While consumers in the downstream market would benefit in the short term if the firm lowered the price level for its finished products, the court continued, such lower prices would merely "place even greater pressure on competitors, thereby increasing the threat to competition arising from the predatory bidding." *Id.* at 10a. In the long term, the court reasoned, when a firm seeks to "recoup the higher costs it had paid for its materials," "[t]he firm would have little incentive to pass on the benefit of lower input prices to consumers when it possessed greater market power and needed to recoup the higher costs it had paid for its materials." *Id.* at 10a-11a. Therefore, the court concluded, "the overall effect of a predatory bidding scheme would result in harm to consumers." *Id.* at 11a.

With regard to the stimulation of competition in the upstream market, the court of appeals recognized that, in some situations, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. The court determined, however, "[t]he nature of the input supply at issue here does not readily allow for market expansion." *Ibid.* Based on that determination, the court reasoned that, "at least in this case, predatory bidding is less likely than predatory pricing to result in * * * the stimulation of competition." *Ibid.* The court thus concluded that "the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing." *Ibid.*

Having decided that "*Brooke Group* does not govern in this case," Pet. App. 13a, the court of appeals sustained the district court's instructions, including the "relevant * * * instruction" that required the jury to find merely that petitioner "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price." *Id.* at 7a n.8, 14a n.30; see J.A. 978a. The court rejected petitioner's assertion that the jury should have been instructed, consistent with *Brooke Group*, that "overbidding for sawlogs could be anticompetitive conduct only if [petitioner] operated at a loss and a dangerous probability of [petitioner's] recoupment of its losses existed." Pet. App. 13a.

The court of appeals then determined that substantial evidence supported the jury's verdict on respondent's attempted-monopolization claim (and thus did not consider the jury's verdict on respondent's monopolization claim). Pet. App. 16a n.38, 17a. The court found that there was "substantial evidence of overbidding for sawlogs to support the jury's

finding of anticompetitive conduct" (and thus did not "analyze whether substantial evidence support[ed] the other alleged anticompetitive acts"). *Id.* at 18a.[3] The court also found that there was substantial evidence to support the other elements of respondent's attempted-monopolization claim: specifically, that petitioner had acted with specific intent to eliminate competition, *id.* at 18a-20a, and that petitioner had a dangerous probability of achieving monopoly power in the relevant market (*i.e.*, the Pacific Northwest alder sawlog market), *id.* at 20a-25a. Finally, the court of appeals upheld the jury's damages award, *id.* at 25a-26a, and the district court's award of attorney's fees and costs, *id.* at 27a.

## SUMMARY OF ARGUMENT

A. The court of appeals mistakenly held that a plaintiff can establish "predatory bidding" in violation of Section 2 of the Sherman Act simply by persuading a jury that the defendant purchased an input at a price that was "higher * * * than necessary" for the purpose of preventing competitors from obtaining that input at a "fair" price. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that a plaintiff alleging that the seller of a product had engaged in predatory pricing must show (1) that the defendant had engaged in below-cost pricing in the short term and (2) that the defendant had a dangerous probability of recouping its losses in the long term. Notably, the Court adopted such a standard even though it recognized

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[3] In concluding that there was substantial evidence of predatory bidding, the court of appeals cited evidence that (1) the price of alder sawlogs increased while the price of hardwood lumber decreased; (2) petitioner had a dominant share of the market for alder sawlogs; (3) petitioner suffered "declining profits" because of the high prices it was paying for raw materials; and (4) petitioner employed a deliberate strategy of raising the price of alder sawlogs. Pet. App. 17a-18a.

that it might permit some anticompetitive conduct, out of concern that a broader standard could lead to "false positives" and chill procompetitive conduct. Because a claim of predatory bidding by a buyer is closely analogous to a claim of predatory pricing by a seller, the *Brooke Group* standard should be applied to a claim of predatory bidding as well.

The court of appeals distinguished predatory bidding from predatory pricing on the ground that predatory bidding does not necessarily produce benefits for consumers in the downstream (or finished-product) market. The court of appeals erred, however, by losing sight of the Sherman Act's overriding purpose of protecting the competitive process. Like aggressive price-cutting by the seller of a finished product, aggressive bidding by the buyer of an input is often (and indeed usually) procompetitive. An increase in the bid price is often simply the result of increased purchasing by a large buyer in a market with inelastic supply. In the vast majority of cases, such increased purchasing reflects procompetitive expansion by a relatively efficient buyer, designed to enable the buyer to increase its output. Aggressive bidding for an input sends important signals to the market, and harm to competition occurs only if the bidder is able to recoup any losses. Moreover, at least when the bidder does not acquire significant market power in the downstream market as a result of its predation in the upstream (or input) market, downstream consumers are unlikely to suffer any detrimental effects from the bidder's behavior. Indeed, downstream consumers will ordinarily benefit from aggressive bidding in the upstream market, because robust competition in that market benefits the most efficient producers (which, in turn, are most likely to generate innovations or cost savings that will benefit downstream consumers in the future). Application of the *Brooke Group* standard is warranted to avoid prohibiting (or deterring) such procompetitive conduct.

The *Brooke Group* standard can readily be adapted to a claim of predatory bidding, and there is no justification for refusing to apply that standard in this case. The court of appeals suggested that the *Brooke Group* standard should not apply to predatory bidding in a market with "relatively inelastic" supply. But it is precisely in such a market that allegations of predatory bidding are likely to arise, yet the increase in the price of an input may be nothing more than the manifestation of procompetitive buying for the purpose of increasing production. Accordingly, it is precisely when supply is inelastic that courts need to guard against the risk of imposing liability on procompetitive conduct. In *Brooke Group*, the Court did not attach independent significance to demand elasticity in the relevant market in formulating its standard for predatory-pricing claims, and there is no justification for attaching significance to supply elasticity here. In any event, a limiting principle based on "relative inelasticity" would be entirely unworkable, as it would introduce ambiguity and uncertainty into the otherwise objective *Brooke Group* test.

B. The jury instruction approved by the court of appeals in this case would permit the imposition of liability for predatory bidding absent a showing that the alleged predator had met either of the *Brooke Group* requirements. And it would establish a standard that turns on a subjective determination of whether the price paid for the relevant input was "higher * * * than necessary" or not "fair." If allowed to stand, such a subjective standard will have the effect of deterring procompetitive conduct. This Court has abjured such subjective standards in other Section 2 contexts, and it should do so again here.

## ARGUMENT

### THE COURT OF APPEALS ERRED BY UPHOLDING THE JURY INSTRUCTION ON RESPONDENT'S "PREDATORY BIDDING" CLAIM

This case involves a claim of "predatory bidding" by the buyer of an input. As the court of appeals noted, "[i]n a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases." Pet. App. 9a-10a. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that a plaintiff alleging that the seller of a product had engaged in predatory pricing must show (1) that the defendant had engaged in below-cost pricing in the short term and (2) that the defendant had a "dangerous probability" of recouping its losses in the long term. *Id.* at 222, 224. Because predatory bidding by a buyer is closely analogous to predatory pricing by a seller, the requirements of *Brooke Group* are also applicable to a claim of predatory bidding. The court of appeals erred in this case by approving an instruction that allowed the jury to award treble damages for predatory bidding without finding that respondent had met either of the *Brooke Group* requirements.

#### A. In Order To Prevail On A "Predatory Bidding" Claim, The Plaintiff Must Prove That The Defendant Suffered A Short-Term Loss And That The Defendant Had A Dangerous Probability Of Recouping Its Loss

Section 2 of the Sherman Act, 15 U.S.C. 2, imposes liability for two types of unilateral conduct: monopolization and attempted monopolization. Section 2 does not prohibit the possession of monopoly power standing alone; instead, it prohibits willfully acquiring, attempting to acquire, or maintaining mo-

nopoly power through anticompetitive, or "exclusionary," conduct. See, *e.g.*, *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-459 (1993); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). Conduct is exclusionary when it tends to exclude competition "on some basis other than efficiency," *i.e.*, when it "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605 & n.32 (citations omitted).

This Court has often recognized "the difficulty of identifying and remedying anticompetitive conduct by a single firm," *Verizon*, 540 U.S. at 408, due to the fact that "the means of illicit exclusion, like the means of legitimate competition, are myriad," *id.* at 414 (citation omitted). The Court has emphasized, however, that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Ibid.* (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). Accordingly, the Court has stressed the importance of "avoid[ing] constructions of § 2 which might chill competition, rather than foster it." *Spectrum Sports*, 506 U.S. at 458. The Court has also noted that "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (citation omitted) (brackets in original).

### 1. *The* Brooke Group *Standard Was Adopted In The Predatory-Pricing Context In Order To Avoid Chilling Procompetitive Conduct*

In *Brooke Group*, the Court provided specific guidance as to when aggressive price-cutting by the seller of a product

constitutes a particular form of exclusionary conduct known as "predatory pricing."[4] The Court rejected the proposition that it would be sufficient for a plaintiff alleging predatory pricing to show simply that the defendant lowered its prices in order to injure or exclude rivals. Instead, the Court held, such a plaintiff must prove that (1) "the prices complained of are below an appropriate measure of its rival's costs," 509 U.S. at 222, and (2) "the competitor had * * * a dangerous probability[] of recouping its investment in below-cost prices," *id.* at 224.

In support of that standard for predatory-pricing claims, the Court supplied several justifications. With regard to the below-cost-pricing prong of the standard, the Court emphasized that "[l]ow prices benefit consumers regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). In addition, the Court noted that, when a company sets its price above the cost of its product, a low price often "reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *Ibid.* A rule that imposed liability for price-cutting even when a company engages in *above*-cost pricing, the Court reasoned, could conceivably "render illegal any decision by a firm to cut prices in order to increase market share." *Ibid.* (quoting *Cargill*, 479 U.S. at 116). Imposing liability only for below-cost pricing thus ensures that antitrust suits will not "bec[o]me a tool for keeping prices high." *Id.* at 227.

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[4] Although *Brooke Group* involved a claim for primary-line price discrimination under the Robinson-Patman Act, 15 U.S.C. 13(a), rather than a predatory-pricing claim under Section 2, the Court made clear that "the essence of the claim under either statute is the same," and accordingly the same "two prerequisites to recovery" apply "whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act." 509 U.S. at 222.

With regard to the recoupment prong of the standard, the Court stressed that "[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme," because "it is the means by which a predator profits from predation." *Brooke Group*, 509 U.S. at 224; see *Matsushita*, 475 U.S. at 588-589 (noting that it would be "irrational" for a company to suffer short-term losses unless it had a "reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered").[5] To the extent that price cutting that does not result in recoupment produces lower prices in the market, the Court explained, it would actually *enhance* consumer welfare. *Brooke Group*, 509 U.S. at 224.

In *Brooke Group*, the Court expressly recognized that its standard might permit some anticompetitive price-cutting (*i.e.*, price-cutting that would exclude rivals on a basis other than efficiency). Specifically, the Court observed that above-cost pricing could sometimes be used to "induce or reestablish supracompetitive pricing," 509 U.S. at 224, and implicitly acknowledged that, even absent recoupment, below-cost pricing could allow a predator to establish short-term market power by injuring and driving out its rivals (until new competitors enter the market and drive the market price back down). *Id.* at 224-225; see *Matsushita*, 475 U.S. at 589; *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 233-234 (1st Cir. 1983) (Breyer, J.).

The Court concluded, however, that those categories of anticompetitive price-cutting would be "beyond the practical

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[5] As this Court further noted in *Matsushita*, "the success of [predatory pricing] is inherently uncertain," because "the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition." 475 U.S. at 589. As a result, "economic realities tend to make predatory pricing * * * self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the [predator]." *Id.* at 595.

ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Brooke Group*, 509 U.S. at 223. As the Court explained, a broader standard would run the risk of imposing liability in cases involving procompetitive price-cutting, and "the costs of [such] an erroneous finding of liability are high," *id.* at 226, because such errors (or "false positives") would "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted). And the risk that such "false positives" will occur under a broader standard is substantial, the Court explained, because "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Ibid.* (internal quotation marks and citation omitted) (brackets in original).

### 2. *The Same Considerations That Led To Adoption Of The* Brooke Group *Standard Indicate That It Should Apply In The Predatory-Bidding Context As Well*

A claim of "predatory bidding" by a buyer in an upstream (or input) market closely resembles a claim of predatory pricing by a seller in a downstream (or finished-product) market. In both cases, as the court of appeals acknowledged, "the price level itself is the anticompetitive weapon." Pet. App. 8a. Like predatory pricing by a seller, predatory bidding by a buyer involves the manipulation of prices for the purpose of "eliminating competitors in the short run and reducing competition in the long run." *Cargill*, 479 U.S. at 117. Whereas a seller engaged in predatory pricing hopes to exploit its monopoly power by selling its product at *higher* prices in the future, a buyer engaged in predatory bidding hopes to exploit its monopsony power by purchasing the relevant input at *lower* prices. See *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, C.J.) (noting that "monopsony pricing * * *

is analytically the same as monopoly or cartel pricing and so treated by the law"), rev'd on other grounds, 522 U.S. 3 (1997); *Ball Mem'l Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.) (stating that "a monopsonistic depression of price is as bad as a monopolistic increase in price").

Despite the similarities between predatory-pricing and predatory-bidding claims, the court of appeals held that *Brooke Group* "does not govern" in this case, Pet. App. 13a, and that petitioner's bidding conduct could therefore be condemned even absent proof that petitioner suffered a short-term loss or that petitioner had a dangerous probability of recouping its loss. That conclusion was erroneous.

*a. The Sherman Act Protects Competition Generally, Including Suppliers As Well As Consumers*

As this Court has noted, "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). The Act "reflects a legislative judgment" that "ultimately competition will produce not only lower prices, but also better goods and services," and that "competition is the best method of allocating resources in a free market." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). The Act is designed to protect the "competitive process" generally, not particular participants in that process. *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136-137 (1998); see, *e.g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).[6] As the court

[6] Thus, the Department of Justice prosecutes bid-rigging cartels aimed at suppressing competition among buyers under Section 1 of the Sherman Act, 15 U.S.C. 1. See, *e.g.*, *United States* v. *Giordano*, 261 F.3d 1134, 1135-

of appeals acknowledged, therefore, the Sherman Act is "concerned with competition on the buy-side of the market as much as on the sell-side of the market." Pet. App. 6a.

In holding that *Brooke Group* was inapplicable in this case, the court of appeals lost sight of the Sherman Act's fundamental purpose: protecting competition as a whole, which is expected to inure to the benefit of consumers. See *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. Like aggressive price-cutting by a seller in a downstream market, aggressive bidding by a buyer in an upstream market is often (and indeed usually) procompetitive. See, *e.g.*, *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 925 (1st Cir. 1984) (Breyer, J.) (noting that a buyer's "competitive instinct" is to "bid up price"), cert. denied, 471 U.S. 1029 (1985). A buyer may aggressively bid for an input so that it can expand output immediately (or in anticipation of doing so in the near future), build up its inventory of the input to hedge against future price increases, or ensure that it obtains the input from a particularly reliable or high-quality supplier. In a market with inelastic supply, such aggressive bidding by a large buyer is particularly likely to increase the bid price of the input. While aggressive bidding may hurt a buyer's rivals in those circumstances, it does so only insofar as a buyer's higher bid "reflects the [buyer's] lower cost structure * * * and so represents competition on the merits." *Brooke Group*, 509 U.S. at 223.

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1137 (11th Cir. 2001); *United States* v. *Romer*, 148 F.3d 359, 363 (4th Cir. 1998), cert. denied, 525 U.S. 1141 (1999); *United States* v. *Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir.), cert. denied, 434 U.S. 938 (1977). Similarly, under Section 7 of the Clayton Act, 15 U.S.C. 18, the Department of Justice challenges mergers that threaten to have anticompetitive effects on the purchasing of inputs. See, *e.g.*, Competitive Impact Statement, *United States* v. *UnitedHealth Group, Inc.*, 71 Fed. Reg. 13,999 (2006); Competitive Impact Statement, *United States* v. *Cargill, Inc.*, 64 Fed. Reg. 44,054 (1999).

In the short term, moreover, vigorous competition among buyers for an input creates incentives for sellers to increase the quantity, or improve the quality, of that input. As then-Judge Breyer once noted in the predatory-pricing context, "[t]he antitrust laws very rarely reject such beneficial 'birds in hand' for the sake of more speculative (future * * *) 'birds in the bush.'" *Barry Wright*, 724 F.2d at 234. Input prices set through competitive bidding send important signals to the market, and harm to competition occurs only if the bidder is subsequently able to lower its bids below competitive levels and successfully recoups its losses.

As with predatory pricing, therefore, a rule that attempted to distinguish precisely between procompetitive and anticompetitive bidding would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate [conduct]," *Brooke Group*, 509 U.S. at 223, because "[t]he mechanism by which a firm engages in predatory [bidding]—[raising] prices—is the same mechanism by which a firm stimulates competition" in the input market, *id.* at 226 (first set of brackets in original). An increase in price may reflect nothing more than procompetitive expansion by a large buyer in a market with inelastic supply. Failure to apply the reasoning of *Brooke Group* in the predatory-bidding context thus could lead to "false positives" and thereby "chill the very conduct the antitrust laws are designed to protect." *Ibid.* (internal quotation marks and citation omitted); see Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 35 (2006) (noting that "[t]he risks of overdeterrence and false positives are equivalent [in predatory-bidding cases] to those in predatory pricing cases").

*b. Consumers Are Seldom Injured By, And Typically Benefit From, Aggressive Bidding In Input Markets, So Discouraging Such Conduct Would Be Contrary To The Goals Of The Antitrust Laws*

gedly predatory bidding does differ from allegedly predatory pricing in that it could conceivably have effects in *two* markets: the upstream market (in which the bidding occurs) and the downstream market. In holding that *Brooke Group* was inapplicable in this case, the court of appeals focused almost exclusively on what it perceived to be the effects of an allegedly predatory bidder's conduct on consumers in the downstream market. Thus, the court explained that, in the short term, "[n]o consumer benefit results * * * if the firm raises or maintains the same price level for its finished products." Pet. App. 10a. Although the court recognized that downstream consumers might temporarily benefit from lower prices during the predation period, to the extent that the alleged predator lowered the price of its product while simultaneously putting upward pressure on the price of the relevant input, the court reasoned that such lower prices may actually be undesirable, to the extent that the alleged predator's competitors would be squeezed in both the input and output markets. *Ibid.* And in the long term, the court reasoned, downstream consumers would likely not benefit either, insofar as the alleged predator would likely not pass on the benefit of lower prices and could instead "charg[e] consumers a higher price" in order to "recoup the higher costs it had paid for its materials." *Ibid.*

While the interests of downstream consumers are indeed one proper focus of analysis, the court of appeals' reasoning concerning the downstream effects of the alleged conduct was fundamentally flawed. The court's assertion that consumers might be charged "higher price[s]" as a result of the alleged

predatory bidding necessarily assumes that the alleged predator had, or that its bidding conduct would confer, significant downstream market power, because a predatory bidder without significant market power in the output market would be unable meaningfully to raise prices in that market. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 676 (2005).[7] In this case, however, there is no reason to believe that petitioner possessed or obtained market power in the relevant downstream market: in rejecting respondent's claim that petitioner had engaged in monopolization or attempted monopolization of the market for finished alder lumber, the jury found that there was no distinct market for finished alder lumber, and the record reflects that petitioner's share of the North American market for finished hardwood lumber was less than 3%. J.A. 700a, 967a. Regardless of whether petitioner was engaged in predation in the market for alder sawlogs, therefore, petitioner could not have raised prices in the downstream market for finished hardwood lumber—and any alleged predation in this case therefore would have had no significant adverse effects on consumers in the downstream market.

The only circumstance in which downstream consumers would unambiguously be harmed by predation in an upstream market is when the alleged predatory bidder *acquires* signifi-

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[7] To the extent that the bidder increases production of its finished product as a result of its increased acquisition of the relevant input (and thereby increases the amount of that product available on the market), consumers in the downstream market may temporarily benefit from *lower* prices (until the market returns to equilibrium), even in the absence of significant market power by the bidder in the downstream market. Without such market power, however, there would be no possibility of subsequently imposing higher prices in the downstream market, as the court of appeals suggested. See Pet. App. 10a.

cant market power in the downstream market (and is thus able to raise prices in that market) as a result of its predatory behavior. In that situation, however, the bidder would be subject to Section 2 liability on the discrete theory that it had engaged in monopolization or attempted monopolization of the *downstream* market by engaging in predatory bidding in the *upstream* market: *e.g.*, by subjecting rivals in both the upstream and downstream markets to a "price-cost squeeze." See *Cargill*, 479 U.S. at 114; see generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986). In this case, the jury expressly rejected respondent's discrete claim that petitioner had engaged in monopolization or attempted monopolization of the downstream market. J.A. 967a. Where, as here, the defendant lacks significant market power in the downstream market (and has no substantial prospect of acquiring it through upstream predation), any alleged predation is unlikely to have an adverse effect on downstream consumers.[8]

The critical point with respect to downstream consumers is that they, like sellers in the input market, will ordinarily benefit from aggressive bidding in the upstream market. That is because vigorous competition in that market ensures that inputs are efficiently allocated to the bidders that are best able to use them, thereby benefiting those bidders that are the most efficient producers (and creating incentives for other bidders to become more efficient). Those producers that are

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[8] Moreover, to the extent that aggressive bidding in the upstream market has even incidental effects on consumers in the downstream market, the *Brooke Group* test would naturally take into account those effects, insofar as changes in the downstream price would naturally affect the alleged predator's revenue (and therefore affect both whether the alleged predator has suffered a short-term loss and whether the alleged predator has a dangerous probability of recoupment).

most efficient, in turn, are precisely those that are most likely to generate innovations (or cost savings), which will benefit consumers in the future. And vigorous competition by sellers of inputs, with resulting improvements in the production of those inputs, will likewise benefit consumers, as the court of appeals recognized. See Pet. App. 11a. A test that more broadly penalized aggressive bidding, like the one endorsed by the court of appeals, would ultimately disserve consumers by prohibiting (and deterring) firms from engaging in procompetitive conduct.

### 3. *The* Brooke Group *Standard Is Readily Adaptable To The Predatory-Bidding Context*

The *Brooke Group* standard can easily be applied to a claim of predatory bidding. In order to prevail on such a claim, a plaintiff should be required to show (1) that the defendant suffered (or expected to suffer) a short-term loss as a result of its allegedly higher bidding and (2) that the defendant had a dangerous probability of recouping its loss through the exercise of monopsony power.

The first prong of the standard will require consideration of the relationship between (1) the cost that the defendant incurred (or expected to incur) for its finished product (taking into account its allegedly predatory bidding for the relevant input) and (2) the revenue that the defendant received (or expected to receive) for that product.[9] In keeping with the ap-

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[9] To be sure, while the *Brooke Group* standard in the predatory-pricing context focuses on a comparison of costs and revenues in the allegedly manipulated market, any cost-revenue comparison in the predatory-bidding context would focus on the *downstream* market (rather than the allegedly manipulated upstream market). Absent some objective indication that the price paid for the input is excessive, however, there is no basis for attributing an unlawful motive to a company's increase in purchases of an input, even when it has the effect of increasing the prevailing market price for that input.

proach followed in *Brooke Group* with regard to predatory-pricing claims, see 509 U.S. at 222 n.1,[10] the Court need not specify exactly how cost (or revenue) should be calculated under the first prong of the standard.[11] At a minimum, however, a reviewing court should evaluate a defendant's profit or loss from the perspective of the time of the allegedly predatory bidding, lest the defendant be held liable simply because it overestimated the eventual sale price or because it failed to foresee an increase in other components of its cost (*e.g.*, a spike in oil prices), thereby causing it to sell at a loss. Cf. *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (noting that "the antitrust laws are not meant to police bad management").

Moreover, a plaintiff should be required to show that the defendant suffered a short-term loss even if the cost of the relevant input constituted only a small percentage of the cost of the finished product. In this case, the relevant input—alder sawlogs—accounts for as much as 75% of an alder sawmill's total cost in producing finished lumber. J.A. 169a. Where the input constitutes only a small percentage of a defendant's overall cost, however, the input likely represents only a small percentage of the overall cost of the defendant's rivals as well, thereby reducing the likelihood that the defendant's aggressive bidding for that input will drive its rivals out of the input market. To the extent that the short-term-loss requirement

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[10] Since this Court's decision in *Brooke Group*, "no consensus has emerged as to what the most 'appropriate' measure of cost is in predatory pricing cases." *United States* v. *AMR Corp.*, 335 F.3d 1109, 1115 (10th Cir. 2003).

[11] The jury instruction in this case did not require any finding that petitioner suffered a short-term loss. Should the Court agree that the court of appeals erred by rejecting the *Brooke Group* standard, it would be appropriate to allow the lower courts to elaborate on the short-term-loss requirement on remand.

will only rarely be met in cases in which the input constitutes a small percentage of a defendant's overall cost, therefore, it is simply because predatory bidding will only rarely be successful in those cases.

The second prong of the standard will require a demonstration that the defendant was likely to recoup its losses in the long term. That requirement is an "indispensable aspect" of the standard for predatory-pricing claims. *Brooke Group*, 509 U.S. at 232.[12] And it is equally indispensable for predatory-bidding claims, because, when the alleged predator does not have a dangerous probability of such recoupment, there is an insufficient risk that the alleged predator would be able to exploit monopsony power for a significant length of time, and thus no significant threat to competition. Indeed, although the court of appeals approved a jury instruction that did not include a recoupment element,[13] it recognized that, "to

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[12] In fact, Judge Easterbrook has suggested that the likelihood of recoupment should be the "initial hurdle" for a predatory-pricing claim, such that "[o]nly if market structure makes recoupment feasible need a court inquire into the relation between price and cost." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989), cert. denied, 494 U.S. 1019 (1990).

[13] The jury *was* instructed that, in order to prevail on its predatory-bidding theory, respondent was required to prove that "there was a dangerous probability that [petitioner] would achieve its goal of monopoly power in the relevant market." J.A. 980a. It does not necessarily follow from such a finding, however, that petitioner had a dangerous probability of successful recoupment of any short-term losses attributable to predation. In order to recoup its losses, a predator not only must achieve some degree of market power, but must achieve enough market power, and maintain it for long enough, to effectuate recoupment. See *Matsushita*, 475 U.S. at 589 (noting that "[t]he success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain"). And a predator's ability to maintain monopoly power would likely be tested, to the extent that the lower price of the input draws rival buyers into that market. Accordingly, the instruction at

carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials." Pet. App. 10a. A rule permitting a predatory-bidding claim to proceed even absent a showing of recoupment would inevitably penalize aggressive but procompetitive conduct.

#### 4. *The* Brooke Group *Standard Is Fully Applicable In Predatory-Bidding Cases Without Regard To Considerations Of Supply Elasticity*

There is no valid justification for refusing to apply the *Brooke Group* standard in this case. The court of appeals seemingly left open the possibility that the *Brooke Group* standard could apply in *some* predatory-bidding cases, stating at one point that the *Brooke Group* standard does not apply here because "this case involves predatory bidding *in a relatively inelastic market*." Pet. App. 11a (emphasis added). To be sure, if supply in the input market at issue is inelastic, it is more likely that an attempt to engage in predatory bidding will be successful, because it is more likely both that prices will increase in the short term without significantly increasing supply (thereby facilitating injury to the predator's competitors) and that prices can be forced down in the long term without significantly reducing supply (thereby facilitating recoupment).[14] But it is also more likely that increased purchasing by a large buyer, which is usually a manifestation of procompetitive expansion, will cause an increase in the bid price (and thereby generate allegations of predatory bidding). Accordingly, an inelastic market is precisely where the need to distin-

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issue did not focus on the critical issue, which is the ability to maintain, not obtain, monopoly power.

[14] Barriers to entry (whether for buyers or for sellers in the input market) may also increase the likelihood that an attempt to engage in predatory bidding will be successful.

guish between procompetitive and anticompetitive bidding is most acute.

In addition, to the extent that predatory *bidding* is more likely to be successful in a case in which supply in the relevant input market is inelastic, the same could be said about predatory *pricing* in a case in which demand in the relevant consumer market is inelastic (insofar as it would be easier to force out rivals, and to recoup losses, in such a market than in a market with elastic demand). In *Brooke Group*, however, the Court attached no independent significance to demand elasticity in the predatory-pricing context, instead focusing solely on the existence of a short-term loss and the likelihood of recouping that loss. The Court certainly did not suggest that its two-prong standard would be inapplicable in the context of a market with inelastic demand. There is no basis for a different approach in the predatory-bidding context.

Moreover, any limiting principle based on "relative inelasticity" would be entirely unworkable, as it would entail endless ambiguity and uncertainty. Such a rule would necessitate a complex and costly market-by-market assessment of supply elasticity, thereby frustrating the compelling need for clear, objective, and easily administrable rules to govern pricing behavior. Firms seeking to expand their output would be uncertain as to the standard by which their conduct would be judged, and procompetitive conduct would likely be chilled. See pp. 28-29, *infra*. Accordingly, the *Brooke Group* standard should apply to a predatory-bidding claim regardless whether it involves a market with "relatively inelastic" supply.[15]

Respondent contends (Supp. Br. in Opp. 2) that it would be premature to apply the *Brooke Group* standard to predatory-

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[15] In addition, the jury made no factual findings on supply elasticity in the Pacific Northwest market for alder sawlogs, and it appears to be a disputed issue. See Pet. Cert. Reply Br. 4 n.3; Campbell Group et al. Amici Curiae Cert. Br. 12-13 & nn.4-5.

bidding claims because there is no substantial body of case law or academic literature concerning the likelihood of "false positives" in cases involving such claims. To be sure, as the government indicated in its brief at the certiorari stage (at 19 n.13), predatory-bidding claims, at least to date, have been less common than predatory-pricing claims.[16] As this Court has emphasized, however, the risk of prohibiting (or deterring) procompetitive behavior is a matter of concern in all contexts involving unilateral conduct. See, *e.g.*, *Verizon*, 540 U.S. at 414 (noting that "[t]he cost of false positives counsels against an undue expansion of § 2 liability"). And in any event, there is no reason to believe that the risk of "false positives" would be any lower in the context of predatory bidding than it would be in the context of predatory pricing. There is thus no reason to apply a more generous liability standard to predatory-bidding claims than to predatory-pricing claims.[17]

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[16] There is, however, a growing body of academic literature that discusses the subject of predatory bidding. See, *e.g.*, Hovenkamp, *supra*, at 35-38 (noting, *inter alia*, that the jury instruction approved in this case constitutes "an antitrust disaster of enormous proportions"); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 652-668 (2005); Salop, *supra*, at 709-714; Richard O. Zerbe, Jr., *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717, 717-725 (2005).

[17] The court of appeals did not address respondent's claim that petitioner had engaged in "overbuying" (*i.e.*, buying more sawlogs than necessary and allowing them to spoil). See Pet. App. 18a & n.42. This case therefore does not present the question of how to analyze such an "overbuying" claim, and the court of appeals should consider that claim on remand (along with respondent's claims that petitioner engaged in other types of exclusionary conduct) in assessing whether respondent's remaining claims should be resubmitted to a jury. We note only that a buyer's decision to stockpile an input may be procompetitive—and that the mere fact that some of the input is ultimately not used may indicate only that the buyer's initial decision was erroneous (*e.g.*, because the buyer overestimated demand for its finished product). To the extent that a buyer instead stockpiles a scarce

### B. The Court Of Appeals Erred By Upholding A Jury Instruction That Would Allow A Plaintiff To Prevail On A "Predatory Bidding" Claim Simply By Showing That The Defendant Paid A Higher Price Than Necessary For An Input

1. Having rejected the *Brooke Group* standard for respondent's predatory-bidding claim, the court of appeals sanctioned an instruction that permitted the jury to find that petitioner had engaged in exclusionary conduct if petitioner "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price." Pet. App. 14a n.30; see J.A. 978a. For the reasons already stated, that instruction is flawed, because it would permit the imposition of liability for predatory bidding absent a showing that the alleged predator had met either of the *Brooke Group* requirements. Such a broad standard for liability would fail to ensure that the challenged conduct was truly anticompetitive in nature, *i.e.*, that it would "exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation omitted).

The specific jury instruction on predatory bidding, moreover, was in no way qualified by the other jury instructions on exclusionary conduct more generally. Those instructions advised the jury that, in determining whether conduct is exclusionary, it should consider whether "the conduct lacks a valid business purpose" or if "the anticipated benefits of the

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input for the purpose of keeping the input out of the hands of its competitors and allowing some of the input to go to waste (and absent any claim that the buyer was thus engaging in monopolization or attempted monopolization of the *downstream* market), it may be appropriate to analyze such a claim as a predatory-bidding claim subject to the *Brooke Group* standard—and to take into account the amount paid for the wasted input in determining whether the buyer suffered a short-term loss.

conduct flow primarily from its tendency to hinder or eliminate competition." J.A. 977a. The specific jury instruction on predatory bidding, however, made clear that, if the jury found that petitioner had "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price," the jury "may regard [petitioner's conduct] as an anti-competitive act," without regard to any other considerations. J.A. 978a; see Pet. App. 7a n.8 (describing the specific instruction as the "relevant * * * instruction" for purposes of respondent's predatory-bidding claim). The other instructions did not require that respondent prove either the existence of a short-term loss or the likelihood of recouping that loss—nor did they elaborate on how the jury should determine whether the price paid by petitioner was "higher * * * than necessary," or what would have constituted a price that was "fair" to respondent. The other instructions therefore did not cure the deficiencies in the specific instruction on predatory bidding.

2. The specific instruction approved by the court of appeals is also flawed because it failed to supply an objective standard by which the alleged predator's conduct was to be measured, and instead established a standard that would allow a jury to award treble damages based on a subjective determination of whether the price paid for the relevant input was "higher * * * than necessary" or not "fair." See, *e.g.*, *Spectrum Sports*, 506 U.S. at 459 (noting that "[t]he concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics"); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) (asking "how * * * a judge or jury [is] to determine a 'fair price'"), cert. denied, 499 U.S. 931 (1991); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 111(d), at 102

(2d ed. 2000) (stating that "'fairness' is a vagrant claim applied to any value that one happens to favor").

If allowed to stand, such a subjective standard would have the effect of deterring procompetitive conduct by large firms. As then-Chief Judge Breyer explained, antitrust rules "must be clear enough for lawyers to explain them to clients" and "must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings." *Town of Concord*, 915 F.2d at 22. If the line between lawful aggressive bidding and unlawful predatory bidding were to turn on a jury's *ex post* assessment of whether the price paid for an input was excessive, large firms competing for inputs would rationally err on the side of caution, pull their competitive punches, and bid less aggressively. In contrast to the *Brooke Group* standard, therefore, an amorphous standard such as the one endorsed by the court of appeals would "discourage the competitive enthusiasm that the antitrust laws seek to promote," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984), and "chill the very conduct the antitrust laws are designed to protect," *Matsushita*, 475 U.S. at 594.

## CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

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WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

---

***ON WRIT OF CERTIORARI***
***TO THE UNITED STATES COURT OF APPEALS***
***FOR THE NINTH CIRCUIT***

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## BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether a plaintiff alleging a combination of price and non-price predatory buying practices leading to monopolization of an input market may establish liability by persuading a jury that defendant eliminated competition "on some basis other than efficiency" under this Court's *Aspen* test; or whether the plaintiff instead must prove the defendant paid so much for the input that the price at which it sold its products did not cover its costs and created a dangerous probability of anticompetitive recoupment under this Court's *Brooke Group* test.

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*Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) ..... 11, 14, 15

*Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) ..... 9

*Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) ..... 18, 21, 22

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*M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160 (4th Cir. 1992) ..... 9

*Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948) ..... 22, 23

*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... 11, 12, 13, 14

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*Poller v. Columbia Broad. Sys. Inc.*,
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*Reid Bros. Logging Co. v. Ketchikan Pulp Co.*,
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*Spirit Airlines, Inc. v. Northwest Airlines, Inc.*,
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*Stearns Airport Equip. Co. v. FMC Corp.*,
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*United States v. New York Tel. Co.*,
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ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 34 (1993) ..... *passim*

Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000) ..... 11, 12, 14

Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981) ..... 16

Malcolm R. Burns, *New Evidence of Price-cutting*, 10 MANAGERIAL & DECISION ECON. 327 (1989) ..... 13

Peter C. Carstensen, *Predatory Pricing in the Courts: Reflection on Two Decisions*, 61 NOTRE DAME L. REV. 928 (1986) ..... 16

Richard Craswell & Mark R. Fratrik, *Predatory Pricing Theory Applied: The Case of Supermarkets v. Warehouse Stores*, 36 CASE W. RES. L. REV. 1 (1985) ..... 13

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Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3 (2004) ..... 24, 25

Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005) ..... 26

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Jonathan Jacobson & Gary Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) ..... 28

Jonathan Jacobson & Gary Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULL. 151 (1992) ..... 26, 28

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Alvin K. Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 AM. ECON. REV. 162 (1993) ..... 12

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Paul Milgrom & John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. ECON. THEORY 280 ..... 13

Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, 1 HANDBOOK INDUS. ORG. 537 ..... 12

Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006) ..... 23-24

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Garth Saloner, *Predation, Mergers, and Incomplete Information*, 18 RAND J. ECON. 165 (1987) ..... 12

Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006) ..... 24

Transcript of Hearing, *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition* (June 20, 2006) at 10, *at* http://ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf (testimony of Deborah P. Majoras, Chairman, Federal Trade Commission) ..... 26

Transcript of Hearing on Predatory Pricing, *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition* (June 22, 2006), *at* http://ftc.gov/os/sectiontwohearings/docs/60622FTC.pdf ..... 19, 20, 25

Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The No Economic Sense' Test*, 73 ANTITRUST L.J. 413 (2006) ..... 8, 9

Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J 284 (1977) ..... 16

Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, (1982) ..... 13

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Richard O. Zerbe, Jr. & Michael T. Mumford, *Does Predatory Pricing Exist? Economic Theory and the Court After Brooke Group*, 41 ANTITRUST BULL. 949 (1996)..... 13

IN THE

# Supreme Court of the United States

No. 05-381

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

## BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

## STATEMENT OF INTEREST

*Amicus curiae* the American Antitrust Institute ("AAI") is an independent, not-for-profit organization whose mission is to increase the role of competition and sustain the vitality of the antitrust laws.[1] This case concerns the application of

[1] The consent of all parties to the filing of this brief has been lodged with the Clerk. Pursuant to Rule 37.6, *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no persons other than *amicus* or its counsel have made a monetary contribution to the preparation or submission of this brief.

This filing has been authorized and approved by the directors of AAI (director Albert A. Foer, Esq. is recused from this case). The Advisory Board of AAI consists of more than 85 prominent lawyers, law

monopolization and attempted monopolization principles under Section 2 of the Sherman Act to a dominant buyer's exclusionary buying conduct. AAI presents this *amicus* brief in the interests of promoting sound development of Section 2 jurisprudence in this buying context. AAI thereby seeks to ensure that the Sherman Act remains effective in preventing anticompetitive uses of "monopsony" power in markets for the purchase of goods and services generally throughout the economy.

## STATEMENT

1. Petitioner, a sawmill operator, manipulated prices and supply in the Pacific Northwest alder sawlog market to eliminate competition from other sawmills. A jury found petitioner liable for both monopolization and attempted monopolization of the input market for these sawmills in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Substantial competent evidence proved that petitioner acted with specific intent to eliminate rival sawmills. Petitioner had the power – and was aware of its power – to influence prices in the alder sawlog market. Using its market power in that market, petitioner bid up sawlog prices and created an artificial shortage of sawlog supplies for the sole purpose of driving rivals out of business.

2. The jury's verdict against petitioner for attempted monopolization required the jury to have found a dangerous probability that petitioner would become the monopoly purchaser (*i.e.*, monopsonist) of Pacific Northwest alder sawlogs. This dangerous probability of successful monopolization was supported by substantial competent direct evidence. This included substantial evidence of barriers to entry sufficient to enable the resulting monopsony

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professors, economists and business leaders (listed on the AAI web site: www.antitrustinstitute.org). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by AAI.

condition to continue for a substantial period of time. *A fortiori*, petitioner had a dangerous probability of recouping the expenses it incurred in prosecuting its buy-side anticompetitive scheme.

3. Petitioner's scheme threatened competition in the upstream (input) market by enabling petitioner in the long run to depress prices for alder sawlogs. Doing so allowed petitioner to appropriate the producers' surplus created when sawmills bid competitively for sawlogs. The monopolization offense in this case rests on harm to competition in the sawlog market, consistent with the theory of predatory bidding and buying in which the offender "hopes to exploit its monopsony power by purchasing the relevant input at lower prices." Brief for the United States as Amicus Curiae Supporting Petitioner at 14 (emphasis omitted). The harm to competition in this case occurred in the upstream supply market for sawlogs, not in the downstream hardwood lumber market.

4. Petitioner did not bid prices up or increase its purchases as part of a normal competitive output expansion, as a hedge against future price increases, or to ensure against supply interruptions or lapses in quality. *Cf.* Brief for the United States as Amicus Curiae Supporting Petitioner at 17. Indeed, the jury was required to rule out such theoretical procompetitive explanations for petitioner's market conduct before it could find against petitioner. More specifically, the jury was instructed to determine (a) whether petitioner purchased more logs than necessary and paid more than necessary "in order to prevent" plaintiffs from meeting their input needs; and (b) whether petitioner's conduct "lacks a valid business purpose." Pet. App. 7a n.8, 14a n.30. Given these instructions, the jury plainly rejected petitioner's contention that it bid up prices or increased its purchases for procompetitive reasons.

5. The significant reduction in the number of Pacific Northwest alder sawmills during the relevant period has not

been attributed to anything other than petitioner's anti-competitive conduct. Rather, the jury found that petitioner's rivals succumbed to the anticompetitive effects of petitioner's price and supply manipulation scheme.

6. As the court of appeals observed, the supply of alder sawlogs was relatively price inelastic. Pet. App. 11a. The response of the quantity supplied to an increase in price, therefore, would be less than proportional. The more inelastic the supply conditions, moreover, the less likely petitioner's overbidding and over-purchasing scheme would "create[ ] incentives for sellers to increase the quantity, or improve the quality, of that input." Brief for the United States as Amicus Curiae Supporting Petitioner at 17. Such a procompetitive dynamic is unlikely in the alder sawlog market in any event, since the "nature of the input supply at issue here does not readily allow for market expansion." Pet. App. 11a. Given these circumstances, there is no reasonable basis for concern that affirmance of the judgment below will somehow bias antitrust law against – or create "false positives" condemning – procompetitive conduct under other conditions in other markets.

## SUMMARY OF ARGUMENT

The court of appeals correctly applied to petitioner's conduct in the alder sawlog market this Court's definition of "anticompetitive or predatory acts" as "those that tend to exclude or restrict competition 'on some basis other than efficiency.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)). The court of appeals also correctly determined that (a) the trial court's jury instructions considered as a whole were consistent with the *Aspen* definition and (b) the evidence in the record amply supported the jury's finding that petitioner's conduct was unlawful in accordance with that test. This Court can, therefore, comfortably affirm the decision below.

Petitioner and supporting *amici* argue for reversal because the court of appeals did not apply the *Brooke Group* test for "predatory pricing" as it has evolved for sellers' pricing conduct, under which a plaintiff must prove that a seller's prices were below an appropriate measure of cost and created a dangerous probability of recoupment through subsequent supracompetitive pricing. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 223-24 (1993). The *Brooke Group* test, however, has come under serious question even as applied to selling-side conduct; it rests on an outdated economic understanding of the rationality and likelihood of predatory pricing schemes. It is in any event not suitable for buying-side conduct in a case of this kind where petitioner artificially increased input prices. A cost-based standard is all the more inappropriate here because this case involves closely connected combinations of price and non-price conduct.

Finally, there is insufficient judicial experience with and empirical analysis of overbidding, overbuying and related buying-side conduct to warrant adoption of the *Brooke Group* test for this area at this time. *Brooke Group* rests on the premise that an exceptionally strict standard for predatory pricing on the selling side is necessary to avoid excessive false positives, which are presumed to be a greater danger than excessive false negatives in that pricing context. Whatever may be the continued validity of that intuition on the selling side, not enough is known about the incentives, competitive dynamics and ultimate effects of dominant buyers' pricing and related strategies to be confident that the same bias against overdeterrence at the expense of underdeterrence is prudent for buying practices in input markets generally.

## ARGUMENT

### A. The Ninth Circuit's Decision Is Consistent With This Court's Long-Established Section 2 Standards.

#### 1. The court of appeals correctly applied *Aspen Skiing Co.*

The decision below is soundly premised on this Court's established *Aspen* test: "Anticompetitive or predatory acts are those that tend to exclude or restrict competition 'on some basis other than efficiency.'" Pet. App. 17a (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)). There is no need to search for a "new" Section 2 standard suitable for use in this case. The Court can affirm the court of appeals' decision under its well-established jurisprudence.

In *Aspen*, this Court affirmed a Section 2 judgment because the evidence supported "an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits . . . in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11. The Court asked whether the defendant "impaired competition in an unnecessarily restrictive way," thereby implementing the Areeda/Turner definition of "exclusionary" as encompassing "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32 (quoting III PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

In the present case, the jury instructions underlying the verdict and upheld by the court of appeals were consistent with the *Aspen* test. The jury was instructed to "consider whether the conduct lacks a valid business purpose" or "unnecessarily impedes the efforts of other firms to compete for raw materials"; whether "the anticipated benefits of the conduct flow primarily from its tendency to hinder or

eliminate competition"; and, more particularly, whether petitioner "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the plaintiffs from obtaining the logs they needed at a fair price." Pet. App. 14a n.30.

Petitioner and all of its supporting *amici* complain that the jury instructions were too "subjective," focusing in particular (and out of context) on the inquiry into whether petitioner purchased more than it "needed" and paid more than "necessary" in order to prevent plaintiffs from obtaining their needs at a "fair" price. Considered as a whole, the instructions adequately informed the jury of its need to focus upon the motive or intent of petitioner's buying strategies. The propriety of that focus is clear from this Court's own most recent Section 2 decision. Thus, in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the Court explained why the conduct at issue in *Aspen* was properly found to be unlawful while that at issue in the case then before it could not similarly be found unlawful because of motive/intent differences between the two cases: the evidence in *Aspen* "suggested a willingness to forsake short-term profits to achieve an anticompetitive end" and "revealed a distinctly anticompetitive bent" while, in contrast, Verizon's conduct "sheds no light upon the motivation of its refusal to deal – upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice." *Id.* at 409.

The court of appeals here was justified in determining that there was substantial evidence to support the jury's verdict. The evidence quoted in the opinion below from petitioner's own officials and documents strongly supports a finding by the jury that the defendant's buying practices lacked a valid business purpose and that its executives had formed the requisite specific intent to monopolize by anticipating the benefits from the elimination of competition.

Pet. App. 19a-20a. The jury could reasonably conclude that buying more than necessary and paying more than necessary for sawlogs for the purpose of impeding competitors' access to this input amounted to "attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).

Both the jury instructions in this case and the Ninth Circuit's analysis of the evidence in the record supporting the verdict are consistent with those well-established *Aspen* principles.

**2. The decision below is consistent with other well-recognized indicia of anticompetitive conduct.**

The jury's verdict and the Ninth Circuit's decision are also consistent with two closely related Section 2 indicia of anticompetitiveness: the "sacrifice test," under which conduct is deemed anticompetitive if it would be "unprofitable for the defendant but for the exclusion of rivals and resulting supracompetitive recoupment"[2] and the "no economic sense test," under which conduct can be deemed exclusionary or predatory if "it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition."[3]

The sacrifice test contributed to this Court's analysis of Section 2 claims in both *Aspen*, 472 U.S. at 610-11; and *Trinko*, 540 U.S. at 409; and it has played a leading role in

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[2] A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 389 (2006).

[3] Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test*, 73 ANTITRUST L.J. 413, 413 (2006).

Section 2 decisions from four circuits.[4] The no economic sense test has been advocated by both the Antitrust Division of the Department of Justice and the Solicitor General in recent years.[5]

Petitioner's purchase of "more logs than it needed" and paying "a higher price for logs than necessary" are, as the jury found, practices that satisfy both the sacrifice test and the no economic sense test. Indeed, how could buying more than needed or paying more than necessary ever be sensible, efficient or otherwise legitimate profit-maximizing conduct? Again, as the court of appeals recognized, evidence from petitioner's own officials and documents precluded any finding of a valid business purpose for this overbuying and overpaying. Pet. App. 19a-20a. Accordingly, the only supportable conclusion is that these practices were profitable and rational only because of their expected elimination of competition, thereby enabling eventual supracompetitive recoupment.

The court of appeals did not require respondent to meet the first prong of the *Brooke Group* test, as petitioner urged, by proving that petitioner suffered a loss in the short term as

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[4] *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522, 524 (5th Cir. 1999); *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 167-68 (4th Cir. 1992); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986).

[5] *See* Werden, *supra*, at 413-14 n.4-7 (citing briefs filed by the United States in four recent Section 2 cases: Brief for the United States and the Federal Trade Commission as Amici Curiae at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682); Brief for the United States at 28 (public redacted version), *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005) (No. 03-4097); Brief for the United States at 2, 30 (public redacted version), *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003) (No. 01-3202); Brief of the Appellees United States and States Plaintiffs at 48, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212, 00-5213)).

determined by the relationship between petitioner's costs (including the prices paid for inputs) and the amount of revenue that petitioner received (or expected to receive) for its finished product. It is sufficient for petitioner to have devoted resources to carrying out its scheme in the sawlog market. As explained below, it was not necessary for petitioner's expenses to have been of such a magnitude to represent a loss on products sold in the downstream (output) market for hardwood lumber. This is because the monopolized market was the *upstream sawlog market* and the harm to competition occurred in that market.

With respect to the second prong of the *Brooke Group* standard, it was unnecessary in this case to require the jury to find a dangerous probability of "recoupment" of its expenses in its anticompetitive scheme. The very nature of becoming an upstream monopolist by illegitimate means in a market surrounded by high entry barriers implies ability to recoup the expense incurred to achieve the monopoly power and more. It would thus have been redundant to require the jury to make a specific finding that the defendant had a dangerous probability of recouping its loss in the long term because a dangerous probability of recoupment follows in this case from the attempted monopolization verdict itself.

### B. There Is No Economic Or Legal Justification For Extending *Brooke Group* To Bidding Practices On The Buying Side.

The *Brooke Group* test has come under question as inadequate, even as applied to predatory pricing claims on the selling side. Growing doubts about the validity of its underlying premises militate against its extension to new applications such as practices on the buying side of the kind here at issue.

### 1. *Brooke Group* is based on an outdated economic understanding of the rationality and likelihood of sell-side price predation.

The Supreme Court has most recently addressed predatory pricing claims in three decisions: *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In all three cases, the Court characterized predatory pricing as "speculative" and "inherently uncertain," emphasizing its "general implausibility" and the "obstacles to [its] successful execution." In *Matsushita*, the Court concluded that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589.

The presumed "consensus" in that regard rested upon empirical analyses of predatory pricing conduct published in 1958 and 1971 by John McGee and Roland Koller,[6] whose studies of cases from the first half of the twentieth century led to their conclusion that predatory pricing was irrational and unlikely to occur.[7] Those studies remained persuasive to the Court seven years later when, in *Brooke Group*, the Court announced the current liability standard for predatory pricing under Section 2 of the Sherman Act.

The McGee/Koller conclusions, however, have been undermined by more recent scholarship on dominant firms'

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[6] *See Matsushita*, 475 U.S. at 590 (citing Roland Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971) and John S. McGee, *Predatory Price Cutting: the* Standard Oil (N.J.) *Case*, 1 J.L. & ECON. 137 (1958)).

[7] "The Court's skepticism about the rationality of predatory pricing was justified by the now dated economic authorities on which the Court relied." Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2263 (2000).

incentives to engage in predatory pricing strategies of various kinds. "It is now the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy." Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000).[8] The judiciary's skepticism of predatory pricing "assumes that predation is extremely rare, but sound empirical and experimental studies, as well as modern economic theory, do not justify this assumption." *Id.* at 2249. Most fundamentally, it ignores "sophisticated modern economic theories founded on more realistic assumptions of imperfect and asymmetric information, where much is unknown and where one party may have more knowledge than the other." *Id. See also* David Easley et al., *Preying for Time*, 33 J. INDUS. ECON. 445, 446 (1985) ("When the problem is seen as one of incomplete information, the standard reasons for saying predation is rare are not compelling."); Garth Saloner, *Predation, Mergers, and Incomplete Information*, 18 RAND J. ECON. 165, 183 (1987) (concluding that "when one abandons the assumption of complete information, there are numerous ways in which rational predatory pricing can arise").

Current economic understanding of predatory pricing no longer accepts the "static, non-strategic view" of predatory pricing on which *Matsushita* and *Brooke Group* are based. *See, e.g.*, Bolton, *supra*, at 2241-50; Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, *in* 1 HANDBOOK INDUS. ORG. 537, 581-90 (Richard Schmalensee & Robert D. Willig eds., 1989); Alvin K. Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 AM. ECON. REV. 162, 166 (1993). *See*

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[8] Federal courts have also recognized new economic understandings of the rationality of predatory pricing behavior: "[R]ecent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational." *United States v. AMR Corp.*, 335 F.3d 1109, 1114 (10th Cir. 2003).

*also* Richard Craswell & Mark R. Fratrik, *Predatory Pricing Theory Applied: The Case of Supermarkets v. Warehouse Stores*, 36 CASE W. RES. L. REV. 1, 3-8 (1985).

To the contrary, recent economic scholarship reveals that predatory pricing is rational, it does occur, and it is profitable and consistent with profit-maximizing behavior. *See, e.g.*, Richard O. Zerbe, Jr. & Michael T. Mumford, *Does Predatory Pricing Exist? Economic Theory and the Court After* Brooke Group, 41 ANTITRUST BULL. 949, 956-68 (1996) (collecting economic literature and concluding that the "empirical evidence regarding predation does not suggest it is either rare or unsuccessful"); Malcolm R. Burns, *New Evidence of Price-cutting*, 10 MANAGERIAL & DECISION ECON. 327, 327 (1989) ("Predatory pricing is a rational strategy in game-theoretic models of oligopoly, based on informational asymmetries, that consider signaling, signal-jamming and reputation effects."); Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 674-77, 699-708 (1982); Paul Milgrom & John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. ECON. THEORY 280, 281 (presenting an economic model in which predation is a "rational, profit-maximizing strategy").

**2. The *Brooke Group* test evolved from cases involving allegations of coordinated predation among multiple firms operating in oligopolistic markets.**

Neither *Matsushita* nor *Brooke Group* involved claims that a single dominant firm engaged in predatory pricing. Rather, both cases concerned allegations of "coordinated" predation among several rivals in an oligopolistic market. While skepticism about the plausibility of predation in that context appeared well-founded, that does not justify skepticism about predation incentives of a single dominant firm in all market environments.

In *Matsushita*, two American television manufacturers sued a group of Japanese manufacturers, alleging that the defendants unlawfully conspired to charge below market prices for televisions in the United States to eliminate competition. *Matsushita*, 475 U.S. at 590. The Court stated that "[s]uch a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator" because "[t]he conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success." *Id.* In this instance, the Court explained, because "success is speculative and depends on a willingness to endure losses," firms have a "strong incentive to cheat" and "[t]he necessary allocation is therefore difficult to accomplish." *Id.*

The Court's skepticism toward coordinated predation resonated again in *Brooke Group*. There, a generic cigarette manufacturer sued another cigarette manufacturer, alleging that the defendant pressured the plaintiff to raise its prices to more profitable levels "through a process of tacit collusion with the other cigarette companies." *Brooke Group*, 509 U.S. at 227. The Court rejected the plaintiff's theory as unavailing because "tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses." *Id.* at 228. *See also* Bolton, *supra*, at 2258 ("[T]he Court's view of the predatory pricing claim was colored by its doubts that predation by tacit coordination could realistically occur.").

The Court has thus not heretofore considered and ruled on the entirely different circumstance of unilateral price predation by a single dominant firm.[9] This makes it all the

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[9] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), did not involve allegations of unilateral price predation under Section 2 of the Sherman Act; rather, it examined whether a competitor suffered the requisite antitrust injury to have standing to enjoin a proposed merger under Section 16 of the Clayton Act, 15 U.S.C. § 26. One of the plaintiff's theories of antitrust injury was that, after the merger was

more prudent for the Court to consider the new economic learning about predation incentives discussed hereinabove before deciding whether the *Brooke Group* test should apply to any single-firm predation, but particularly to buy-side purchasing.

**3. The intolerable risks of chilling legitimate price-cutting present in *Brooke Group* are not present in this case where the defendant increased the price of raw materials paid by sawmills.**

Because of the need to ensure that antitrust rules do not discourage or punish conduct consisting of directly lowering prices to consumers, this Court in *Brooke Group* adopted an exceptionally strict test for predatory pricing. There, the Court explained that the "mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition." *Brooke Group*, 509 U.S. at 226. In that light, a strict test was deemed necessary to avoid discouraging procompetitive price-cutting.

Unlike those kinds of predatory pricing cases, the present case involves predatory bidding in which petitioner artificially *increased* the prices it paid for inputs used in its operation. Liability for increasing prices in the manner found by the jury in this case does not create disincentives to procompetitive pricing on the selling side. While there may be limited instances in which overbidding can benefit competition, it can do so only quite indirectly. *See, e.g.*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced*

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consummated, the merged firm would engage in predatory pricing and thereby drive plaintiff out of the market. This Court rejected that argument, concluding that the plaintiff lacked standing to enjoin the proposed transaction under the Clayton Act because it "never raised nor proved any claim of predatory pricing." *Cargill*, 479 U.S. at 119.

*Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 655 (2005) ("[I]t seems indisputable that any negative impact of a predatory bidding case on downstream price competition is less direct and less certain than the impact of a predatory pricing case, which is a direct assault on a seller's decision to lower prices to its customers.").

In short, any negative consequence for consumers of deterring desirable bidding practices on the buying side is far more remote and uncertain than that entailed in punishing firms for directly lowering their downstream prices. Because of this difference, *Brooke Group* should not be extended to predatory bidding claims. As the court of appeals in this case observed, "[The] benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a.

**4. A cost-based test for buy-side predation is inappropriate.**

Cost-based tests for anticompetitive conduct may on the surface appear "objective" but contain substantial elements of subjectivity and are exceptionally difficult to administer. *See, e.g.*, Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J 284, 305 (1977) (presenting arguments why cost-based standards for predatory pricing are insufficient and problematic); Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 756-57, 765-69 (1981); Peter C. Carstensen, *Predatory Pricing in the Courts: Reflection on Two Decisions*, 61 NOTRE DAME L. REV. 928, 945-46 (1986). Extending *Brooke Group*'s cost-based test to overbidding in the purchase of inputs in upstream markets would be all the more problematic for two additional reasons.

First, there is no satisfactory way to measure cost when a dominant buyer cross-subsidizes the amount it overpays for one input with a second input that could have been purchased at a reduced price. In this scenario, the available cost information may not reveal that a firm has overbid or overpaid for the input at issue because the buyer is able to account for the overpayment on one input through cross-subsidization from one input to another. There is no good means to account for that possibility or its effects in the application of a cost-based test in this upstream context.

Second, it is also quite unclear how a cost-based test for overbidding would allocate fixed costs. For example, would fixed costs include the average cost to purchase current inventory, or would the cost measure only be concerned with the incremental price of each additional sawlog? This difficulty in determining how a cost standard would account for fixed costs militates against the extension of *Brooke Group*'s cost-based test to buy-side conduct such as overbidding.

### C. Cost-Based Tests Are Particularly Inappropriate For Claims Involving Closely Connected Combinations Of Price And Non-Price Conduct On Either The Selling Or Buying Side, As With The Combination Of Overbidding And Overbuying Along With Other Non-Price Conduct In The Present Case.

Petitioner and its *amici* urge the adoption of a safe harbor that would allow any buyer to escape liability for "predatory buying" of an essential input if it is able to demonstrate that the buying conduct did not result in selling its goods incorporating that input below the pertinent measure of the cost of those goods. This incorrectly assumes that the sole measure of wrongdoing under the Sherman Act is the price a company charges an end-use consumer. Under both the Sherman and Clayton Acts, courts have regularly recognized that harm to competition is not so restricted. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001); *see*

*also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-700 (1962).

For the reasons explained above, there should be no such safe harbor for petitioner here. This is especially so since the conduct at issue involved closely connected combinations of price and non-price conduct.[10] Predatory "pricing" in the form of "overpaying" for sawlogs was only one among several related practices supporting the jury verdict and district court judgment that the court of appeals affirmed in this case.

The record below establishes all of these facts:

- Petitioner owns seven hardwood sawmills in the Pacific Northwest. J.A. 158a.
- It both drove up sawlog prices and restricted access to sawlogs. Pet. App. 3a.
- It overbought. *Id.* at 3a-4a.
- It "tracked competitors' profit margins and estimated the potential effects of targeted increases in sawlog costs on the ability of low-margin competitors to survive." *Id.* at 20a.
- It entered "restrictive or exclusive agreements with sawlog suppliers." *Id.* at 4a.
- It made "misrepresentations to state officials in order to obtain sawlogs from state forests." *Id.*
- During the relevant period, the "supply of alder sawlogs remained relatively stable or declined." *Id.* at 11a.

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[10] Petitioner's *amici* assert that non-price conduct played no role in the court of appeals' affirmance of the district court's judgment. Although we do not believe this to be the case, the Ninth Circuit's grounds for affirmance would not in any event constrain the scope of this Court's review. This is "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (internal citations omitted).

- A companion case had specifically recognized the significance of allowing surplus logs to rot. *Id.* at 9a n.14.
- Alder sawlogs are a natural resource that has a limited annual supply and is a "highly inelastic" market that is a byproduct of the "more important softwood harvest." *Id.* at 11a & n.20.
- 95 percent of hardwood lumber in the Pacific Northwest is alder, and the mills at issue are the only hardwood mills in the western United States. *Id.* at 2a.

And the parties stipulated that the alder was "typically, but not always, harvested within 100 miles of the sawmill in which [it was] processed into hardwood lumber, chips, and other products." J.A. 153a. As well, petitioner embarked on an aggressive acquisition program that enabled it to control the market. In their stipulated facts, the parties recounted petitioner's acquisitions: one in 1980, three in 1995, and one in 2000. *Id.* at 158a.

In short, this is a case involving substantial elements of non-price buying conduct and a case in which the geographic and product characteristics of the supply market are particularly significant.

Even assuming that the *Brooke Group* test is appropriate to apply to pricing conduct on the buying side, it cannot reasonably apply to the combination of buying practices established on the record of this case.[11] Because *Brooke*

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[11] Indeed, at the recent hearings on Section 2 policy conducted jointly by the Federal Trade Commission and the Department of Justice, much of the discussion during the "buy-side" session focused on how to characterize the non-price conduct; regardless of the label, the participants agreed that it was not appropriate to lump such conduct in with predatory pricing. *See* Transcript of Hearing on Predatory Pricing, *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition* (June 22, 2006) at 162-67, *at*

*Group* focuses on predatory pricing, petitioner and its supporting *amici* have glossed over the distinction between overbidding and overbuying.[12] This is a mistake, *first*, because overbuying is a distinct form of exclusionary conduct, independent of pricing and *second*, because the other aspects of anticompetitive conduct are not even arguably captured by a predatory pricing analysis. Thus, for example, Blair and Harrison highlight the strategy employed in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), in which tobacco companies bid aggressively for tobacco they did not utilize in their own cigarettes, in order to restrict the supply available to companies that would use it. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 34 (1993).

On occasion, other companies have employed such tactics in order to restrict supply. *See, e.g., Poller v. Columbia Broad. Sys. Inc.*, 368 U.S. 464 (1962) (examining the purchase of UHF stations that were then abandoned); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) (examining the expansion of gate capacity and flights that were dropped after Spirit, the low-cost carrier, exited the market); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (2d Cir. 1977) (denying summary judgment where plaintiff alleged that the sources of gravel and grit supplies were bought up by defendants to deny plaintiff access).

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http://ftc.gov/os/sectiontwohearings/docs/ 60622FTC.pdf (testimony of Prof. John Kirkwood, Seattle University School of Law; Prof. Tim Brennan, University of Baltimore, Maryland County; Prof. Steven Salop, Georgetown University Law Center; Frederick Warren-Boulton, Microeconomic Consulting & Research Associates, Inc.; Janet McDavid, Hogan & Hartson LLP) [hereinafter Section 2 Hearing Transcript].

[12] One *amicus* brief went so far as to state that it was treating the overbidding and overbuying claims as "functionally interchangeable." Brief for Law Professors as Amici Curiae in Support of Petitioner at 3 n.2.

As Blair and Harrison have recognized, even though there are seldom "pure monopsonists," dominant buyers can "impose monopsonistic welfare losses." BLAIR & HARRISON, *supra*, at 49. These losses result ultimately in too few resources being purchased because a dominant firm's privately optimal level of purchase is different from the socially optimal level. *See id.* at 39. The *Brooke Group* test takes no account of this kind of upstream harm; its sole concern is the rationality of a downstream pricing decision.

The case of *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), was one of a handful of cases in which price and non-price conduct were separate but related parts of a systematic attack on competition. In *Reid Bros.*, in addition to collusive bidding, the court of appeals found that otherwise undesirable purchases were made in order to deny competitors access to timber; defendants also extended credit to loggers, thus giving the defendants the power to "cut off a logger's financing, force the logger out of business, and acquire the company or its assets." *Id.* at 1298. Another such case was *Swift & Co. v. United States*, 196 U.S. 375, 391-92 (1905), in which the purchasers of live stock had engaged in a combination of practices that included restrictive contracts with railroads and stockyards, complemented by alternately bidding prices up to induce shipments to a given location and then manipulating bidding so that the live stock was purchased at a reduced price. Another was *Spirit Airlines*, in which Northwest Airlines was found to have not only manipulated prices but also to have increased the number of flights to selected destinations, even though it had planned to reduce the number of flights prior to Spirit's entry into the market. 431 F.3d at 923-24.

In cases of this kind, involving combinations of price and non-price conduct, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Indeed, this Court recognized in

*Continental Ore* that even acts that might be legal in themselves could "lose that character when they become constituent elements of an unlawful scheme." *Id.* at 707.

The "constituent elements of an unlawful scheme" analysis is particularly important here. As Blair and Harrison suggest:

> There is a bright line test that would be highly indicative of a predatory buying effort. As noted earlier, the seller engaged in such an effort must consider what it will do with the inputs it is required to buy at the artificially high price. *Rather than produce more of the output, it may find it less costly to destroy a perishable input or to hoard an input that is not perishable. This type of behavior, especially when accompanied by a bidding war for the input, is hard to interpret as anything other than an effort to deny the competing buyers access to the input.* Indeed, in a case in which the input is destroyed, the welfare loss could not be more obvious.

BLAIR & HARRISON, *supra*, at 156 (emphasis added). In other words, when a buyer deliberately pays a price substantially higher than what would be appropriate and economically justifiable in a competitive market, society's limited assets are wasted and the overall economy is made less efficient – a result that is just the opposite of the policy embedded in antitrust. Overbidding and overbuying of logs that ultimately were used for a low-return purpose (pulpwood) because they were no longer suited for sawlogs would fit that scenario.

As this Court recognized in *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948), distortions in a supply market will ultimately affect related end products and thus consumers. Thus, it was deemed "inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate

phases of the overall activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers." *Id.* at 240. And, in any event, the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* at 236.

The Sherman Act thus appropriately condemns buyer predation that injures the competitive process generally in upstream markets without regard to whether related adverse effects have yet materialized downstream. Such conduct creates supply inefficiencies and resource allocation distortions that produce long-term welfare losses. This is particularly so when the conduct at issue promotes the dominant buyer's predation reputation and thereby raises input market barriers to entry. This case exemplifies dangers of this kind from a combination of price and non-price conduct, thus calling for robust application of Section 2 standards to an evidentiary record that flatly contradicts petitioner's proffered "efficiency" justifications.

### D. Indicia Of Anticompetitive Conduct Unlawful Under Section 2 Of The Sherman Act Should Be Sufficiently Robust To Avoid Not Only Excessive "False Positives" But Equally Undesirable Excessive "False Negatives."

Dominant firm practices with the potential to be anticompetitive are far too diverse in nature and effects to be susceptible to one overarching test under Section 2 of the Sherman Act. As one recent commentator emphasized, there is no "one size fits all"; the appropriate test for any case should take into account "the likely consumer harms and benefits from the conduct, but also the risk of false positives, false negatives, and legal process costs." Mark S.

Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006). Section 2 standards that "wrongly curb a monopolist's incentive to compete *or* that improperly enable a monopolist to impede or vanquish would-be rivals threaten significant and lasting harm to both competition and consumers." *Id.* at 436 (emphasis added).

Recent scholarship is in agreement that Section 2 standards for exclusionary conduct should seek to minimize *both* the underdeterrence and overdeterrence of anti-competitive conduct. *See, e.g.*, A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 383 (2006) (explaining that Section 2 standards should seek "to minimize the sum of the costs of enforcement errors and transaction costs overall"); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 345-54 (2006); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 68-69, 74-76 (2004).

In short, courts overseeing Section 2 cases should be sensitive to the need to minimize *both* false positives and false negatives. Most recently, this Court in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), was concerned with false positives involving a dominant firm's refusal to deal with a competitor when the conduct at issue was regulated by a comprehensive regulatory scheme. There, the Court "weigh[ed] a realistic assessment of [antitrust]'s costs" against "the slight benefits of antitrust intervention," concluding that "[t]he cost of false positives counsels against an undue expansion of §2 liability" in that context. *Id.* at 414.

While the Court in *Trinko* focused on the risk of false positives, minimizing false negatives is equally important.

Indeed, a "Section 2 standard that is animated by greater tolerance of aggressive dominant firm [ ] strategies that both exclude and do not benefit consumers will . . . very likely lead to 'false negatives' and under-deterrence, with uncertain, but very likely substantial adverse consequences for the nascent competition that is often its target." Gavil, *supra*, at 5. Standards that "are likely to lead to an increased incidence of false negatives" can "seriously undermine Section 2's vitality as a shield that guards the competitive process." *Id.*

As discussed above, the Court in *Brooke Group* deemed it necessary to adopt an exceptionally strict test for predatory pricing because of the considerable risk of chilling procompetitive conduct that would result in lower prices for consumers. Here, there is far less risk of that sort. Predatory bidding involves increasing the price of inputs; a strict test is not necessary to avoid disincentives to engage in pro-competitive conduct. Because there is no reason to believe the risk of false positives is greater than the risk of false negatives in applying Section 2 to predatory bidding and related practices on the buying side, the Court should not extend *Brooke Group*'s test to this domain.

### E. There Is Insufficient Judicial Experience With And Empirical Analysis Of Overbidding, Overbuying And Related Buying-Side Conduct To Warrant Adoption Of A Single Predation Test For This Area At This Time.

There is another reason that this Court should not rush to adopt a test in this case that may be underinclusive. There has been very limited experience with or analysis of litigated cases involving buy-side conduct.[13] Indeed, there have been

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[13] Prof. John B. Kirkwood raised precisely this point at the joint FTC-DOJ Section 2 Hearing on Predatory Pricing. *See* Section 2 Hearing Transcript, *supra*, at 107-08 (testimony of Prof. John Kirkwood, Seattle University School of Law).

none involving single-firm monopsony conduct under Section 2 prior to this case. *See* BLAIR & HARRISON, *supra*, at 17. Jacobson and Dorman included a list of the cases they were able to locate, 39 altogether, in which "antitrust violations based primarily on the acquisition or abuse of buyer power have been found." Jonathan Jacobson & Gary Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULL. 151, 159-60 (1992) (hereinafter Jacobson & Dorman, *Monopsony Revisited*). Although many cases included Section 2 allegations, all of them concerned collusive or concerted action (or challenged mergers under Section 7 of the Clayton Act, 15 U.S.C. § 18). It thus made sense that, when Blair and Harrison analyzed non-price buying practices, they did so only for concerted action cases. *See* BLAIR & HARRISON, *supra*, at 76-81.

It is much easier to evaluate – and fashion judicial remedies to redress – concerted action than unilateral conduct. *See* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 163-64 (2005). Indeed, at the introductory session of the recent joint Federal Trade Commission-Department of Justice hearings on Section of the Sherman Act, Federal Trade Commission Chairman Deborah Platt Majoras characterized the issue of how unilateral conduct should be evaluated as having "dominated our antitrust debate for several years" and as "the most heavily discussed and debated area of competition policy in the international arena." Transcript of Hearing, *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition* (June 20, 2006) at 10, *at* http://ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf (testimony of Deborah P. Majoras, Chairman, Federal Trade Commission).

Caution is appropriate in allowing acts that would be "in restraint of trade" if undertaken by agreement among rivals to subject a single firm to liability if the firm unilaterally engages in those acts. But caution is also called for in

*ignoring* buying-side conduct of the kind at issue here. These claims have rarely been litigated, and there is no present basis for adopting sweeping judgments about their marketplace effects. Where a single firm has become dominant enough to inflict welfare harms in its buying practices, there is good reason for heightened vigilance.

Cartels are inherently unstable. Thus, concerted exclusionary conduct can be undermined by defectors.[14] Unilateral exclusionary conduct – if coupled with power-entrenching market characteristics such as high barriers to entry – can be more enduring and cannot readily be rectified. There is accordingly significant risk in adopting an especially strict test for condemning conduct of that ilk, particularly when it occurs on the buying side where courts have little experience in examining its economic implications. There are many possible strategies apart from predatory bidding that might be utilized by power buyers for anticompetitive purposes. A clear danger in prematurely establishing a single, formulaic test in the context of predatory bidding is that it might have unfortunate spillover effects as other strategies emerge, possibly even encouraging the emergence of such strategies.

There is certainly no need to expand the *Brooke Group* test to the buying side to avoid a new flood of indeterminate litigation of the sort suggested by some of the *amici* supporting the appeal in this case. As Jacobson and Dorman have explained, the exercise of monopsony power requires three conditions: "(1) the buyer or group of buyers must represent a substantial portion of total purchases in the market; (2) the supply curve must be upward-sloping; and (3) there must be some barriers to entry into the buyers'

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[14] Blair and Harrison describe the incentive for collusive buyers to cheat: "Since each member of the cartel will be confronted with the same temptation, it is not unlikely that the agreement will be undermined through clandestine defections." BLAIR & HARRISON, *supra*, at 46.

market." Jonathan Jacobson & Gary Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 10 (1991). The authors posit, and the cases bear out, that only certain industries, such as agriculture, natural resources, and labor, possess all of these characteristics. *See* Jacobson & Dorman, *Monopsony Revisited*, *supra*, at 162 n.32.[15]

Without agreeing that those traditional conditions of monopsony power must always be present in order to find Section 2 liability, we note that all of them are present here (as the court of appeals recognized). The alder sawlog market also shares another characteristic that, as a practical matter, permits the rise of monopsony in such industries in particular: alder sawlogs are limited to a narrow (and thus more easily dominated) geographic area, particularly given that most sawlogs are processed within 100 miles of the site of harvest. J.A. 153a. Alder forests cannot be replicated in, say, Nevada. As a practical matter, alder's tendency to stain makes storage and lengthy transport economically infeasible. The converse is also true: alder is the predominant hardwood in the Pacific Northwest, and the only hardwood mills in the Western United States are located there. Pet. App. 2a. Thus, control over alder sawlog supply in the Pacific Northwest is tantamount to control over western hardwood supply.[16] Treating the unusual facts at issue here as a basis for declaring buying practices generally to be lawful unless a

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[15] Although Jacobson and Dorman did not mention the movie industry, the cases they cite are replete with challenges that arise when a theater is able to dominate a local geographic market for first-run films. *See* Jacobson & Dorman, *Monopsony Revisited*, *supra*, at 159-60.

[16] It is true that globalization has altered the analysis applied to most geographic markets, because manufacturing and even services can be delivered virtually anywhere. At the same time, there remain resources that have unique properties narrowing the scope of the relevant supply market significantly. From the facts found below, alder is one such resource.

victim of them meets the *Brooke Group* test would be dangerous indeed.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,
*Petitioner,*

*v.*

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR AMICI CURIAE AT&T INC., BELLSOUTH CORPORATION, GENERAL ELECTRIC COMPANY, QWEST COMMUNICATIONS INTERNATIONAL INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the Ninth Circuit erred in approving an instruction that enabled a jury to subject a company to antitrust liability by finding that the company purchased more raw materials "than it needed" from upstream suppliers or paid a higher price for those materials "than necessary, in order to prevent [rivals] from obtaining the [materials] they needed at a fair price."

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### CASES

Page(s)

*A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) ..... 15, 20

*American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) ..... 12

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*Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ..... *passim*

*Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ..... 13

*Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) ..... 11

*Kinetic Concepts Inc.* v. *Hillenbrand Industries*, 262 F. Supp. 2d 722 (W.D. Tex. 2003) ..... 19

*LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004) ..... 16, 17, 19

*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) ..... 7

*Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir.), *supplemented on denial of reh'g*, 802 F.2d 217 (1986); ..... 20

*Scripto-Tokai Corp.* v. *Gillette Co.*, No. CV-91-2862, 1994 WL 746072 (C.D. Cal. Sept. 9, 1994) ..... 20

*Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993) ..... 7, 14, 16

*Spirit Airlines, Inc.* v. *Northwest Airlines, Inc.*, NO. 00-71535, 2003 WL 24197742 (E.D. Mich. Mar. 31, 2003), *rev'd and remanded*, 431 F.3d 917 (2005), *reh'g and reh'g en banc denied*, (6th Cir. 2006) ..... 18, 20

*Stearns Airport Equipment Co.* v. *FMC Corp.*, 170 F.3d 518 (5th Cir. 1999) ..... 20

*Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) ..... 20

## TABLE OF AUTHORITIES—Continued

Page(s)

*United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) ..... 20
*Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... 8, 13
*William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981) ..... 20

### OTHER AUTHORITIES

Abbott, Alden F., & Michael A. Salinger, *Learning from the Past: The Lessons of Vietnam, IBM, and Tying*, 2 Competition Policy Int'l 1 (2006) ..... 14
ABA, Model Jury Instructions in Civil Antitrust Cases (2005 ed.) ..... 19, 20
Areeda, Phillip E., & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000) ..... 7, 17, 20
Areeda, Phillip E., Louis Kaplow & Aaron Edlin, *Antitrust Analysis* (6th ed. 2004) ..... 14
Areeda, Phillip E., & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) ..... 20
Baumol, William J., & Alan S. Blinder, *Economics: Principles and Policy* (8th ed. 2000) ..... 14
Bork, Robert H., *The Antitrust Paradox* (1993 ed.) ..... 7
Carlton, Dennis W., & Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed. 2005) ..... 9
Easterbrook, Frank H., *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984) ..... 9
Easterbrook, Frank H., *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986) ... 6, 14, 15
Edlin, Aaron S., *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941 (2002) ..... 13
Elhauge, Einer, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253 (2003) ..... 4, 21

**TABLE OF AUTHORITIES—Continued**

Page(s)

Elhauge, Einer, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications For Defining Cost And Market Power*, 112 Yale L.J. 681 (2003) ..... 13

Epstein, Richard A., *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49 (2005) ..... 4

Evans, David S., & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73 (2005) ..... 14

Hovenkamp, Herbert, *The Antitrust Enterprise* (2005) ..... 4, 13, 14, 21

Hovenkamp, Herbert, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147 (2005) ..... 4

Hovenkamp, Herbert, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257 ..... 15

Hovenkamp, Herbert, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917 (2003) ..... 14, 19

Hylton, Keith N., *Antitrust Law: Economic Theory and Common Law Evolution* (2003) ..... 21

Joskow, Paul L., *Transaction Costs Economics, Antitrust Rules, and Remedies*, 18 J.L. Econ. & Org. 95 (2002) ..... 15

Muris, Timothy J., *Improving the Economic Foundations of Competition Policy*, 12 Geo. Mason L. Rev. 1 (2003) ..... 15

O'Malley, Kevin F., et al., *Federal Jury Practice and Instruction* (5th ed. 2001) ..... 20

Posner, Richard A., *Antitrust in the New Economy*, 68 Antitrust L.J. 925 (2001) ..... 13

Posner, Richard A., *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548 (1969) ..... 14

# In the Supreme Court of the United States

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## INTEREST OF AMICI[1]

Amici submit this brief to express their concern that, like the Ninth Circuit here, many lower courts disregard the need for objective standards in antitrust law generally, particularly as formulated in jury instructions. The lack of such standards makes the outcome of antitrust litigation unpre-

[1] This brief was prepared in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

dictable, makes antitrust advice little more than guesswork, probably skews the results of antitrust litigation against defendants, and, perhaps most important, requires firms such as amici to err inefficiently on the side of caution in their business affairs lest they face antitrust liability for efficient, pro-consumer business conduct. Amici urge the Court to address these concerns by requiring antitrust courts to use objective standards rather than undefined buzzwords in their legal analysis and jury instructions.

## SUMMARY OF ARGUMENT

I. The Ninth Circuit held below that a market "middleman" may be subject to treble damages for aggressive buying conduct in an upstream input market even if that conduct does not meet this Court's *Brooke Group* test for predatory pricing—that is, even if the defendant's sales of finished products in the downstream market cover its costs, and even if the defendant would be unable in any event to recoup any losses over the long term. The Ninth Circuit sought to distinguish *Brooke Group* on the ground that a defendant that "buys too much" or "pays too much" on the buying side does not thereby produce the immediate consumer benefits that a defendant creates when it cuts prices on the selling side. But that is a distinction without a difference. A basic purpose of the antitrust laws is to promote allocative efficiency: *i.e.*, the efficient allocation of resources to their most highly valued uses. The consumer benefits from an above-cost price cut in a retail market represent one benefit of allocative efficiency, but so do the benefits that input providers derive from a large but non-money-losing bid from an intermediary buyer. Both have the immediate effect of expanding output. In each case, total welfare and the long-run interests of consumers are best served by leaving resource allocation questions to the free play of market forces.

The Ninth Circuit's rejection of *Brooke Group* principles in this case has the perverse effect of thwarting key antitrust objectives. Under that court's approach, a defendant in Weyerhaeuser's position that uses all the inputs it buys

can avoid liability only by buying less and therefore reducing its sales of the finished products. Antitrust, however, favors efficient *increases* in output, as long as prices do not fall below cost. The Ninth Circuit's approach turns that objective on its head.

II. Quite apart from the Ninth Circuit's erroneous rejection of the *Brooke Group* standards, the court further erred in upholding a jury instruction that contained no standards of any kind to guide the jury's discretion. That instruction permits a jury to hold a company liable under Section 2 if it finds that the company purchased more raw materials "than it *needed*" from upstream suppliers or paid a higher price for those materials "than *necessary*, in order to prevent the Plaintiffs from obtaining the [materials] they needed at a *fair* price." Pet. App. 7a n.8 (emphasis added). Those undefined terms have no objective content.

As this Court has emphasized, antitrust liability for single-firm conduct must be delimited by clear rules, lest the prospect of such liability deter economically efficient behavior. The Ninth Circuit's reliance here on juror intuitions about "fairness" flies in the face of that precedent. Unfortunately, the Ninth Circuit is not alone; other courts of appeals have likewise upheld jury verdicts in favor of antitrust plaintiffs on the basis of instructions predicating antitrust liability for whatever single-firm business conduct strikes a jury as too hard on particular competitors. This Court should take this opportunity to reaffirm that antitrust instructions must give juries objective, determinate standards to apply, and must not contain undefined terms such as "too much," "more than necessary," or "unfair."

## ARGUMENT

Antitrust commentators have lamented the absence of an objective, generally applicable standard for defining unlawful "monopolization" under Section 2 of the Sherman

Act.[2] But this Court *has* adopted an objective test that must be met before a firm's unilateral price decisions can be regarded as anticompetitive.[3] In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court ruled that, because price reductions generally benefit consumers, they should be deemed anticompetitive only when they entail short-term losses combined with a dangerous probability of subsequent recoupment through monopoly profits. That test, which objectively measures both short-term pricing decisions and long-term market conditions, can be readily understood and successfully applied by the bar, the business community, the bench, and—when the test is properly defined and articulated—a lay jury. A key strength of the *Brooke Group* rule is that it uses objective standards to assess conduct that, because it is labeled "predatory," would otherwise invite the type of subjective considerations that are irrelevant to sound antitrust analysis.[4]

In this case, the Ninth Circuit rejected both the rule and the rationale of *Brooke Group* on the ground that this case involves buy-side conduct instead of the sell-side behavior analyzed in *Brooke Group* itself. As we explain in Point I below, however, the antitrust policies underlying *Brooke Group* are just as applicable in this buy-side case as they

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[2] *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 255 (2003); Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49, 58 (2005).

[3] *See, e.g.*, Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 147-148 (2005). This case does not present, and amici do not address, the other factors that may preclude antitrust liability even where *Brooke Group's* conditions are met.

[4] "Antitrust is not concerned with ethical or community standards of conduct, but only with whether the conduct is anticompetitive—that is, whether it tends toward reduced innovation or reduced output and higher prices in some market. These are fundamentally objective rather than subjective inquiries." Herbert Hovenkamp, *The Antitrust Enterprise* 51 (2005).

were in that sell-side case. Moreover, as we explain in Point II below, regardless whether the Ninth Circuit was correct not to apply *Brooke Group*'s bright-line test in this case, it still erred in approving jury instructions containing vacuous terms that cannot be applied objectively.

## I. THE NINTH CIRCUIT'S ANALYSIS IS ECONOMICALLY INCOHERENT

In *Brooke Group*, this Court adopted a bright-line principle to govern antitrust claims concerning a defendant's unilateral decisions about price and quantity. The Court held that a monopolist cannot be held liable for charging buyers too little for goods or services unless the plaintiff proves (i) "that the prices complained of are below an appropriate measure of [the defendant's] costs" and (ii) that the defendant has "a dangerous probability . . . of recouping its investment in below-cost prices." 509 U.S. at 222, 224. When a price cut does not satisfy both of these criteria, the Court concluded, it should remain lawful because it "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Id.* at 223.

The animating principle of *Brooke Group* is that antitrust rules concerning unilateral decisions about price and quantity should be drawn narrowly enough to preserve every firm's incentives to compete vigorously with its rivals by, among other things, expanding output to the benefit of its trading partners. In *Brooke Group* itself, this Court applied that principle to protect a larger firm from antitrust liability when it competed against smaller firms by lowering prices and increasing output. But it is no less important to protect a large firm's ability to compete against its rivals to the benefit of its trading partners when it *bids for inputs*, whether in the form of talented employees, research and development of new technologies, or (as here) raw materials. In each case, it would defeat the purpose of the antitrust

laws to suppress competition, reduce output, and disadvantage the trading partners in order to protect unhappy competitors. To that general principle, *Brooke Group* permits only one exception: where the dominant firm conducts its transactions at a loss in order to exclude its rivals *and* enjoys a "dangerous probability" of recouping that loss to the long-run *detriment* of its trading partners. *Id.* at 222, 224. That general principle, and its one possible exception, apply as much to buying as to selling.

The Ninth Circuit deemed *Brooke Group* inapplicable to claims of predatory bidding principally because the court concluded that "excessive" purchases from an input supplier do not generate the immediate consumer surplus produced when a monopolist cuts prices in a retail market. Because this Court cited that consumer benefit as a benefit of its rule constraining antitrust liability for price cuts, 509 U.S. at 223-224, 226-227, the Ninth Circuit concluded that no such rule could be appropriate in the absence of that benefit, *see* Pet. App. 8a-9a.[5] This analysis is flawed for two basic reasons.

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[5] The Ninth Circuit recognized that high input prices might sometimes induce new entry and thus benefit consumers "in the long run," but it asserted that "this is not such a situation" because the supply of alder sawlogs is "relatively inelastic." Pet. App. 11a. Even if there were record evidence to support that assertion, *but see* Pet. 17 n.7, the jury was never instructed to make any such finding. In any event, the court's extra-record speculation could not support the conclusion that application of the *Brooke Group* rule here would provide no consumer benefits. For example, the court ignored the prospect of efficient competitive responses other than an increase in the supply of alder sawlogs, such as an increased supply of substitutes for alder sawlogs and increased productive efficiency by rivals. Moreover, it would be impracticable to administer a rule—on either the buy-side or the sell-side—under which a firm can be found to have violated the antitrust laws for engaging in profitable competition if it fails to prove that consumers benefited specifically from its conduct. *See Brooke Group*, 509 U.S. at 223; Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 976-977 (1986) ("To require the defendant to show that its conduct is efficient is to hand victory to the plaintiff in a large number of cases no matter whether the defendant's conduct helped or harmed consumers.").

*First:* The Ninth Circuit's focus on immediate consumer benefits confuses means with ends. The fundamental objective of antitrust is the promotion of economic welfare through allocative efficiency: the efficient allocation of scarce resources to their most highly valued uses. The systematic pursuit of that objective benefits the economy—and thus consumers—over the long term. But wealth redistribution in favor of consumers is not an antitrust end in itself. Accordingly, the authorities describing the economic benefits of antitrust law in general, and the *Brooke Group* rule in particular, confirm that the purpose of antitrust is to promote the efficiency of the market as a whole and to prohibit *only* conduct that interferes with that purpose.[6] Although these authorities sometimes refer to "consumer welfare," they generally do so as shorthand for the principle that antitrust should promote the interests of competition rather than particular competitors. *E.g.*, Robert H. Bork, *The Antitrust Paradox* 427 (1993 ed.) (the purpose of antitrust is "the maximization of consumer welfare, or if you prefer, economic efficiency").

Indeed, if important antitrust principles like the *Brooke Group* rule applied only where they operated to benefit consumers in the short run, they would be inapplicable even to most conventional sell-side cases. The typical buyers in such cases, such as the wholesaler purchasers that benefited from the price cuts in *Brooke Group* itself, are themselves corporate intermediaries. *See, e.g.*, *Brooke Group*, 509 U.S. at 231-232. But no one has suggested that defendants in such cases may avail themselves of a *Brooke Group* defense only

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[6] *See, e.g.*, 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 112 (2d ed. 2000) ("the underlying antitrust goal [is] encouraging economic efficiency"); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993) ("[t]he purpose of the [Sherman] Act is . . . is to protect the public from the failure of the market"); *see also Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but is instead "comprehensive in its terms and coverage").

if they show that their price cuts will flow through to the ultimate consumers. If immediate consumer benefits were an antitrust end in themselves, unrelated to broader concerns about the efficient functioning of the market, this Court would not have observed recently that the "charging of monopoly prices" to consumers "is an important element of the free-market system" promoted by antitrust because the prospect of monopoly profits "induces risk taking that produces innovation and economic growth." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

Just as principles of allocative efficiency favor rules that permit market incentives to produce lower prices in a concentrated retail market where the main seller is a monopolist, *see Brooke Group*, 509 U.S. at 223-224, 226-227, so too do they favor rules that permit market incentives to promote higher prices in a concentrated upstream market where the main buyer is a monopsonist. The common theme in either case is the need for rules that foster efficiently high levels of output. Also, in each case, the question is whether the defendant can be presumed to promote the efficient allocation of resources when it enters into a business arrangement that is profitable both for itself and for its trading partners (even if not for its competitors).

There is no reason to answer that question differently when the trading partners are suppliers of the inputs a defendant buys rather than retail customers of the finished products the defendant sells. *Brooke Group* provides the same answer in both contexts. Mutually beneficial arrangements between a firm and its trading partners should be categorically trusted to produce economically efficient outcomes, except where the firm incurs a loss in order to exclude rivals *and* enjoys a dangerous probability of recouping that loss as the result of excluding them.

Just as low retail prices benefit purchasers, high input prices benefit suppliers. Neither, however, threatens competition unless it leads to market power and recoupment. The second of the *Brooke Group* requirements is thus as im-

portant as the first, and as applicable to claims of buy-side predation as to ordinary sell-side predation. If a firm cannot subsequently recoup its losses through inefficient pricing practices, it cannot cause the economic harms that antitrust is designed to prevent: reduced output and deadweight loss. Put succinctly, "if the practice cannot end in a monopoly profit, there is no antitrust problem." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 28 (1984)).[7]

*Second:* By focusing single-mindedly on the upstream (buy-side) market, the Ninth Circuit overlooked the tendency of its competitor-protecting approach to produce, in the downstream (sell-side) market, the exact type of economic harms that antitrust policy is designed to prevent.

The crux of the plaintiff's grievance here is that Weyerhaeuser's willingness to pay more for sawlogs allowed it to buy more sawlogs, leaving fewer for the plaintiff to buy at its preferred price.[8] But the jury was not instructed to find, and did not find, that Weyerhaeuser wasted any of the sawlogs it bought. The logical upshot of the Ninth Circuit's holding that Weyerhaeuser bought too much, therefore, is this: Weyerhaeuser should have *restricted its output* in the downstream market for finished hardwood products, for that would have been the necessary result of reducing its purchase of inputs. Reductions in supply typically raise consumer prices, all else equal. *E.g.*, Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 94-96 (4th

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[7] Of course, even if a practice does "end in monopoly pofit," there might not be a problem. The *Brooke Group* tests are necessary but not sufficient requirements for antitrust liability.

[8] There can be no valid independent claim that Weyerhaeuser paid "too much" for a *given quantity* of sawlogs, even though the jury was permitted to predicate liability on such a finding. *See* Pet. App. 7a n.8. Even if Weyerhaeuser could have obtained the same quantity of sawlogs at a lower price—and there is no evidence that it could have—its paying more than that price would not have reduced the amount of sawlogs available to competitors or otherwise harmed them, let alone harmed competition.

ed. 2005). Thus, under the Ninth Circuit's analysis, Weyerhaeuser should have sold less to consumers and charged them more. It is difficult to imagine a result more at odds with sound antitrust policy.

The Ninth Circuit reached this perverse result because, in its competitive analysis, it ignored the downstream, "sell-side" market for finished hardwood lumber. But the welfare of that market is part and parcel of any analysis of Weyerhaeuser's conduct in the upstream, "buy-side" market for alder sawlogs. At least in a single-input, single-output context like this one, a claim of over-buying in the upstream market (buying inputs that a rival needs) normally collapses into a claim of over-selling in the downstream market (making sales that the rival wants). The gravamen of either claim is that the defendant is seeking unlawfully to "squeeze" a rival middleman's margins: to preclude the rival from earning a profit in the downstream market given the higher costs and reduced availability of inputs in the upstream market.

Indeed, the Ninth Circuit noted this connection between the upstream and downstream markets when it stated that, "[i]n a predatory buying scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases." Pet. App. 9a-10a. But the court then ignored the significance of that connection. If a firm can resell its purportedly excessive upstream purchases at a profit in the downstream market, its success "either reflects [its] lower cost structure . . . , and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks," *Brooke Group*, 509 U.S. at 223—in this case, risks of deterring economically efficient purchases and sales. It would flout basic antitrust objectives to impose liability on such a firm for "squeezing" its rival's margins. The threat of such liability would force the firm to cut production in the downstream market, to the detriment of its trading partners there, by reducing its acquisition of inputs in the upstream

market, to the detriment of its trading partners in *that* market too.

In these respects, the Ninth Circuit's analysis conflicts with *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), in which this Court implicitly recognized the importance of a unified buy-side, sell-side analysis in cases involving antitrust disputes between rival middlemen. There, the Court addressed the claim, similar to the plaintiff's claim here, that the defendant's market power "threaten[ed]" the plaintiff's "supply of [inputs in the upstream market] and its ability to compete" in the downstream market. *Id.* at 107. Specifically, the plaintiff alleged that the merger of two integrated beef packers would allow the resulting entity to "bid up the price it would pay for cattle, and reduce the price at which it [would sell] boxed beef," disadvantaging the plaintiff (also an integrated beef packer) in both the input and output markets. *Id.* at 114; *see also id.* at 108. The Court appropriately analyzed plaintiff's allegation as a single predatory pricing claim. *See id.* at 114-119. It did not compartmentalize its analysis into separate buy-side (upstream) and sell-side (downstream) inquiries, much less make the Ninth Circuit's mistake of focusing almost entirely on the buy-side market to the exclusion of the sell-side market.

The Court's conclusions in *Cargill* are instructive here. The parties had presented two possible standards for liability: "(1) a threat of a loss of profits stemming from the possibility that [the defendant], after the merger, would lower its prices to a level *at or only slightly above* its costs"; and "(2) a threat of being driven out of business by the possibility that [the defendant], after the merger, would lower its prices to a level *below* its costs." 479 U.S. at 114 (emphasis added). The Court found that only the latter theory—below-cost pricing—stated a proper antitrust claim. *Id.* at 114-119. Like *Brooke Group*, *Cargill* thus reaffirms that a middleman's purchases of inputs in an upstream market can be predatory only if the result is below-cost pricing (combined

with a dangerous probability of recoupment) in the sell-side market for finished products.[9]

Ironically, if the plaintiff here *had* alleged that Weyerhaeuser so "bid up" the price of sawlogs that it sold its finished lumber at a loss, the Ninth Circuit likely would have followed *Cargill* and required proof of below-cost pricing and likely recoupment. It is only because the plaintiff made no such allegation, *see* Pet. 5, that the Ninth Circuit felt free to ignore *Cargill* and *Brooke Group* and hold the plaintiff to an easier standard. It makes no sense, however, to hold plaintiffs alleging less culpable (or non-culpable) behavior to *less* rigorous standards for establishing liability.

## II. THE COURT SHOULD REAFFIRM THE NEED FOR CLEAR AND OBJECTIVE STANDARDS IN ANTITRUST JURY INSTRUCTIONS

Quite apart from its substantive errors, the Ninth Circuit further erred in endorsing a jury instruction that lacks *any* determinate standard. That instruction permitted the jury to impose treble damages on any monopsonist that, in the jurors' subjective view, "purchased *more* [goods] than it needed" from input suppliers or "paid a *higher* price for [those goods] than necessary, in order to prevent the Plaintiffs from obtaining the [goods] they needed at a *fair* price." Pet. App. 7a n.8 (emphasis added). The instruction did not define any of the terms italicized above. They are not standards, but empty locutions. The Court should take this op-

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[9] The analysis might be more complex if a properly instructed jury finds that a defendant deliberately wasted inputs, *see generally American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-804 (1946), although the defendant might plausibly argue that the *Brooke Group* test remains applicable even then and that the costs it incurred to purchase and dispose of those inputs should be taken into account in determining whether downstream market prices are sufficient to generate revenues in excess of the defendant's costs. As noted, that issue is not presented here because this jury did not make, and was not instructed to make, any finding that Weyerhaeuser wasted inputs during any relevant period.

portunity to reaffirm the need for the use of determinate standards in antitrust jury instructions.

### A. Economic Rigor In Antitrust Law Requires Clear Standards In Jury Instructions

Since its decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court has repeatedly emphasized the need for bright-line, administrable principles to ensure that the antitrust laws are enforced "for 'the protection of competition not competitors.'" *Id.* at 488 (citation omitted). *Brooke Group* is itself a key illustration of this trend.[10]

A few critics of *Brooke Group* and other cases delimiting antitrust liability with bright-line principles have expressed concern that such principles can produce "false negatives": *i.e.*, individual cases in which, from the perspective of an omniscient economist, banning particular conduct in a given market would promote greater long-term consumer welfare than would non-intervention.[11] But a fundamental premise of modern antitrust analysis is that neither antitrust judges nor lay juries are omniscient economists.[12]

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[10] *See also Verizon Commc'ns*, 540 U.S. at 407 (placing strict limits on any obligation of monopolists to deal with rivals, and explaining that such limits are needed (among other reasons) to preserve efficient investment incentives for both the monopolists and their rivals); Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 931-932 n.7 (2001) (recent antitrust analysis "reflect[s] a series of emphatic post-*Alcoa* [*United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945)] statements by the Supreme Court that the antitrust laws protect competition in the sense of efficient business practices rather than in the sense of rivalry per se") (citing, *inter alia*, *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

[11] *See, e.g.*, Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941 (2002); *but see, e.g.*, Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications For Defining Cost And Market Power*, 112 Yale L.J. 681 (2003) (explaining why criticism is unsound).

[12] *See, e.g.*, Hovenkamp, *supra* n.4, at 47 ("[T]here is relatively little disagreement about the basic proposition that often our general judicial

Bright-line principles are thus necessary both to preclude "false positives"—cases in which the antitrust laws ban conduct that, on balance, enhances total welfare—and to reduce market-distorting uncertainty about the extent to which lawful but aggressive competition, normally a core virtue in a capitalist economy, will subject a firm to treble damages under the antitrust laws.[13] As then-Judge Breyer explained long before *Brooke Group* was decided: "Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983). Put differently, clear, simple, and administrable antitrust rules may produce some false negatives, but the benefits of such rules outweigh the costs of trying to preclude all false negatives.[14]

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system is not competent to apply the economic theory necessary for identifying strategic behavior as anticompetitive."); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 629 (1969) ("[L]egal proceedings are simply not well adapted to sifting complex economic data and arriving at sound judgments on sophisticated economic questions."); *see also* Herbert Hovenkamp, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917, 942-943 (2003); Easterbrook, *supra* n.5, at 976-977.

[13] "One problem that haunts most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power. The resulting danger is that the courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but that really are the opposite. The difficulty is that effective competition by a firm is always tough on its rivals." William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 425-426 (8th ed. 2000) (paragraph break omitted); *see also Spectrum Sports*, 506 U.S. at 458-459; Phillip E. Areeda, Louis Kaplow & Aaron Edlin, *Antitrust Analysis* 30 (6th ed. 2004); Hovenkamp, *supra* n.4, at 50.

[14] David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 80-88 (2005); Alden F. Abbott & Michael A. Salinger, *Learning from the Past: The Lessons of Vietnam, IBM, and Tying*, 2 Competition Policy Int'l 1, 6 (2006) ("Simple rules can be desirable even if they do not yield the correct result in every case in which they are applied—they

Open-ended jury instructions are just as counterproductive in this respect as opacity or imprecision in the substance of antitrust principles. Because antitrust principles are often difficult for nonspecialists to grasp, juries unconstrained by bright-line rules tend to decide cases on lay notions of fairness, which can diverge radically from sound antitrust principles.[15] Because each jury focuses narrowly on the parties to a given dispute, juries as a group systematically understate the costs of false positives—and the deterrent effect of the fear of false positives—on the economy as a whole. In short, imprecise instructions both distort outcomes in antitrust litigation and undermine the fundamental antitrust interest in clear rules and meaningful guidance to the business community.

### B. The Instruction Approved Below Exemplifies The Inadequacy Of Many Jury Instructions In Antitrust Cases

The decision below upheld a jury instruction that dispensed not just with the clear rules established in *Brooke Group*, but with any other clear rule as well. As noted, that instruction permitted the jury to impose treble damages if,

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merely need to satisfy the criterion that overall welfare will be higher in the presence of the rule than in its absence."); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 313; Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 Geo. Mason L. Rev. 1, 22 (2003); Paul L. Joskow, *Transaction Costs Economics, Antitrust Rules, and Remedies*, 18 J.L. Econ. & Org. 95, 99-100 (2002) ("[T]he test of a good legal rule is not primarily whether it leads to the correct decision in a particular case, but rather whether it does a good job deterring anticompetitive behavior throughout the economy given all of the relevant costs, benefits, and uncertainties associated with diagnosis and remedies.").

[15] "Jurors have no interior compasses that help them determine which business practices are efficient. . . . To set the jury adrift on uncharted seas—and then to defer to whatever it does—is to introduce considerable risk into all business decisions. And for no good purpose." Easterbrook, *supra* n.5, at 979; *see also A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989).

in the jury's view, Weyerhaeuser's conduct placed rival buyers at an "unfair" disadvantage in getting what they "need." In that respect, the decision below is a throw-back to an earlier era of antitrust jurisprudence that this Court has sought to end: an era in which antitrust factfinders remained free to penalize a large company for conduct that they subjectively considered "unfair," irrespective of the long-term effect of those penalties on consumer welfare. *See, e.g., Spectrum Sports*, 506 U.S. at 459 ("The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics."). Antitrust instructions can degenerate into such standardless gibberish whenever, as in the decision below, lower courts decide to treat this Court's antitrust jurisprudence as permitting, outside narrowly defined classes of cases, decisions based on the unguided instincts of juries.

This case is not alone in that respect. Another case in point, for example, is the Third Circuit's controversial decision in *LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004). In that case, defendant 3M, a manufacturer of office supplies, offered its customers special discounts if they purchased bundles of its products, one of which—Scotch-brand tape—dominated sales of branded transparent tape. Plaintiff LePage's, a rival manufacturer of office supplies, challenged these bundled discounts as a "predatory" means of disadvantaging rivals in other markets. But the plaintiff could "not make a predatory pricing claim" under *Brooke Group* (324 F.3d at 151) because, despite the discount, the defendant continued to sell Scotch-brand tape "above its costs however costs [were] calculated" (*id.* at 147 n.5). And the plaintiff had dropped its claim for illegal tying early in the litigation because it could not meet the elements of tying: customers that rejected the bundled discount remained free to purchase Scotch tape by itself at commercially reasonable prices. *See id.* at 174 n.1 (Greenberg, J., dissenting, joined by Scirica and Alito, JJ.)

The Third Circuit nonetheless treated the plaintiff's failure to claim predatory pricing or tying as a basis for defaulting to a looser, totality-of-the-circumstances approach that disregards the affirmative policy goals underlying those established standards and permits each jury to apply its general sense of fair play to the facts of each individual case.[16] The extreme subjectivity of this approach is evident from the jury instructions the court approved on appeal from a verdict for the plaintiff. Those instructions told the jury that it could find liability if it determined that the defendant "engaged in predatory or exclusionary acts or practices"—defined as conduct that "tends to impair the opportunities of its rivals" and "either does not further *competition on the merits*, or does so in an *unnecessarily restrictive* way," such that it is "very difficult or impossible for competitors to engage in *fair competition*." 324 F.3d at 167-168 (emphasis added).

The Third Circuit found these instructions "thorough," "clear," and "sound." 324 F.3d at 169. They are none of those things. Without an economic definition, one juror's "competition on the merits" is another juror's "predatory or exclusionary act." And without objective economic guidance, jurors have no coherent basis for distinguishing between "unnecessarily restrictive" (or "unfair") practices and healthy competition. "'[F]airness' is a vagrant claim applied to any value that one happens to favor." 1 Areeda & Hovenkamp, *supra* n.6, ¶ 111d.

All too often, antitrust courts punt hard legal issues to the jury by means of such analytically empty instructions. In one recent case, for example, the Sixth Circuit ruled that a high-level economic dispute about how to measure "cost"

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[16] *See* 324 F.3d at 162-164; *see also id.* at 177-178 (Greenberg, J., dissenting, joined by Scirica and Alito, JJ.) ("I realize that the majority indicates that 'LePage's unlike the plaintiff in *Brooke Group*, does not make a predatory pricing claim.' But that circumstance *weakens* rather than *strengthens* LePage's's position as it merely confirms the lawfulness of 3M's conduct." (emphasis added; citation omitted)).

in a class of predatory pricing cases must be left to the case-by-case discretion of juries. The dispute in *Spirit Airlines, Inc.* v. *Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005), concerned how to draw an apples-to-apples comparison between price and cost in determining whether the defendant airline charged below-cost prices to "price-sensitive" passengers on particular routes. The district court ruled for the defendant. It observed that, if (as the plaintiff insisted) the relevant price figure were the average price charged to those *particular* customers instead of all passengers, then the relevant "cost" for antitrust purposes must be the incremental cost of serving those particular customers, rather than (as the plaintiff proposed) the average variable cost of serving *all* passengers. *See Spirit Airlines, Inc.* v. *Northwest Airlines, Inc.*, No. 00-71535, 2003 WL 24197742, at *19 (E.D. Mich. Mar. 31, 2003).

The Sixth Circuit reversed, holding that the "'intellectual disagreement' among the parties' experts" about "the appropriate measure of costs" should have been decided by the jury as a matter of fact. 431 F.3d at 945.[17] But the economic content of antitrust doctrine—such as which measure of cost a firm should take into account in deciding what prices it may charge—is a matter of law that should be decided by courts on a consistent basis from case to case. Here, the Sixth Circuit abdicated its responsibility to decide that issue of law by referring to the jury the "intellectual disagreement" between opposing economic theorists. As Professor Hovenkamp put it, "the worst possible outcome" a

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[17] In *Brooke Group*, this Court held that a price cannot be "predatory" unless it falls below an "appropriate measure" of the defendant's costs, but it did not define that "appropriate measure" because doing so was unnecessary to resolve that case. 509 U.S. at 222. Nothing in the Court's reasoning, however, suggests that this issue should be left to juries to resolve as a question of fact. Nor would that be a sensible result. The appropriate measure of costs in predatory pricing is a fundamental question of antitrust policy and is thus part of the legal standard, which is for a court to resolve. Whether a particular firm's prices exceeded the specified, relevant measure of costs is a question of fact for the jury.

court can order when confronting complex antitrust policy issues "is the one that too often obtains: the judge washes his hands of the matter and gives it to the jury, thus passing the issue off to an even less qualified decisionmaker." Hovenkamp, *supra* n.12, at 942-943.

Even apart from the relative competence of courts and juries to delimit antitrust liability with sound economic considerations, businesses need to know in advance, not after they have been subject to a treble-damages award, how vigorously they may compete against their competitors. Antitrust law will degenerate into an unprincipled crapshoot—and all large firms will err on the side of inefficient caution—until courts enforce consistent legal standards from one case to the next. There can be no such consistency until courts cabin the discretion of juries with clear instructions on basic principles of economics and law.

Widely used pattern jury instructions are not immune from these problems of analytical indeterminacy. As the Third Circuit noted, the vague jury instruction approved in *LePage's* (and discussed above) "closely followed the [1999] ABA sample instructions . . . as to predatory and exclusionary conduct, including its instructions distinguishing between procompetitive and anticompetitive conduct." 324 F.3d at 168; *see also Kinetic Concepts Inc.* v. *Hillenbrand Indus., Inc.*, 262 F. Supp. 2d 722 (W.D. Tex. 2003) (employing similarly standardless instructions); *cf.* ABA, Model Jury Instructions in Civil Antitrust Cases, at C-26 to C-30 (2005 ed.) ("ABA Instructions (2005)"). And the most recent ABA pattern instructions include a controversial charge for sell-side predatory pricing that, in its lack of objective standards, closely resembles the buy-side instruction in this case: It permits a jury to find a defendant liable if it charged prices above average variable cost (but below average total cost) and "sacrificed greater profits or took greater losses *than*

*were necessary* and did so in order *substantially to lessen or eliminate competition*." *Id.* at C-66 (emphasis added).[18]

These buzzwords provide no meaningful guidance to the jury. A firm that offers a discount to its customers often "sacrifices profits" in one sense or another. What, then, does it mean for a firm to sacrifice more profits "than necessary?" And necessary for what, exactly? The instruction does not say. Likewise, every for-profit company wishes to increase its sales at the expense of rivals, and indeed "a desire to *extinguish* one's rivals is entirely consistent with, often is the motive behind, competition." *A.A. Poultry Farms*, 881 F.2d at 1402 (emphasis added).[19] When then, if ever, should a firm

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[18] This ABA pattern instruction, based on the Ninth Circuit's pre-*Brooke Group* decision in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1036 (9th Cir. 1981), also reflects a substantively incorrect view of "cost." The ABA commentary itself remarks that "the continued viability of *Inglis* is unclear after *Brooke Group*." ABA Instructions (2005), at C-67. Most lower courts have read *Brooke Group* to preclude liability for predatory pricing whenever a defendant charges a price above incremental or avoidable cost (even if below average total cost). *See, e.g., Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999); *see generally* Phillip E. Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). And some courts rejected the *Inglis* rule even before *Brooke Group*. *See, e.g., Barry Wright*, 724 F.2d at 235-236. Nonetheless, the Sixth Circuit recently reaffirmed its adherence to a version of the *Inglis* standard, *see Spirit Airlines*, 431 F.3d at 937-938, and some courts in the Ninth Circuit have held that *Inglis* remains good law despite *Brooke Group*, *see Scripto-Tokai Corp.* v. *Gillette Co.*, No. CV-91-2862, 1994 WL 746072, at *3, *4 n.7 (C.D. Cal. Sept. 9, 1994).

[19] Likewise, jury instructions that condemn "willfulness," an "intent to vanquish rivals," or the like, *e.g.*, 3A Kevin F. O'Malley et al., *Federal Jury Practice and Instruction* § 150.31 (5th ed. 2001) ("The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless . . . the monopoly power was willfully and intentionally acquired and maintained."), are highly misleading because desirable procompetitive conduct is inherently designed to injure rivals by persuading their customers to shop elsewhere. *See, e.g.*, 3 Areeda & Hovenkamp, *supra* n.6, ¶ 651b; *see also United States* v. *Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.); *Olympia Equipment Leasing Co.*

be punished for adopting otherwise permissible price cuts if it does so "in order substantially to lessen or eliminate competition?"

All such instructions, including those in this case, not only invite false positives, but produce radically indeterminate results from one antitrust case to the next. Jurors may interpret them however they wish, to achieve whatever results they subjectively deem fair. No two juries (or jurors) will share the same intuitions about what is "fair," how much price competition is "necessary" in particular circumstances, and when large firms should leave on the kid gloves to give struggling competitors a better chance of success. Without standards to guide it, an antitrust jury becomes a black box. And any well-counseled firm will respond to this unpredictable threat of treble damages by pulling punches even when consumers would benefit from a competitive free-for-all.

This is no way for the federal appellate courts to superintend a critical business statute that affects all corners of the economy. The Court should take this opportunity to reaffirm the imperative for analytical rigor in all antitrust cases; for legal standards that take into account the costs of false positives; and for jury instructions that cabin jury discretion by clearly explaining applicable legal standards—explaining what it *means*, for example, for a price to be "too high," for the amount purchased to be "too much," or for a business practice to be "unfair."

## CONCLUSION

The judgment below should be reversed.

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v. *Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir.) (Posner, J.), *supplemented on denial of reh'g*, 802 F.2d 217 (1986); Elhauge, *supra* n.2, at 268-269; Hovenkamp, *supra* n.4, at 177-178; Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 192 (2003).

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No. 05-381

IN THE
# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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1 American Bar Association, *Antitrust Law Developments* 249 (5th Ed. 2002) ..... 12

Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) ..... 7

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3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2002) ..... 14

Roger D. Blair & Jeffrey L. Harrison, *Monopsony* (1993) ..... 14

Robert H. Bork, *The Antitrust Paradox* (1978) ..... 4

Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1 (2005) ..... 10

Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986) ..... 7

Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications for Defining Costs and Market Power*, 112 Yale L.J. 681 (2003) ..... 9

Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147 (2005) ..... 8, 16

Frank McChesney, *Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law*, 52 Emory L.J. 1401 (2003) ..... 13-14

Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589 (2005) ..... 11

Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 Geo. Wash. L. Rev. 1103 (2001) ..... 18

Richard A. Posner, *Antitrust Law* (2d ed. 2001) ..... 7

Jack A. Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 Loy. U. Chi. L. J. 857 (1987) ..... 13

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IN THE

# Supreme Court of the United States

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**No. 05-381**

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WEYERHAEUSER COMPANY,

*Petitioner*,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR AMICI CURIAE BUSINESS ROUNDTABLE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST

*Amicus curiae* Business Roundtable is an association of approximately 160 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $4.5 trillion in revenues.[1] The executives who created Business

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or

Roundtable believed that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers of major corporations more directly into public debate. The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

*Amicus curiae* National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing in America's economic future and living standards.

*Amici* have participated in numerous cases before this Court, including cases involving antitrust issues. *See, e.g.*, *Volvo Trucks North Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006) (NAM); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004) (Business Roundtable); *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997) (Business Roundtable and NAM). *Amici* filed a brief in support of the petition for certiorari in this case.

*Amici* have a strong interest in this case because the question presented has enormous practical importance for their members nationwide. *Amici*'s members have relied on the standards for "predatory pricing" set forth in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) for all pricing decisions—including decisions

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submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk. Petitioner is a member of Business Roundtable and NAM.

related to selling goods and those related to purchasing inputs. The Ninth Circuit in this case, however, refused to apply the *Brooke Group* standards to a predatory pricing claim because the claim involved alleged predation in the price Weyerhaeuser paid for raw materials rather than the price it charged consumers. As a result, Weyerhaeuser was held liable for treble damages under the Sherman Act based on a jury's subjective finding that the company had purchased more inputs "than it needed" or paid more "than necessary" for them. Pet. App. 7a n.8. That open-ended inquiry is unmanageable for corporate executives and courts alike, and it will deter efficient purchasing decisions in the marketplace—all to the ultimate detriment of consumers.

The Ninth Circuit's departure from *Brooke Group* threatens the stability and predictability that is essential to productive economic enterprise. *Amici*'s members regularly engage in price negotiations and decisions at each stage of the production process—all with an eye toward maintaining efficiency and engaging in the vigorous competition that benefits consumers. The Ninth Circuit's ruling, which subjects companies to an unknowable risk of treble damages resulting from efficient and commonplace purchasing decisions, should be reversed.

## SUMMARY OF ARGUMENT

The Sherman Act is "the Magna Carta of free enterprise," guaranteeing to every business "the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The liability standards for predatory pricing that this Court established in *Brooke Group* protect a business's freedom to compete—and even to compete aggressively—against its rivals.

The Ninth Circuit, however, sharply curtailed that freedom when it refused to apply *Brooke Group* to allegedly predatory *bidding*. The court of appeals instead adopted loose and

subjective standards (Were the purchases really "necessary"? Was the bid price "fair"?) that threaten to subject routine business purchasing decisions to judicial oversight, and potentially treble damages, depending on what a lay jury concludes was "necessary" or "fair." Pet. App. 7a n.8.

*Brooke Group*'s liability standard should apply to all allegations of predation—whether the conduct challenged is on the buying or selling side of a business plan. Clarifying that *Brooke Group*'s two prerequisites apply to purchases of inputs as well as to sales of finished products will allow companies to make efficient purchasing decisions and to adjust to rapidly-evolving market conditions. It will ensure that firms have the flexibility to determine and adjust their prices—up or down—to accommodate changing economic conditions. If allowed to stand, the decision below will disrupt efficient market behavior nationwide, encourage inefficiency, and discourage innovation—by forcing a more efficient firm to alter its own pricing decisions to ensure that a less efficient rival is able to perpetuate itself in business. Subjecting pricing decisions to the whim of juries applying a vague "fairness" test—as occurred below—would deter economically beneficial behavior and disrupt the efficient allocation of resources that results from those price signals. The Ninth Circuit's decision should be reversed.

## ARGUMENT

### *BROOKE GROUP* PROVIDES THE PROPER STANDARD FOR ANALYZING A CLAIM OF PREDATORY PRICING IN THE PURCHASE OF RAW MATERIALS.

A firm's conduct can be fairly characterized as predatory—and therefore anticompetitive—if the firm is " 'attempting to exclude rivals on some basis other than efficiency.' " *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting Robert H. Bork, *The Antitrust Paradox* 138 (1978)). Conduct that excludes

rivals simply because a firm is more efficient, however, constitutes aggressive competition rather than unlawful predation. This Court has long recognized that a clear distinction between these two scenarios is necessary to avoid "deter[ring] procompetitive conduct." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 593 (1986). To avoid such deterrence, the Court provided a transparent and objective way to distinguish between the two in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

The *Brooke Group* standard imposes two prerequisites for a finding of predatory pricing. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* at 222. The Court required below-cost pricing because it rejected "the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." *Id.* at 223. And second, a plaintiff must demonstrate "that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224.[2] If after analyzing "both the scheme alleged by the plaintiff and the structure and conditions of the relevant market," it appears that recoupment of the defendant's losses from its below-cost pricing is not a dangerous probability, then "the plaintiff's case has failed." *Id.* at 226.

*Brooke Group* thus tells us how to recognize when conduct has crossed the line from robust competition to predation and anticompetitiveness: below-cost pricing together with a

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[2] Although *Brooke Group* involved a claim under the Robinson-Patman Act, the Court made clear that the "two prerequisites to recovery remain the same" under Section 2 of the Sherman Act. *Id.* at 222.

dangerous probability of recoupment. *Id.* at 222-224. Predation is behavior that appears economically irrational in the short term—because a firm incurs losses—but is made rational over the longer term—because the firm recoups more than the initial losses it suffered. Courts and corporate executives alike have understood and followed this clear standard, and it has provided an objective basis for ferreting out competition on the merits from predation. It allows for the essence of aggressive competition—a company's use of its greater efficiency to increase market share—without chilling procompetitive conduct.

The requirements for predation articulated in *Brooke Group* apply with equal force to allegations of predatory pricing in purchasing inputs as in selling finished goods. The same underlying concerns with protecting competition and allowing a firm to use its greater efficiency to gain a competitive advantage exist in both scenarios and compel application of the same standard to both.

### A. The *Brooke Group* Standard Imposes Liability Only When Unilateral Pricing Decisions Merit An Anticompetitive Inference.

This Court has repeatedly made clear that businesses are entitled—indeed, encouraged—to engage in above-cost competition without fear that those procompetitive actions will subject them to antitrust liability: "[T]he antitrust laws * * * were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). The Sherman Act does not seek "to protect businesses from the working of the market." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993). It "directs itself * * * against conduct which unfairly tends to destroy competition itself." *Id.* The Sherman Act accordingly seeks to promote economic efficiency and competition as a whole; it is indifferent to

complaints that less efficient companies have a lower profit margin or a higher cost structure and therefore a lesser ability to participate in vigorous competition.

It is entirely consistent with the promotion of robust and vigorous competition in the marketplace that firms that operate less efficiently may go out of business. That is why the Court in *Brooke Group* refused to condemn *above*-cost pricing; any exclusionary effect stemming from above-cost pricing "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223. *Brooke Group*'s line of demarcation represents the Court's commitment to the principle that the antitrust laws are not to be used to shield less efficient players from market forces. *See* Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001) ("It would be absurd to require the firm to hold a price umbrella over less efficient entrants."); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 709-711 (1975) (predation rules should only protect equally efficient competitors).

The *Brooke Group* standard is a "high" one, as the Ninth Circuit repeatedly noted (Pet. App. 7a, 8a, 11a, 15a),[3] for good reason: "Competitive and exclusionary conduct look alike." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 972 (1986). The objective *Brooke Group* standard minimizes the danger of confusing the two types of conduct and thereby chilling procompetitive conduct. *See Copperweld Corp.* v. *Indepen-*

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[3] *Brooke Group* itself notes that the two prerequisites to recovery on a predatory pricing claim—which it termed the "essential components of real market injury"—"are not easy to establish." 509 U.S. at 226.

*dence Tube Corp.*, 467 U.S. 752, 767-768 (1984) (recognizing that it is "difficult to distinguish robust competition from conduct with long-run anticompetitive effects").

The Court reiterated its understanding of the dangers of false positives just recently. "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' " *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citation omitted). *Brooke Group* provides a "workable definition of exclusionary conduct under § 2 of the Sherman Act" because it "define[s] anticompetitive exclusionary conduct with tolerable accuracy, in particular, without excessive false positives," and because it is "administrable by a court." Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 148 (2005). The standard allows for the essence of competition—using efficiency advantages to increase market share—without chilling procompetitive conduct through the threat of false-positive liability findings.

The Ninth Circuit's rejection of the *Brooke Group* standard, and its focus instead on whether a competitor could access the raw materials that it "needed" at a "fair price" (Pet. App. 7a n.8), ignores the economic reality that less efficient firms may falter—and sometimes fail—in the face of vigorous competition on the merits. *See Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 337 (1990) (so long as prices do not reach predatory levels, "the business lost by rivals cannot be viewed as an 'anticompetitive' consequence"). A firm's decision to take advantage of its greater efficiency in making competitive pricing decisions that are "aimed simply at increasing market share" is legitimate market conduct. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986). It is distinct from predatory pricing, which "has as its aim the elimination of competition." *Id.* The proper inquiry, therefore, is not the

effect on a specific rival, but whether the conduct "has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at 605.

### B. *Brooke Group* Applies Equally To Upstream Price Decisions.

1. This Court has never held that the antitrust laws could subject a firm to liability for above-cost pricing, whether the price be the price paid for inputs or the price charged for outputs.[4] *See generally* Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications for Defining Costs and Market Power*, 112 Yale L.J. 681, 827 (2003) (article "reaffirm[ing] the wisdom of the position that antitrust law should not recognize *any* claim of above-cost predatory pricing") (emphasis added). Indeed, this Court has previously distinguished an above-cost "price-cost squeeze" from predatory pricing. *See Cargill*, 479 U.S. at 114-115. *Cargill* involved allegations that one competitor would "bid up the price" it paid for inputs (there, cattle), while simultaneously reducing the price at which it sold outputs (there, boxed beef). *Id.* at 114. While the Court recognized that rivals would incur a loss in profits by matching those input and output prices, it notably emphasized that the "antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition." *Id.* at 116. The Court explained that price competition—including competition from an above-cost "price-cost squeeze"—was "not predatory activity." *Id.* at 118.

The lower courts have been in near-unanimous agreement (with the exception of the case under review) that above-cost pricing decisions—either upstream or downstream—are not

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[4] It is undisputed that Weyerhaeuser continued to make a profit on finished lumber despite paying prices found to be more than "fair." *See* Pet. 5.

predatory conduct subjecting a company to treble damages under the Sherman Act. *See, e.g., United States* v. *ARM Corp.*, 335 F.3d 1109, 1120 (10th Cir. 2003) (predatory pricing claim failed where it was "uncontested" that company did not price below costs); *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 266 (2d Cir. 2001) ("a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it" through low, but above-cost pricing); Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 9-10 (2005) ("[M]ost judicial opinions and commentators agree that any competitor excluded from a market because of its inferior efficiency has no complaint under the antitrust laws."). Whether the price point is for upstream inputs or downstream outputs, above-cost pricing cannot effectively or reliably be distinguished from competition on the merits.

Application of the *Brooke Group* standard to purchasing decisions reinforces the same underlying principles as does its application to consumer sales—namely, that the antitrust laws cannot be used to insulate less efficient rivals and that the antitrust laws encourage vigorous competition. All price adjustments—including those for input purchases—"up to the point of marginal cost are consistent with competition on merits, since in this case only less efficient firms will be disadvantaged." *California Computer Prods., Inc.* v. *IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979).

In this regard, monopsony (buying side power) is analytically the same as monopoly (selling side power), and should be so treated under the law. *See Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) ("monopsony pricing * * * is analytically the same as monopoly or cartel pricing and so treated by the law") (citing *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)), *vacated on other grounds*, 522 U.S. 3 (1997); *Vogel* v. *American Soc'y of Appraisers*, 744

F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("monopoly and monopsony are symmetrical distortions of competition from an economic standpoint").[5] The purchase price for inputs only merits an inference of predation if a firm is paying so much for its inputs that it is operating at a loss—and it is undisputed that Weyerhaeuser was *not* operating at a loss. *See* Pet. 5.[6]

The mere desire to increase market share is not anticompetitive; it is the goal of competition. As this Court reiterated just two years ago, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Law Offices of Curtis V. Trinko*, 540 U.S. at 407. Thus, "to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Id.*; *see also Ball Mem'l Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986) (Easterbrook, J.)

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[5] *See also United Airlines, Inc.* v. *U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005) (the antitrust laws forbid monopsonies and monopolies "on equal terms"); *United States* v. *Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) (Kozinski, J.) (" 'Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side' ") (citation omitted); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589, 591 (2005) ("[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis.").

[6] The antitrust laws have never been held to require a company to engage in profit maximization. *See, e.g., AMR Corp.*, 335 F.3d at 1118-19; *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 533 n.14 (5th Cir. 1999); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983); *see also* Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 Antitrust L.J. 669, 700 (2005).

(holding that the antitrust laws do not penalize an "intent to do more business"). It is only where increased market share "results from conduct that initially creates losses and which leads to profits only thereafter because it drives competitors from the market, the motives may be considered improper and the conduct may be deemed predatory." 1 American Bar Association, *Antitrust Law Developments* 249 (5th Ed. 2002). The Court's statement in *Brooke Group* about cutting *prices* to increase market share on the *seller* side equally applies to cutting *profits* to increase market share on the *buyer* side: " 'To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices [or profits] in order to increase market share. The antitrust laws require no such perverse result.' " *Brooke Group*, 509 U.S. at 223 (quoting *Cargill*, 479 U.S. at 116).

2. The first prerequisite of the *Brooke Group* standard—below-cost pricing—should apply equally to input purchasing decisions. If a company lowers the costs in its production process through innovation or streamlining, it should be able to apply its costs savings to another part of the production process if it so chooses—including purchasing additional or higher quality raw materials so long as it operates at a profit. No antitrust liability standard should discourage innovation and streamlining in production—which is what the Ninth Circuit's decision accomplishes by disregarding the role of efficiency and cost structure in its analysis.

*Brooke Group*'s second prerequisite—a dangerous probability of recoupment—should also be a prerequisite to claims of predatory pricing in the purchase of raw materials. *See Brooke Group*, 509 U.S. at 226 (below-cost pricing alone does not show injury to competition). During the recoupment period, a company must lower the price paid to suppliers to such a degree that it makes back all it lost and more. This is a far from certain endeavor. If a buyer with

market power "depresses too vigorously its suppliers' prices, it will succeed only in eliminating sources of inputs by driving potential suppliers out of the input market." Jack A. Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 Loy. U. Chi. L. J. 857, 865 (1987). And once the input price is lowered, competitors will have every incentive to re-enter the market, especially in markets with low barriers to entry.

Claims that a firm's purchase price for inputs threatens competition must be evaluated with the same care as claims that a firm's sale price threatens competition, because in both circumstances it is " 'inherently uncertain' " that the conduct will benefit the alleged predatory firm. *Cargill*, 479 U.S. at 121 n.17. In both cases, any long-run gain is speculative and "highly uncertain." *Id.* The bright line below-cost-plus-probability-of-recoupment rule takes into account "that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous." *Id.*

The *Brooke Group* standard similarly recognizes that economic rationality makes predation a rare and self-deterring behavior. *Brooke Group*, 509 U.S. at 226 ("As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are high.") (quotation omitted); *Matsushita*, 475 U.S. at 595 ("economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the [predator]"). And in both predatory buying and selling, the cost of false positives outweighs the cost of false negatives; while false negatives are self-correcting over time, there is no market correction for imposing liability on conduct that is actually beneficial. *See* Frank McChesney, *Talking 'Bout My Antitrust Generation: Competition For and*

*In the Field of Competition Law*, 52 Emory L.J. 1401, 1412-13 (2003).[7]

In both predatory selling and bidding, conduct is only "predatory" such that it permits an inference of anticompetitive intent if a firm is accepting short term losses as part of a plan that is dangerously probable of achieving longer term gains through reduced competition. *Brooke Group*, 509 U.S. at 226; 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 726b, at 304 (2d ed. 2002) (predation "is profitable and thus rational only if the payoff from the future monopoly or oligopoly profits is sufficiently large to 'recoup' the immediate predation investment."). Without a probability of recouping its losses, a predation scheme would not be rational. It would instead be economically senseless. And "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor." *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 468-469 (1992).

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[7] The decision below incorrectly states that consumers only experience short-term benefits during the predatory period of a predatory *selling* scheme but not a predatory *buying* scheme. *See* Pet. App. 10a. Consumers in fact benefit from lower prices in both instances—just through different mechanisms. When suppliers are paid more for inputs, they will supply more inputs to the extent they are able to. Any time that the price paid for an input is higher, suppliers able to substitute into the production of that input will have an incentive to do so. *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 66-67 (1993). More inputs will result in more finished products for sale to consumers, which will result in lower prices to consumers. *See* Salop, *supra*, 72 Antitrust L.J. at 676. In fact, this is exactly what happened in this case: "From 1998 to 2001, sawlog prices increased while finished lumber prices decreased," so consumers benefited. Pet. App. 3a. Thus, the "predatory" period on both the buying and selling side has the potential to provide short-term benefit to consumers.

3. The *Brooke Group* standards also make practical sense when assessing claims of predatory pricing in the purchase of inputs. Many legitimate business reasons exist for outbidding rival firms to purchase necessary inputs, *especially* if there is a relatively limited supply of inputs, as was the case below.[8] *Amici*'s members routinely make pricing decisions based on such factors as market conditions, business strategies, efficiency concerns, available supply, supplier reputation, and expected growth in customer demand—none of which merits an inference of anticompetitive conduct. For instance, a company might be willing to pay a premium for inputs to preclude future input shortages, reduce or eliminate transaction costs with sellers, reduce variations in inputs by purchasing all inputs available from a smaller number of suppliers, purchase inputs only from more reputable or established suppliers as opposed to less reliable suppliers in the market, or increase the elasticity of a market by encouraging those who might have withheld their goods or those who have equivalent or substitute goods to put them up for sale. Companies also regularly make changes to raw material purchase prices based on inventory policies, increased demand for a firm's products, variations in how risk-averse the company is when purchasing inputs, or to facilitate expansions in capacity, hedge against raw material price increases, or meet competition from a new market entrant. None of these exercises of business judgment should subject a firm to potential treble damages under the Sherman Act.

Similarly, a company might rationally accept a lower per-unit profit by paying more for raw materials if it anticipates being able to sell a higher volume. Or the company might be able to pay more for raw materials because it has lower costs

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[8] When the supply of an input is relatively inelastic, how could a firm purchase more of that limited supply except by offering to pay more than its competitors are paying?

than rivals somewhere else in the production chain—such as lower distribution costs, lower personnel costs, or more efficient machinery (such as the indisputably higher-caliber equipment in Weyerhaeuser's facilities, *see* Pet. 3). Companies should not risk antitrust liability for profiting from the development of a faster or less costly production process, or because they incorrectly predicted future demand. *See* Hovenkamp, *supra*, 72 U. Chi. L. Rev. at 160 (explaining that "many practices that raise rivals' costs, such as innovation that either deprives rivals of revenue or forces them to innovate in return, are also welfare enhancing").[9]

### C. Applying *Brooke Group* To Purchases Of Raw Materials Protects Efficient Competition; Applying The Ninth Circuit's Rule Protects Inefficient Competitors.

*Amici*'s members have long relied on the clear standards of *Brooke Group* and its predecessors when engaging in one of the central activities of any business: purchasing and selling price decisions. The Ninth Circuit's subjective "fairness" standard will sweep away the predictability, administrability, and transparency upon which businesses depend in making every day decisions, with significant impact on numerous businesses nationwide and numerous everyday business pricing decisions. It will generate great uncertainty in the marketplace, which in turn leads to the risk of chilling competition; businesses abhor unnecessary risks. When faced with issues of above-cost pricing decisions, this Court

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[9] In the sawmill market—like many other markets—a company's choice of production method can influence cost efficiency. *See, e.g.*, Philip H. Steele, *et al.*, *The Value Versus Volume Yield Problem For Live-Sawn Hardwood Sawlogs*, 43 Forest Products J. 35 (1993) (discussing the output differences depending on whether a sawmill chooses a lumber volume or a lumber value maximization when hardwood sawlogs are processed).

has previously recognized general courts' and lay juries' limitations in understanding all of the dynamics of aggressive competition at play; the Court should do so again now.

Businesses need rules that can practicably be implemented on a day-to-day basis. Routine pricing decisions are made by ordinary business people—not by industrial organization economists. These individuals cannot consult economists and lawyers every time a bid for materials is due, a contract is up for renewal, or another of the varied and routine pricing decisions must be made. Pricing decisions are often time sensitive and require the exercise of business acumen and insight; they should not require the participation of economists or lawyers.

The harm that would result from affirming antitrust liability for Weyerhaeuser purchasing more inputs than a jury felt were "needed" and at a higher price than "necessary" is considerable. Reasonable firms confronted with the possibility of treble-damages liability for aggressive purchasing decisions will opt to simply disengage from vigorous competition rather than risk a jury condemning a competitive practice, and rather than hire a cadre of lawyers and economic consultants to justify every new proposed payment to a supplier. In effect, a subjective standard like that in the decision below will increase economic inefficiencies. The *more* inefficient a competitor is, in fact, the *more* an efficient rival must solicitously rein in its own pricing decisions to ensure that its competitor can buy whatever raw materials it needs at whatever price the inefficient competitor deems "fair." In other words, an efficient company with a higher profit margin cannot use that to its advantage if by doing so it would prevent an inefficient competitor with a low profit margin from continuing to remain competitive.

Subjective and open-ended liability rules like the one the Ninth Circuit endorsed here "disrupt the proper functioning

of the price-setting mechanism." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 461-462 (1986) (condemning agreement that causes party to consider "whether a particular purchase is cost justified" because that "is likely enough to disrupt the proper functioning of the price-setting mechanism"). Upholding the Ninth Circuit's decision in this case would impose a considerable burden on businesses, not just by subjecting them to the risk of treble damages, but also by creating the specter of antitrust litigation in each of the routine business decisions that executives and managers make on a daily basis. These costs would eventually be passed on to consumers.

It is imperative that antitrust rules "must be clear enough for lawyers to explain them to clients," and they must be "administratively workable." *Town of Concord, Mass.* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). Courts should properly consider in formulating antitrust liability standards "what advice a lawyer, faced with [that] rule, would have to give a client" and whether he would have "to point out the risks of suit—whether ultimately successful or not—by an injured competitor." *Barry Wright*, 724 F.2d at 235 (Breyer, J.). Because of the open-ended nature of the Ninth Circuit's subjective standard, no lawyer or client will be able to predict when a jury might find a company's purchases to be just pennies too expensive to be "fair", or to have included just a few extra sawlogs more than "necessary."

Courts will face similar difficulties in administering the subjective standard endorsed by the Ninth Circuit. Courts and lay juries are ill-equipped to determine what prices are "fair" or how many logs a particular company "needs." *See* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 Geo. Wash. L. Rev. 1103, 1118-19 (2001) ("identifying [above-cost predation strategies] in the particular case without chilling aggressive, competitive pricing is far beyond the

capacity of any antitrust tribunal"). As then-Judge Breyer recognized, once a court asks itself "how is a judge or jury to determine a 'fair price?,' " it becomes clear that courts need rules and remedies "that are easier to administer." *Town of Concord, Mass.*, 915 F.2d at 25.

*Brooke Group* adequately protects " 'management's exercise of independent business judgment.' " *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quotation omitted); *see also Klor's, Inc.* v. *Broadway-Hole Stores, Inc.*, 359 U.S. 207, 212 (1959) (criticizing agreements that " 'cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment' ") (quoting *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)). Firms also must be able to exercise this independent business judgment when purchasing raw materials. The difference between legitimate competition and unlawful predatory conduct already requires "the most subtle of economic judgments about particular business practices." *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). Inquiries into the "fairness" of prices and the "necessary" levels of purchases by each competitor would wreak havoc on that subtle economic judgment and its predictability.

Only if *Brooke Group*'s objective and administrable prerequisites are applied to all predatory pricing allegations will consumers avoid shouldering the increased costs that come with chilling competition. The standard for predatory conduct is meant to distinguish non-efficiency-based anticompetitive conduct from vigorous competition and the aggressive pursuit of legitimate business objectives. In order to accomplish that task here, the Court should make clear that the standard of *Brooke Group* applies to all predatory pricing claims, including those involving the purchase of inputs.

## CONCLUSION

For the foregoing reasons and the reasons in the brief for Petitioner Weyerhaeuser, the judgment below should be reversed.

Respectfully submitted,

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In The
# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER, CO.,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, OREGON, ARIZONA, IOWA, LOUISIANA, MONTANA, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF RESPONDENT


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## QUESTION PRESENTED

1. Whether a plaintiff alleging that a defendant's "predatory bidding" for input supplies constitutes exclusionary conduct for purposes of a Section 2 Sherman Act claim must satisfy the bright-line *Brooke Group* test this Court constructed for analyzing the specific conduct of "predatory pricing."

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OTHER AUTHORITIES

*Commission Guidelines on the Assessment of Horizontal Mergers*, 2004 O.J. (C31) 5 at ¶¶ 61-63 ..... 21

H. Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 38 (Spring 2006) ... 22, 23, 24, 28

J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding*, 72 Antitrust L.J. 625 (2005) ..... *passim*

Oregon Department of Forestry, About Us, *available at* http://www.oregon.gov/ODF/about_us.shtml ..... 5

Oregon Department of Forestry, State Forests Management, *available at* http://www.oregon.gov/ODF/State_Forests/state_forest_management.shtml ..... 5

Oregon Department of Forestry, Status of Common School Forest Land Management, *available at* http://www.oregon.gov/ODF/STATE_FORESTS/docs/management/annual_reports/2005/AnnualReportCSL.pdf ..... 6

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P. Areeda, H. Hovenkamp, and J. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* ¶ 515, at 114 (2d ed. 2002)..... 27

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R. Noll, *Buyer Power and Economic Policy*, 72 Antitrust L.J. 589 (2005) .....*passim*

S. Salop, *Anticompetitive Overbuying By Power Buyers,* 72 Antitrust L.J. 669 (2005).....*passim*

S. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrificed Standard,* 73 Antitrust L.J. 311, 343 (2006) ..... 9

Transcript of U.S. Department of Justice and Federal Trade Commission, Sherman 2 Act Joint Hearing, *Predatory Pricing* (June 22, 2006) *available at* http://ftc.gov/os/sectiontwohearings/docs/60622FTC.pdf.....18, 23, 27

Transcript, U.S. Senate Judiciary Committee 1st Session, *Hearing on Monopsony Issues in Agriculture,* October 20, 2003, at 84-115 ..... 9, 26

## INTEREST OF AMICUS CURIAE

Because amici States are responsible for enforcing state and federal antitrust laws, amici States are interested in the development of workable standards for fostering healthy business competition. Amici States also have an equal interest in protecting consumers and the marketplace from those who adopt abusive tactics in seeking to manipulate the market and suppress competition. As procurers of a vast array of products and services, amici States have found that encouraging competitive bidding from multiple sources enables them to obtain at the best price for goods and services, including inputs and final products, required by their agencies, municipalities, and educational institutions. It is the stated goal, for example, of the State of California to foster small businesses and multiple bids in its procurement processes precisely in order to encourage competition. See Cal. Gov. Code § 14836(a), (b) (2006); Cal. Pub. Contract Code § 10340(a) & (b) (2006); see also Or. Rev. Stat., § 279B.055-.060 (2005) (regarding competitive purchasing). It is also a goal of Section 2 of the Sherman Act to protect small businesses. *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-429 (2d Cir. 1945). As amici States will explain, predatory bidding can be the vehicle to eliminate small business competitors, reduce competitive bidding, and require taxpayers to pay more than they should for goods and services. Additionally, amici States are owners and sellers of a variety of agricultural and/or natural resource inputs (such as timber and mineral rights) at risk of predatory bidding. As a seller into such markets, it is in the interest of amici States to avoid the creation of local markets where power buyers can drive down the price of such resources below market levels.

## STATEMENT

1. The forests west of the Cascade Mountains in Oregon and Washington contain sufficient hardwood to support the only concentration of hardwood sawmills in the Western United States. The predominant hardwood species in that region is alder, accounting for 95% of the annual hardwood production. The three principal players in the alder portion of the hardwood lumber industry are: (1) timberland owners and loggers who supply alder sawlogs; (2) production facilities, including sawmills, that buy sawlogs and process them into finished lumber; and (3) purchasers who buy hardwood lumber from production facilities. Pet. App. 2a-3a. Because alder sawlogs degrade quickly and are expensive to transport, alder sawmills typically obtain their sawlogs from no farther than 100 miles away. J.A. 152a, 153a, 169a.

2. Petitioner and respondent operated sawmills in the Pacific Northwest. Petitioner and respondent purchased alder sawlogs from landowners or loggers and processed them into hardwood lumber, which is used in consumer goods such as furniture, guitar blanks, paint brush handles, hangers, and cabinetry. Petitioner owned substantive timber holdings and supplied as much as 50% of its Longview, Washington mill's needs. J.A. 152a, 153a, 169a, 207a; Pet. App. 3a.

3. Respondent was a pioneer in the alder business, starting in 1962. It operated a mill in Longview, Washington continuously until it went out of business in 2001. From 1990 to 1997, Respondent experienced modest prosperity. From 1998 to 2001, its production declined. During that latter time period, sawlog prices increased whereas finished lumber prices decreased. This was unusual: historically, the price of alder sawlogs fluctuated with the price of finished lumber. Because its material costs went up and its production went down, respondent

incurred losses and was forced to shut down in 2001. Pet. App. 3a.

4. Petitioner now owns six hardwood mills in the Pacific Northwest and is one of the largest manufacturers of hardwood lumber in the world. From 1998 to 2001, the period during which Respondent's profits dropped, petitioner's share of the Pacific Northwest market for alder sawlogs rose from 65% to 75%. J.A. 663a-664a, 700; Pet. App. 3a. Petitioner listed its market share for finished alder lumber at 75% in 2000. J.A. 753a.

5. The advent of expensive new machines and product-grading, which did not exist when petitioner entered the market, has raised the costs for entry into the market for processing alder logs to $20-25 million per mill. J.A. 370a; Pet. App. 24a. Petitioner's market share of 70% created an additional barrier to entry into the market due to limited log supplies. J.A. 369a.

6. Respondent brought an action against petitioner under Section 2 of the Sherman Act, alleging that petitioner monopolized and attempted to monopolize the Pacific Northwest input market for alder sawlogs through its purchase of sawlogs. At trial, respondent offered testimony and other evidence to prove that petitioner attempted to eliminate competing buyers of alder by driving up sawlog prices and restricting access to sawlogs through: (1) predatory overbidding (*i.e.*, paying a higher price for sawlogs than necessary); (2) overbuying (*i.e.*, buying more sawlogs than needed); (3) entering restrictive or exclusive agreements with sawlog suppliers; and (4) making misrepresentations to Oregon state officials in order to obtain sawlogs from state forests. Respondent provided evidence that petitioner deliberately raised sawlog prices even as it suffered declining profits due to the high prices it was paying for those logs. Petitioner tracked its rivals' profit margins and estimated the potential effect of targeted increases in sawlog costs on the ability of low-margin competitors to survive. Petitioner

also used exclusive supply agreements to restrict competitors' access to sawlogs. Petitioner planned to lower the prices it paid for sawlogs after acquiring a greater market share due to decreased competition, envisioning itself to be the great "consolidator" in the Pacific Northwest. Petitioner responded to this evidence by attributing respondent's failure to substandard equipment, inefficient operation, poor management, and inadequate capital investment. Respondent prevailed after a jury trial. J.A. 260a-261a, 354a, 745a; Pet. App. 3a-4a, 17a-19a. The district court noted that sufficient evidence existed to support the determination by the jury that Respondent's losses were not the result of vigorous competition by a more efficient competitor. Pet. App. 34a n.4.

7. As petitioner satisfied a substantial portion of its log needs from its own timberlands, respondent offered evidence showing Petitioner's internal log transfer price for logs supplied to its Longview, Washington mill. (This was the mill which competed with respondent.) Petitioner supplied logs it owned to its Longview, Washington mill at a 32% discount to the average cost of logs purchased from third parties. J.A. 831a. The district court found this evidence to be relevant, noting "[a]mong other things, the jury could have found that [petitioner] was internally transferring lumber to its Longview mill, at below cost, to conceal or compensate for the fact that [petitioner]'s Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep [respondent] from obtaining those logs." Pet. App. 33a. The district court further observed that "[a]lternatively, the jury could find that the price discrepancy illustrates the difference between what [petitioner] believed those logs were actually worth versus what it was paying for equivalent logs on the open market in order to prevent [respondent] from obtaining an adequate supply of quality alder saw logs at reasonable prices." *Id.*

8. The jury received a number of instructions including that "anti-competitive conduct is conduct that has the effect of wrongly preventing or excluding competition, or frustrating or impairing the efforts of firms to compete for customers within the relevant market, making it difficult or impossible for firms to engage in fair competition." The jury was further instructed that "in deciding whether conduct is anti-competitive, you must consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers,. . . ." Finally, the jury was instructed that the conduct to be judged included "one of the [respondent's] contentions is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act." Pet. App. 14a n.30; J.A. 973a, 977a-979a.

9. The State of Oregon, one of the targets of Petitioner's bidding activities, is the owner and supplier of timber. See, *e.g.*, State of Oregon, Oregon Department of Forestry, State Forests Management, *available at* http://www.oregon.gov/ODF/State_Forests/state_forest_management.shtml. The Oregon Department of Forestry manages the state forest, and its mission is to "serve the people of Oregon by protecting, managing, and promoting stewardship of Oregon's forests to enhance environmental, *economic*, and community sustainability." See State of Oregon Department of Forestry, About Us, *available at* http://www.oregon.gov/ODF/about_us.shtml (emphasis added) Over 200 million board feet of timber valued at approximately $100 million was harvested from state forest lands in

2000, producing revenues for schools, counties, and local taxing districts.[1]

10. State law requires the State Forester first to appraise such forest products and then to sell them through competitive bidding. Or. Rev. Stat. § 530.059(1) (2005). The State Forester reserves the right to accept or reject all bids. *Id.*, § 530.059(2) (2005); see also *id.*, § 273.522-.531 (2005).

11. The importance of state timber sales, both for the economy of Oregon and for petitioner, is demonstrated in a letter admitted into evidence in this case, dated September 23rd 1999, from petitioner to the Board of Forestry. J.A. 782a (Trial Exh. 446). As that letter states, hardwoods such as alder "compromise a portion of most state timber sales." *Id.* "Hardwood management could be an economically and environmentally attractive alternative on ... state lands if *markets for hardwoods remain strong and competitive*." *Id.* (emphasis added).

12. In that same letter, petitioner represented to the State of Oregon that it estimated hardwood logs from government lands supplied 50 percent of the timber for

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[1] The Oregon Department of Forestry manages two types of forest lands. The first is the Common School Forest Lands (CSFLs). See Oregon Department of Forestry, Status of Common School Forest Land Management, *available at* http://www.oregon.gov/ODF/STATE_FORESTS/docs/management/annual_reports/2005/AnnualReportCSL.pdf. CSFLs are trust lands that were granted to the State of Oregon upon admission to the union for the use of schools. *Ibid.* The Oregon Department of Forestry distributes the money from CSFLs timber sales to the Department of State Lands, which then distributes it to the Common School Fund. *Ibid.* The Oregon Department of Forestry also manages Board of Forestry lands (County Forest Trust Lands). See *ibid.* From July 1, 2004 through June 30, 2005, the Oregon Department of Forestry conducted timber sales from CSFLs that brought in $20.1 million, and Board of Forestry lands that brought in $89.5 million. See *id.* (Table 1, p. 4); see also J.A. 317a-320a (testimony concerning harvest plans of the State of Oregon).

two of its mills. J.A. 784a. In advocating for a rule change to permit it to export softwood logs while remaining eligible to purchase hardwood logs in government sales, petitioner represented to the State that independent companies would remain competitive in hardwoods. Petitioner also stated that, while hardwoods represent a minor portion of the total timber harvest, the component value of hardwoods affects the market value of state timber sales. J.A. 785a.

13. While this case involves timber, amici States also provide inputs and access to natural resources through the competitive bidding process in a number of other markets such as mining and drilling leases,[2] mineral and geothermal rights such as oil and gas,[3] grazing rights,[4] and use of materials such as gravel from submersible and submerged lands.[5]

## SUMMARY OF ARGUMENT

Monopsony pricing—or the possession of sufficient market power by a buyer that it can dictate the price to the seller—is quite similar in its anti-competitive effects on the market with monopoly pricing—or the possession of sufficient market power by a seller that it can dictate the price to a buyer. However, it does not follow from this truism that predatory bidding on the monopsony side should be treated the same as predatory pricing on the monopoly side.

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[2] Or. Rev. Stat. § 273.551 (2005).

[3] Or. Rev. Stat. § 273.775-.790 (2005); Cal. Pub. Res. Code § 6815.1 (West 2001); *id.*, § 6913(f) (West 2001).

[4] Or. Rev. Stat. § 273.805-.825 (2005).

[5] Or. Rev. Stat. § 274.525-.590 (2005); see Cal. Pub. Res. Code § 6871 (West 2001).

Predatory pricing—the pricing of an *end-product* below cost by a monopolist or a would-be monopolist so as to drive rivals out of the market—carries the short-term pro-competitive benefit of low prices with a very minimal risk that such a predation strategy would succeed in the long run. Accordingly, in order to avoid chilling what is quintessential pro-competitive conduct, lower prices, this Court concluded in *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993) that predatory pricing violated Section 2 only if (a) prices were below-cost in the short term and (b) the seller had a dangerous probability of recovering its losses in the long term.

Predatory bidding or overbuying can be defined as the bidding or purchasing of inputs at such elevated levels that rival buyers cannot survive (or compete vigorously). At first blush, predatory bidding is more akin to other forms of monopsonistic exclusionary conduct, such as exclusive supply contracts, than it is to predatory pricing. But, in any event, the intricacies of predatory bidding—and its differences from predatory pricing—do not lend themselves to *Brooke Group*'s bright-line test.

Predatory bidding may, in the short term, benefit existing input suppliers who receive an increased price for their inputs. However, consumers do not necessarily realize any savings in the short-term from such a strategy. If input supply is relatively inelastic, *e.g.*, new entry of suppliers is not possible, then the increased bidding price for input supplies will not result in an increased supply of inputs (that could potentially lower output prices) even in the short term. And predatory bidding in the medium to long term leads to depressed prices and the lowered production of inputs as the predatory buyer succeeds in securing a monopsony position in the input market. This harms the long-term welfare of both the suppliers and the public. Predatory bidding in an upstream market can also result in price increases and reductions in output in the downstream market, harming consumer welfare, even if

the upstream buyer lacks market power (or the dangerous probability of acquiring it) in the downstream market. Indeed, the predator buyer need not pass on any savings from lower input prices to consumers. As witnessed by Petitioner's plans in this case for the Pacific Northwest alder lumber market, the predator buyer's end game can be the pocketing of the monopsony profits. Economists and commentators have expounded on these anti-competitive effects.[6] And, as sellers of natural resources (or natural resource rights) in often local geographic markets, as well as procurers of often specialized goods and services, Amici States have grave concerns about the adoption of a bright-line rule that fails to recognize and to deter conduct with such a direct anti-competitive effect on them.

The import of the *Brooke Group* test into the predatory bidding context encounters other application problems as well. In the predatory pricing context, there are objective, valid cost benchmarks for determining when sales are below cost such as average variable cost. However, the literal adoption of a *Brooke Group*-type price/cost test in the predatory bidding context (*e.g.*, comparing the cost of the one input as elevated by the higher bids to the price of the complete end-product to determine if the predator's conduct is profitable) has severe administrative problems that render such a test unworkable in the predatory bidding context and raise the substantial prospect of "false negatives." Compare S. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 343 (2006) (rationale for *per se* rule which eliminated requirement that plaintiff prove anti-competitive harm to consumers is the fear of a "false negative").

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[6] See Transcript, United States Senate Judiciary Committee, 1st Session, *Hearing on Monopsony Issues in Agriculture*, October 20, 2003, at 84-115 (Report of Professor Cotterill discussing monopsony profits in the intermediate level of New England fluid milk industry).

Under the *Brooke Group* standard, a firm engaging in predatory pricing must later increase that same price to monopoly levels to recoup the profits lost during the predatory pricing period. Such straight-line recoupment on the sell-side is not necessary where predatory bidding is concerned: a firm can, for example, use cost savings from other inputs to cover the lost profits from its predatory bids.

Amici States recognize that some aggressive input bidding behavior that seems to be predatory can be pro-competitive, such as implementing a plan to expand output of a final product. Application of the "rule-of-reason" analysis applicable to Section 2 cases of exclusionary conduct such as predatory bidding provides a recognized framework for avoiding chilling of such pro-competitive behavior. In the example given, if a defendant with sufficient market power to have a monopsony, or a dangerous probability of acquiring one, possesses plausible pro-competitive justifications, and evidence of exclusionary intent is lacking, then that defendant is not liable under Section 2 for any predatory-like bidding behavior. Similarly, if barriers to entry into the input market are absent, summary judgment would be appropriate on a predatory bidding claim. See *Brooke Group*, 509 U.S. at 226.

Amici States agree the Court of Appeals properly rejected application of *Brooke Group* to this case. Amici States also submit that importation of *Brooke Group*'s test into future predatory bidding cases would be inappropriate.

## ARGUMENT

### I. THE BRIGHT-LINE *BROOKE GROUP* TEST FOR PREDATORY PRICING IS AN INAPPROPRIATE ONE FOR THE DIFFERENT, AND MORE VARIABLE, SETTING OF PREDATORY BIDDING

As Justice Scalia noted:

> Our § 2 monopolization doctrines are directed to discrete situations in which a defendant's possession of market power, combined with his exclusionary or anti-competitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power. [Citation.] Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might not otherwise be of concern to the antitrust laws—or that might even be viewed as being pro-competitive—can take on exclusionary [or predatory] connotations when practiced by a monopolist. [Citation.]

*Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting, joined by O'Connor, Thomas, J.J.). While monopolies involved the exercise of market power by a seller to increase the price (and lower the demand) for a product, monopsony is the exercise of market power by a buyer to depress the price paid to (and lower the supply offered by) sellers of a product to below market levels. Although it has been correctly remarked that "monopsony pricing . . . is analytically the same as monopoly or cartel pricing and so treated by the law," *State Oil Co. v. Khan*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, C.J.), *rev'd on other grounds*, 522 U.S. 3 (1997), this is not the equivalent of stating that monopsony and monopoly pricing have all the same features. Cf. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) ("Antitrust analysis must always

be attuned to the particular structure and circumstances of the industry at issue.").

The "default" standard for assessing the conduct of a monopolist is the rule announced in *Aspen Skiing* in which this Court will first look to whether the conduct of the monopolist can be characterized as anti-competitive, that is exclusionary or predatory, based on intent evidence and other factors. *Aspen Skiing Co. v. Aspen Highland Co.*, 472 U.S. 585, 595-596, 602, 605 (1985). If claims of efficiency exist, the Court will take them into account in determining whether the conduct as a whole is anti-competitive. *Id.*, at 605, 610-611; *United States v. Microsoft*, 253 F.3d 64, 68-69 (D.C. Cir. 2001) (en banc). No reason exists to distinguish a monopsony from a monopoly in applying *Aspen Skiing*.

However, *Brooke Group* deviated from *Aspen Skiing*'s framework as to predatory pricing by a monopolist. In creating an exception for analyzing predatory pricing cases, the Court operated against the backdrop of a wealth of studies and commentaries that concluded: predatory pricing schemes were not only rarely tried, and even more rarely successful, but the application of a rule of reason analysis would chill quintessential pro-competitive conduct, lowering prices for consumers. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 226 (1993), citing *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 589 (1986).

The question in this case is whether the features of predatory bidding by a monopsony warrant a similar application of *Brooke Group*, and thus a similar deviation from the standard Section 2 framework. Amici States respectfully request that this Court answer this question in the negative by looking to market realities rather than the formulaic syllogisms petitioner offers, *e.g.*, if the economic effects of predatory pricing is quintessentially pro-competitive in the short run and if *Brooke Group* sets out a workable test for assessing the legality of predatory pricing, the same must be true of predatory bidding—Pet. Brief, at

26-28. Cf. *Eastman Kodak*, 504 U.S. at 465-466 (Blackmun, J., writing for the Court) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."). Insofar as petitioner and its amici complain about the chilling of pro-competitive bidding by large companies, see, *e.g.*, Brief of the United States in Support of Petitioner at 20-21, 24, the application of traditional antitrust principles as set out in *Aspen Skiing* can protect such activities. Consequently, amici States first turn to a comparison of predatory bidding and predatory pricing, in the context of economic and market realities, through the lens of *Brooke Group*.

### A. The Application Of The *Brooke Group* Test To Predatory Pricing Has An Economic Basis

Predatory pricing is aggressive price-cutting by the seller of a product below its costs with the objective of driving its rivals out of the market and subsequently recouping its costs. In *Brooke Group*, this Court found that a plaintiff cannot allege a valid claim of anti-competitive predatory pricing unless it could show (a) the defendant engaged in below-cost pricing in the short-term and (b) that the defendant had a "dangerous probability" of recouping his losses in the long-term. *Id.*, at 222, 224. The creation of the test formulated in *Brooke Group* made economic sense.

This Court has recognized low prices are the essence of competition and directly benefit the consumer. *Brooke Group*, 509 U.S. at 223. The first element of *Brooke Group*, a price/cost comparison, serves to protect pro-competitive pricing above costs. Regarding this price/cost comparison, it is well-understood that, economically speaking, a product is priced below-cost when it is priced below its marginal cost. But, because marginal costs is an abstract, economic concept that cannot be practically determined by forensic accountants, almost all federal circuits now accept pricing below average variable costs as the yardstick for

measuring when a product is being priced below-cost. See, *e.g.*, *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 937-938 (6th Cir. 2005); *United States v. AMR Corp.*, 335 F.3d 1109, 1115-1116 & n.7 (10th Cir. 2003). The second element of *Brooke Group*, recoupment, serves to ensure that supposed anti-competitive effects of a below-cost pricing strategy are likely to be achieved before liability is imposed. This requirement originated in a case where this Court was skeptical of plaintiff's assertion that recoupment was not required because the alleged below-cost sales strategy was subsidized *over a twenty-year period* by profits from other product lines. *Matsushita*, 475 U.S. at 592 & n.18 (possibility of supra-competitive profits in Japanese market does not answer question of why Japanese corporations would sustain losses for two decades in the United States market in alleged conspiracy to engage in predatory pricing with no apparent success).

Consequently, the *Brooke Group* test prevents false positives while fostering competition. See *Brooke Group*, 509 U.S. at 223, 226.

### B. The Application Of *Brooke Group* To Predatory Bidding Is Not Appropriate As Predatory Bidding Shares None Of The Characteristics Of Predatory Pricing

Predatory bidding has been described as the bidding or purchase of inputs for a product or service at such "elevated levels that rival buyers cannot survive (or compete as vigorously) and, as a result, the predating buyer acquires (or maintains or increases its) monopsony power—the power to lower the price of the input profitably below the competitive level." J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding* [hereinafter "Kirkwood"], 72 Antitrust L.J. 625, 651 (2005); see also, *e.g.*, S. Salop, *Anticompetitive*

*Overbuying By Power Buyers*, 72 Antitrust L.J. 669 (2005) [hereinafter "Salop"]; R. Noll, *Buyer Power and Economic Policy*, 72 Antitrust L.J. 589, 590 (2005) [hereinafter "Noll"]. While predatory pricing involves nothing more than the setting of a price for a final product, predatory bidding involves potentially differing pay-outs (*e.g.*, differing offers and purchases at various elevated prices and bids) to various sellers to lock up input capacity and deny that capacity to a buyer's rivals. When viewed through this buy-side prism, the use of predatory bidding closely resembles the use of exclusionary contracts to lock up supply and, as evinced by this case, can be used in tandem with exclusionary contracts to gain control of an input market. *Aspen Skiing* stands for the proposition that a monopsonist cannot use exclusionary conduct, such as a sudden, unprofitable refusal to deal with a rival, so as to squelch competition. See *Aspen Skiing*, 472 U.S. at 605-610. Amici States therefore believe *Brooke Group* is inapplicable as a threshold matter on the ground it did not purport to regulate exclusionary conduct even if that conduct involved buyer payouts instead of buyer contracts.

Because predatory bidding can directly change the price charged by sellers in a way that individual exclusionary supply contracts may not, a more in-depth comparison of predatory bidding and predatory pricing may be appropriate in this Court's determination of whether *Brooke Group* should apply to predatory bidding. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) (price is "the central nervous system of the economy"). Based on the record in this case and on economic analyses, however, amici States respectfully assert that, in fact, predatory bidding shares none of the characteristics of predatory pricing that would justify such an extension of *Brooke Group*. In particular, predatory bidding in upstream input markets does not necessarily decrease prices to consumers in short term. Further, sellers and consumers can experience anti-competitive

effects in the medium and long term, effects that are more pronounced the more inelastic the upstream input market.

### 1. Predatory Bidding Often Has Anti-Competitive Effects In The Short Run As Well As The Long Run In Upstream Input And Downstream Output Markets

Predatory pricing is pro-competitive insofar as it involves the sale of products to consumers below cost in the short-term as a cornerstone of the strategy to drive rivals out of the market. Predatory bidding is a different story.

In the short term, predatory bidding is based on the strategy of a power buyer's increasing the market price paid to sellers for their goods, *e.g.*, inputs, beyond the optimal level dictated by the market so as to drive any rivals out of the market. See, *e.g.*, Kirkwood, *supra*, 72 Antitrust L.J. at 653. Although that increase in price provides an unlooked-for windfall to sellers of that input, it increases the buyer's costs beyond what would be the optimal level in a competitive market. Thus, consumers do not receive the benefit of a buyer's competitive optimization of its resources, *e.g.*, either through the use of funds to improve products and services in lieu of paying for the increased bids or a reduction in prices. And, if the power buyer also has sufficient power in the downstream market that it can pass on the increased costs arising from its bidding strategy, consumers can actually suffer a short-term price increase as well. Predatory bidding thus can do a disservice to consumer welfare even in the short run. See Pet. App. 2a; see generally, *e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), quoting R. Bork, *The Antitrust Paradox* 66 (1978) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'"); Noll, *supra*, 72 Antitrust L.J. at 591 (finding the exercise of monopsony power to be likely anti-competitive under a "harm to consumers" or a "deadweight loss" standard).

In the medium to long run, after the power buyer's predatory strategy succeeds, the power buyer can decrease the price paid to sellers below competitively optimum levels without fear of competition from its rivals. This can cause sellers not to make the investments that a competitive market would dictate, translating into a market facing input supply shortages, lack of input quality and services, and/or lack of input improvements. Furthermore, the predator buyer need not pass on any savings from these lower prices to consumers: as shown by Petitioner's plans for the Pacific Northwest alder lumber market, the predator buyer can pocket the monopsony profits. Predatory bidding thus can do a disservice to public welfare in the medium to long term as well due to these effects. See Kirkwood, *supra*, 72 Antitrust L.J. at 653; Noll, *supra*, 72 Antitrust L.J. at 594-595; see also Pet. App. 10a-11a.

Also, it bears mentioning that predatory bidding can have second order anti-competitive effects in the medium to long term in downstream product markets. If the power buyer had a substantial prospect of acquiring market power in a downstream product market even before it carried out a predatory bidding scheme in the upstream input market, the power buyer could use its acquired power over the upstream input market to tip the scales in favor of its acquisition of market power in the downstream market. It can then use that market power to increase the prices paid by consumers for the end product. Accord Brief of the United States in Support of Petitioner at 19-20 (denoting this strategy as a price-cost squeeze strategy); Kirkwood, *supra*, 72 Antitrust L.J. at 649-650 & n.72 (same).

Amici for petitioner stress the fact that petitioner supposedly lacked market power in the downstream nationwide market for finished lumber products as a point that would allow this Court to reserve for another day the impact of such downstream effects on the adoption of *Brooke Group* in predatory bidding cases. See, *e.g.*, Brief of the United States in Support of Petitioner, at 18-20.

However, negative downstream effects on consumer welfare are entirely possible even in the absence of market power in the downstream market, *e.g.*, a reduction in output of the end product by the power buyer could occur as a corollary to its reduction of inputs following its acquisition of monopsony power in the upstream market. Tr. of United States Department of Justice and Federal Trade Commission, Sherman 2 Act Joint Hearing, Predatory Pricing (June 22, 2006) [hereinafter "Section 2 Transcript"] at 110, lns:2-19 *available at* http://ftc.gov/os/sectiontwohearings/docs/60622FTC.pdf (remarks of Professor Kirkwood); see Noll, *supra*, 72 Antitrust L.J. at 599-600 (explaining that downstream, end-product market prices could also increase if downstream rivals of the buyer have to use more marginal suppliers at a higher input cost because of the predatory bids).

The aforesaid argument by amici for petitioner as to petitioner's lack of market power in a nationwide market begs the question of whether petitioner (or indeed that any power buyer)'s newly-acquired monopsony position in the upstream input market could grant it market power in a local geographic market or in a relevant sub-market such as the one that is often present for products and services destined for government use. See *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962) (Court can examine competitive impact of alleged illegal conduct on product or service sub-markets); accord, *e.g.*, *Spirit Airlines*, 431 F.3d at 933; see also *Reid Bros. v. Ketchikan Pulp Co.*, 699 F.2d, 1292, 1296-1298 & n.5 (9th Cir. 1983) (analyzing competitive effects of predatory bidding conduct by defendants in Tongass National Forest in Alaska to eliminate rivals and bar new entrants); Noll, *supra*, 72 Antitrust L.J. at 598-599 (noting that a buyer can obtain a monopsony in a local geographic market). In these sub-markets, first- and second-order anti-competitive effects can become more pronounced because these markets can be quite inelastic. See Salop, *supra*, 72 Antitrust L.J. at 671; Kirkwood,

*supra*, 72 Antitrust L.J. at 653; Noll, *supra*, 72 Antitrust L.J. at 607-608. Often, new expansion or entry is difficult, and reasonable substitutes are absent, to serve as countervailing forces to a power buyer's bidding strategy to secure the sources of input supplies and drive out rival buyers. See Noll, *supra*, 72 Antitrust L.J. at 597-598 (discussing natural resources and agricultural markets); *id.*, at 610-611 (discussing markets created due to product differentiation). Amici States therefore respectfully submit that this Court should not disregard these second-order downstream effects, especially in local or specialized markets, in determining whether to extend *Brooke Group*. Cf. Brief of the United States in Support of Petitioner at 20 n.8 (implicitly arguing that *Brooke Group* should apply even if downstream market effects were considered).

Speaking more generally, the more inelastic an upstream input market may be, the more pronounced can be the anti-competitive effects of predatory bidding in the short run as well as the long run. For example, in relatively inelastic markets, a power buyer can increase its bids for inputs, and stockpile or destroy any excess inputs so purchased above its needs, without fear of inviting any new entry or expansion by sellers or would-be sellers of that input. Kirkwood, *supra*, 72 Antitrust L.J. at 653-654; see Noll, *supra*, 72 Antitrust L.J. at 606, 610-611. In such inelastic markets, a power buyer could prevent any conceivable short-term benefit to consumers that might otherwise occur as sellers produce more inputs and rivals of the power buyer take advantage to lower downstream prices for end-products. See Pet. App. 11a (discussing alder sawlogs market). That is an important distinction between predatory bidding and predatory pricing to the extent that the short-term benefit to consumers of predatory pricing—low prices—does not disappear if a market is inelastic.

### 2. These Anti-Competitive Effects Of Predatory Bidding, Absent In Predatory Pricing Cases, Greatly Concern Amici States

The anti-competitive effects occasioned by such predatory bidding strategies, especially in inelastic markets, greatly concern amici States in their roles as sellers of natural resources, or natural resource rights, and in their roles as procurers of products and services made for, or adapted to, government use. For example, the State of Oregon owns timberlands and sells timber. Predatory bidding can leave a State such as Oregon in the position where its taxpayers would receive less for the sale of such timber rights than would occur in a competitive market. This is a particular disadvantage to the public welfare. See Noll, *supra*, 72 Antitrust L.J. at 594-595, 597-598.

As a further example, the State of California has set out a set of bidding policies for the procurement of products and services to encourage bids by qualified small businesses on government procurement contracts. See, *e.g.*, Cal. Gov. Code §§ 14836-14839, 14845-14847(b) (2006). As Judge Learned Hand recognized, Congress' desire, in enacting Section 2, was to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them." *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-429 (2d Cir. 1945). Small businesses not only can nimbly adapt to and service in cost-effective ways, the specialized needs of government agencies; they also can inject healthy competition into a procurement process. However, predatory bidding by multi-product or vertically integrated conglomerates in upstream input markets is well suited for eliminating competition from small businesses in downstream markets for supplying goods and services to the government, as small businesses often lack the deep capital pockets to withstand a bidding war in an upstream input market. Cf. Cal. Gov. Code § 14837(d) (2006) (small businesses are defined generally

as having 100 or fewer employees and average yearly gross receipts of $10,000,000 or less over the past three years). Consequently, such predatory tactics can leave the State with no choice but to go with the conglomerate as the single-source supplier, requiring its taxpayers to pay more and thereby disserving the antitrust laws and the public policy of the State. See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 973 P.2d 527, 544 (Cal. 1999), quoting *Cargill v. Monfort of Colorado*, 479 U.S. 104, 116 (1988) (antitrust laws do protect small businesses "against the loss of profits from practices forbidden by the antitrust laws"); Cal. Pub. Contract Code § 10340(a) & (b) (2006) ("Except as provided by subdivision (b), state agencies shall secure at least three competitive bids or proposals for each contract.").[7]

### 3. There Is No Objective Or Valid Cost Benchmark In Predatory Bidding Cases As There Is In Predatory Pricing Cases

A consensus exists in predatory pricing cases as to the objective benchmark to be used for cost-price comparisons: the average variable costs of a single final product versus its price. The landscape is quite different as to predatory bidding.

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[7] Indeed, in situations in which such predatory strategies are carried out by the acquisitions of rivals, in lieu of bid increases targeting them, the European Union has set out the existence of similar anti-competitive effects as a reason for potentially rejecting a proposed merger. See *Commission Guidelines on the Assessment of Horizontal Mergers*, 2004 O.J. (C31) 5 at ¶¶ 61-63 (merger that creates or strengthens the market power of a buyer may allow it to obtain lower prices by reducing its inputs, in turn leading it to lower its level of output in the final product market and/or to foreclose rivals, and hurt consumer welfare). The acquisition of rival buyers, like the successful use of bidding to raise input prices and drive rival buyers out of the market, is evidence of market power under Section 2. See *Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75 (1911)).

A couple of economists seem to suggest that a relevant comparison could be the price of the end product to the increased costs arising from the higher bids on the inputs. Under this analytical framework, as long as a would-be monopsonist could make a profit on the end product, it would not matter if it were running substantial losses on an input due to its bidding strategy. See H. Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 38 (Spring 2006) [hereinafter "Hovenkamp"] ("In such a situation [where the cost of the timber is 75% of the cost of finished lumber], it should be easy to conclude that an input price is not 'too high' unless a firm is unable to make a profit on its sales."); Salop, *supra*, 72 Antitrust L.J. at 701-702 & n.96 (focusing on a comparison of marginal input costs to the end product's price).

However, both economists forthrightly note substantial drawbacks with this analytical framework that, in the opinion of Amici States, make it unworkable. Professor Hovenkamp begins with the observation that such a price/cost comparison works *if* the defendant has no market power in the downstream end-product market (allowing it to raise prices to cover the increased cost). Hovenkamp, *supra*, 2 Competition Policy Int'l at 38. He then notes that "[o]n administrative grounds, a price/cost test is more difficult to defend if the input in question constitutes only a small percentage of the cost of the finished product." *Id.* Professor Salop admits that a monopsonist can manipulate marginal costs on inputs. See Salop, *supra*, 72 Antitrust L.J. at 701-702 & n.96.[8] (In other words, a power buyer could subsidize the overage for one input arising from its higher bids with cost savings from another input.) He further states "[t]o be sure, requiring the plaintiff to satisfy the below-cost pricing test

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[8] Professor Salop's focus on marginal costs raises additional "administrative" issues as marginal costs are an economic abstraction that cannot readily be determined by forensic accountants. See, *e.g.*, *AMR Corp.*, 335 F.3d at 1115-1116.

also could lead to 'false negatives.' [Footnote.] An alternative approach to reducing false positives would be to apply the full rule of reason solely with a rigorously applied consumer welfare harm standard." Salop, *supra*, 72 Antitrust L.J. at 704 & n.98.[9]

Other problems also arise with a downstream price/cost test. As part of this process, a forensic accountant (or a court) would need to wrestle with questions such as the following: What if the would-be predator can and did absorb the cost increased involved in predatory bids by reducing costs on other inputs such that no cost increase appears on the books under a price/cost test? See *id.*, at 703 n.96. What happens if the would-be predator has multiple product lines across the country, or is vertically integrated, such that it can run losses involving increased bidding on inputs in a narrow geographic market or on a specialty product even as its input costs on a division-wide or nation-wide basis may hold firm? See, *e.g.*, Pet. App. 33-34a. What if the input in question actually ends up going into a variety of different final products that sell at different prices? See, *e.g.*, J.A. 152a, 153a (noting multitude of different products that can be made from alder timber). What if the input cost increase involved is small because the specific input involved is a small percentage of the total input costs but is essential to the manufacture of the final product? Compare, *e.g.*, Brief of the United States in Support of Petitioner at 22-23 (suggesting that such a small cost increase should not matter) with Hovenkamp, *supra*, 2 Competition Policy Int'l at 38 (noting that even a small cost increase can reflect anti-competitive predatory bidding).

Indeed, amici for petitioner studiously avoid suggesting to this Court any sort of objective or valid cost benchmark

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[9] Other economists have echoed the point that importing *Brooke Group*'s price-cost "safe-harbor" into the predatory bidding context will create "a high rate of false negatives." Section 2 Transcript, *supra*, at 151 lns. 21-25 – 152 lns. 1-3, 13-22 (Testimony of Dr. Rick Warren-Boulton).

to be applied in predatory bidding cases. The United States, with prior experience in undertaking complex calculations on cost, see *AMR Corp.*, 335 F.3d 1109, avoids suggesting such a benchmark. See Brief of United States in Support of Petitioner at 22-23. The United States disclaims any need to do so because this Court in *Brooke Group* did not provide such an objective benchmark in the predatory pricing context. See *id.* However, the Court did not address this issue there because the parties had already agreed on the relevant measurement of costs as being average variable costs. *Brooke Group*, 509 U.S. at 223 n.1 Similarly, amici economists supporting petitioner also avoid suggesting any sort of objective or valid cost benchmark for applying *Brooke Group*. See Brief of Amici Economists at 2-3.

Consequently, no objective or valid, workable cost benchmark exists on which *Brooke Group* could be imported from predatory pricing cases to predatory bidding cases.

#### 4. The Need For Recoupment Is Not A Given With Predatory Bidding The Way It May Be With Predatory Pricing

Those economists who support the notion that recoupment is required to establish predatory bidding appear to do so based on assumptions without any empirical foundation. *E.g.*, Hovenkamp, *supra*, 2 Competition Policy Int'l at 38 ("Third, recoupment seems essential in all cases of predatory spending. Whether or not the defendant's costs are pushed higher than its prices, an anticompetitive strategy of overbuying will not be profitable unless its payoff is greater than the investment."). However, the determination of the necessity of recoupment can be so complex in a predatory bidding scenario that forcing this scenario into *Brooke Group*'s recoupment test would destroy its bright-line nature.

In the predatory pricing context, the sale at a price below cost of a final product creates a straightforward, absolute loss that must be made up by the company somehow. Unless a firm is willing to cross-subsidize that loss with profits from other product lines (raising questions of motive similar to those raised by this Court in *Matsushita*, 472 U.S. at 592 & n.18), a firm willing to embark on such a strategy must recoup those losses by raising prices (if its rivals have been successfully driven out of the market).

However, in the predatory bidding context, the purchase of an input at an extra cost may or may not cause a loss that would need to be recouped as witnessed by the various scenarios discussed in the previous section on the cost prong of *Brooke Group*. If the input is a small percentage of the total cost, the loss may be too insignificant to warrant recoupment. If the input is a more sizeable percentage of the total cost, the loss may be made up by squeezing more efficiencies out of other inputs so that recoupment would not be warranted. If the input goes into a variety of downstream products, then whether a loss (that would need to be recouped) is suffered could depend on the price of those final products. And, of course, if the downstream price of the final product rose due to predatory bidding in the upstream market, then any losses might be made up in a manner that does not fit the *Brooke Group* standard.

Consequently, predatory bidding is far more akin to the kind of exclusionary conduct condemned in *Aspen Skiing* than to predatory pricing.[10]

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[10] There are very few cases and relatively little commentary or studies addressing predatory overbidding. See Brief of the United States in Support of Petitioners at 25-26. Amici States respectfully note that the absence of predatory buying cases could be a "false negative" in the sense that predatory bidding is most readily tried by power buyers in industries such as agriculture against small, atomistic suppliers who

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## II. THE *ASPEN SKIING* STANDARD ENABLES THE COURTS TO ADDRESS THE ANTI-COMPETITIVE EFFECTS OF PREDATORY BIDDING WHILE AVOIDING THE CHILLING OF PRO-COMPETITIVE BIDDING CONDUCT

*Aspen Skiing* sets out a type of rule-of-reason test for Section 2 cases in which this Court looks first to determine whether complained-of conduct is exclusionary and, hence, anti-competitive (including the analysis of "intent" evidence). Next, the Court determines whether the conduct in question has pro-competitive effects. *Aspen Skiing*, 472 U.S. at 605, 610-611; *Microsoft*, 253 F.3d at 59. That analysis requires, in the Section 2 context, that the asserted pro-competitive effects at least be plausible based on the facts in the record. See *Kodak*, 504 U.S. at 472-473 (majority op.); *Microsoft*, 253 F.3d at 59, 71-72.

Amici States believe that *Aspen Skiing*'s rule-of-reason analysis supplies the proper mode of analysis for predatory bidding cases as predatory bidding can be viewed as a species of exclusionary conduct. Accord, Kirkwood, *supra*, 72 Antitrust L.J. at 661. In the predatory bidding context, a defendant cannot be liable unless it has monopsony power (or a dangerous probability of acquiring it), there are barriers to entry, there are no pro-competitive justifications, and there is an anti-competitive effect.

Thus, *Aspen Skiing* itself should not be applied unless the defendant either enjoys monopsony power or possesses buying strength that approaches a monopsony such that it has a "dangerous probability" of acquiring it, see *Spectrum*

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lack the capital resources to fight or to sue. See Transcript, United States Senate Judiciary Committee, 1st Session, *Hearing on Monopsony Issues in Agriculture*, October 20, 2003, at 23 (Testimony of Professor Cotterill discussing milk industry); *id.*, at 61-65 (Report of Professor Carstensen discussing various agricultural industries such as beef, milk, and grain).

*Sports v. McQuillan*, 506 U.S. 447, 456, 459 (1993). While that market power conceivably may be proved directly from the buyer's evidenced ability to directly set input prices and output without regard for the market,[11] it may also be demonstrated inferentially from market conditions such as the vertical integration of the buyer,[12] or, more commonly, from the buyer's market share.[13] As a general rule, market shares of 70% or more are normally required to trigger a finding of monopsony power with at least a 55% market share, combined with other market factors, required for a "dangerous probability" finding in attempted monopsony cases.[14] And, the existence of one or more powerful rival buyers, *e.g.*, at least one buyer with sufficient capital resources of its own that it could match or exceed the defendant's bids, should, all things being equal, militate against any finding that a would-be predator is a monopsonist or has a "dangerous probability" of becoming one. See, *e.g., Indiana Grocery Co., Inc. v. Super-Valu Stores, Inc.*, 684 F.Supp. 561, 579 (S.D. Ind. 1988).

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[11] See, *e.g., Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 227 (2d Cir. 2006).

[12] See, *e.g., Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing Areeda & Turner). Another important market condition in inferring the buyer's market power to carry through a predatory bidding scheme is the supply elasticity of the upstream input market. See, *e.g.*, Section 2 Hearing Transcript at 148, 151-152 (remarks of Dr. Warren-Boulton); Salop, *supra*, 72 Antitrust L.J. at 671; Kirkwood, *supra*, 72 Antitrust L.J. at 653; Noll, *supra*, 72 Antitrust L.J. at 607-608.

[13] See, *e.g., Heerwagen*, 435 F.3d at 227, citing and quoting 2A P. Areeda, H. Hovenkamp, and J. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 515, at 114 (2d ed. 2002).

[14] See, *e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America et al.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989); *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 409 (2d Cir. 1988); *Aluminum Co. of America*, 148 F.2d at 424.

Furthermore, liability under *Aspen Skiing* cannot be triggered unless there are barriers to entry that prevent existing sellers from expanding their input capacity or new sellers from entering the input market. See, *e.g.*, *Microsoft*, 253 F.3d at 54-56. The existence of barriers to entry of input supplies is a key prerequisite for the success of a predatory bidding scheme. *E.g.*, Kirkwood, *supra*, 72 Antitrust L.J. at 661; cf. *Matsushita*, 475 U.S. at 591 n.15 (discussing alleged predatory pricing conspiracy). Absent barriers to entry, overbidding by a would-be predator will merely serve to stimulate additional input production by existing and new businesses alike.

Absent these pre-conditions (*e.g.*, monopsony or the "dangerous probability" of achieving monopsony, and barriers to entry), a firm resultantly can engage in aggressive bidding behavior without fear of liability under Section 2. "Where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks the adequate excess capacity [or capital to outbid] his rivals and cannot quickly create or purchase new capacity [or acquire sufficient additional capacity], summary judgment is appropriate." *Brooke Group*, 509 U.S. at 226.

Additionally, the rule-of-reason standard allows courts to consider whether pro-competitive reasons exist for a firm to engage in aggressive input-bidding behavior resembling predatory conduct. Pro-competitive justifications could include: a firm might need to meet increased downstream demand for that final product; it might need to introduce a new version of a final product requiring greater levels of input; it might anticipate a future shortage based on market forecasting; or it might need to introduce a new, more efficient mode of producing that final product requiring a greater amount of inputs. See, *e.g.*, Brief of the United States in Support of Petitioner at 16; Kirkwood, *supra*, 72 Antitrust L.J. at 655 & n.109; Salop, *supra*, 72 Antitrust L.J. at 682-683; Hovenkamp, *supra*, 2 Competition Policy Int'l at 38. As long as these

efficiencies are plausible on the facts and are not counterbalanced by evidence that the firm's intent was exclusionary (*e.g.*, to squeeze out rivals and reap monopsony profits), then summary judgment would be appropriate. See, *e.g.*, *Microsoft*, 253 F.3d at 59.

Only if the evidence were ambiguous, for example, in that contrary inferences of plausible pro-competitive efficiencies and a predatory intent exist, then a balancing of pro- and anti-competitive effects arising would be appropriate. Kirkwood, *supra*, 72 Antitrust L.J. at 661; see *Microsoft*, 253 F.3d at 59. And, conversely, if there were evidence of a predatory intent, unaccompanied by evidence of plausible efficiencies on the facts of a case, then the courts can and should hold the would-be monopsonist liable under Section 2 for predatory bidding. See *Aspen Skiing*, 472 U.S. at 605, 610-611. This is "facially anti-competitive and exactly the harm that antitrust laws aim to prevent." *Eastman Kodak*, 504 U.S. at 478.

## III. THE *ASPEN SKIING* REQUIREMENT OF ANTI-COMPETITIVE EFFECT CAN BE APPLIED IN THE PREDATORY BIDDING CONTEXT

*Aspen Skiing* requires a showing that the exclusionary conduct, here predatory bidding, had an actual anti-competitive effect. See *Aspen Skiing*, 472 U.S. at 605-608. The question then arises as to how a plaintiff may prove such an anti-competitive effect without making any input price increase caused by a monopsonist, no matter how minor, potentially actionable. Amici States propose that the correct test under *Aspen Skiing* for determining when predatory bidding causes an anti-competitive effect be if the conduct (a) raised the price that the buyer's rivals had to pay for the input beyond a level that could be justified or explained by other market or exogenous factors, and (b) substantially affected the ability of the buyer's rivals to compete for the input. Accord, Kirkwood, *supra*, 72 Antitrust L.J. at

661; see also, *e.g.*, *Aspen Skiing*, 472 U.S. at 607-608 (examining impact on rival of exclusionary conduct). If a plaintiff alleging that a defendant engaged in predatory pricing could not provide evidence of such an anti-competitive effect, then summary judgment for the defendant would be appropriate. See *Aspen Skiing*, 472 U.S. at 605. In this manner, *Aspen Skiing* would continue to remain a supple instrument for addressing the varied anti-competitive circumstances and effects of predatory bidding, consistent with other forms of exclusionary conduct.

## CONCLUSION

For the foregoing reasons, amici States respectfully request that this Court affirm the judgment of the Court of Appeals, and reject the application of *Brooke Group* to predatory bidding cases.

Dated: October 12, 2006

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# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON 247 (1985) ..... 22

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Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991) ..... 22

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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### INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The American Forest and Paper Association (AF&PA) is the national trade association of the forest, paper, and wood-products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard, and wood products. The forest-products industry accounts for approximately seven percent of total U.S. manufacturing output, employs 1.1 million people, and ranks among the top ten manufacturing employers in 42 States. AF&PA member companies represent approximately 84% of the domestic paper, paperboard, and market pulp production capacity, and account for more than half of the solid-wood manufacturing capacity. They own a significant

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

portion of the nation's commercial forests and annually plant nearly half of all tree seedlings in the United States.

In this case, the Ninth Circuit affirmed a $78 million antitrust judgment against petitioner Weyerhaeuser Company based on a claim of "predatory bidding." In doing so, the court displayed a fundamental misunderstanding of the forms legitimate competition may take in a market economy – particularly in the context of an inelastic supply market. Moreover, the Ninth Circuit applied a liability standard that fails to provide any objective basis to distinguish a manufacturer's legitimate and desirable competition to acquire raw materials from buying behavior that is truly predatory and anticompetitive. As a result, juries will mistakenly award treble damages against defendants that did not actually engage in predatory conduct, and countless additional firms will simply refrain from vigorous competition in order to avoid the risk of such liability. The effects of the Ninth Circuit's decision are far reaching. Manufacturers, suppliers of raw materials, and consumers of manufactured products will suffer ill effects if the Ninth Circuit's standard is affirmed.

The *amici* are well situated to explain the practical effects that the Ninth Circuit's decision will have on these disparate groups. AF&PA members include businesses that are substantial producers of forest products that are used as inputs to produce wood and paper products, as well as businesses that buy such inputs to produce wood and paper products. The Chamber's membership, likewise, includes many businesses that produce raw materials and other inputs used by manufacturers, as well as manufacturers that purchase such inputs. The Chamber's membership also includes businesses that purchase billions of dollars of manufactured products of all kinds. The Ninth Circuit's decision, by deterring vigorous competition among manufacturers to acquire raw materials, will adversely affect all of these groups, for the reasons explained below.

## STATEMENT

Weyerhaeuser owns and operates six hardwood sawmills in the Pacific Northwest. It purchases alder timber from timberland owners and loggers and uses those sawlogs to produce finished alder lumber. From 1998 to 2001, alder sawlog prices increased, while the price of finished alder lumber decreased. Weyerhaeuser's profits declined, but it continued to operate profitably. Ross-Simmons Hardwood Lumber Company, one of Weyerhaeuser's competitors, lost money during this period and shut down in 2001. It sued Weyerhaeuser, claiming that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in predatory "overbidding" and "overbuying" of alder sawlogs in order to eliminate Ross-Simmons and others as competitors in the market for the purchase of sawlogs. The case was tried to a jury, which found for Ross-Simmons on this claim[2] and awarded damages of $26 million (automatically trebled to $78 million). Pet. App. 2a-4a; Pet. 3-5.

The Ninth Circuit affirmed. It observed that Section 2 of the Sherman Act prohibits monopolization of markets for the purchase of products, as well as of markets for the sale of products. Pet. App. 6a. It described Ross-Simmons's claim as one in which "the price level itself is the anticompetitive weapon." *Id.* at 8a. It recognized that, "[i]n the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials" during the period of the so-called overbidding. *Id.* at 10a. "[T]he recoupment phase of a predatory bidding scheme mirrors the recoupment phase of a predatory pricing scheme." *Id.* at 11a n.19.

The court of appeals held, nonetheless, that the plaintiffs did not need to prove the prerequisites for predatory pricing liability established by *Brooke Group Ltd.* v. *Brown &*

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[2] The jury returned a verdict for Weyerhaeuser on a separate claim that it had monopolized the market for the sale of finished alder lumber. See Pet. 4 n.2.

*Williamson Tobacco Corp.*, 509 U.S. 209 (1993). There was no "need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." Pet. App. 13a. "*Brooke Group* does not control in the buy-side predatory bidding context." *Id.* at 5a. The jury was properly instructed, according to the court of appeals, when it was told that it could be an anticompetitive act if Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." *Id.* at 14a n.30.

## SUMMARY OF ARGUMENT

By endorsing a liability standard that asks simply whether input prices were "fair" to competitors, the Ninth Circuit revealed its fundamental misunderstanding about the nature of competition. The court of appeals' analysis tacitly assumed that (1) antitrust law requires "fair" prices, rather than prices resulting from free competition among buyers and sellers; and (2) firms should not engage in vigorous competition over the price of scarce inputs. Both of those assumptions are wrong. In a market economy, price is determined by supply and demand, not by normative concepts such as fairness. Moreover, the notion that firms should decline to compete vigorously to acquire inputs ignores the practical reality that firms often *must* compete on this and many other aspects of production. That is particularly true where, as the court of appeals believed to be the case here, firms are vying for a limited, inelastic supply of inputs. Inelasticity makes it likely that entirely legitimate competition to acquire scarce inputs will drive up prices, because the only sure way to secure additional inputs is to bid up the price. Indeed, the price movements here – rising input costs and falling output prices – are entirely consistent with legitimate buy-side and sell-side price competition.

The Ninth Circuit's flawed understanding of the nature of competition is compounded by its misguided concept of market

power. The court should have asked whether Weyerhaeuser had the ability to cause the relevant antitrust injury – *i.e.*, a *sustained reduction* in the prices it must pay for inputs. Only firms with very large market shares in markets with high barriers to entry have that capacity. Instead, the court asked whether Weyerhaeuser was able to cause a *short-term increase* in the price it and its competitors paid for inputs. Firms with much smaller market shares have the ability to do that. Because such firms would be incorrectly deemed to have market power under the Ninth Circuit's approach, those firms will face treble-damages awards even though they are utterly incapable of successfully executing a predatory buying scheme.

No less troubling, the Ninth Circuit's standard would defy practical application. Asking whether one firm's buying behavior was "fair" to a competitor affords no meaningful guidance and invites juries to conflate vigorous competition and predatory conduct. The very real possibility of such false positives casts a long shadow. Firms will be unable to predict whether an input price level is "fair," because that assessment often will require information about competitors that a firm typically does not possess. The resulting uncertainty will no doubt deter firms from engaging in vigorous competition, particularly because the vague "fairness" standard will protect even dubious claims from dismissal before trial. Perversely, the court of appeals' standard might even tempt some firms to share input pricing data with each other in hopes discerning a "fair price," which might itself constitute anticompetitive behavior.

Applying the *Brooke Group* standard to buy-side predation claims, by contrast, would give firms clear signposts for avoiding liability while adequately addressing conduct that is actually likely to be predatory. Whether the alleged predator operated at a loss and, if so, whether there was a "dangerous probability" that those losses could be recouped are questions that judges and juries can answer by looking at objective evidence. Use of that standard therefore reduces the likelihood that juries would mistake competition for predation. The *Brooke Group* standard also turns on information that is readily

available to firms (for example, their own costs and revenues), allowing them to engage in vigorous, legitimate competition without fear that a disadvantaged rival may later cry foul.

The court of appeals rejected the *Brooke Group* standard for predatory bidding because of its belief that buying competition produces fewer benefits than selling competition. That view grossly underestimates the value of buying competition. An antitrust liability standard that discourages such competition harms sellers and reduces their incentives to expand output of their products. It also harms competition among buyers, because a buyer that purchases a smaller quantity of raw materials (which is what Weyerhaeuser should have done, according to the plaintiff and the court of appeals) will necessarily reduce its output of finished products. The result will be to reduce the total output of finished products, or to shift production of those products from more efficient to less efficient manufacturers, both of which are inconsistent with the objectives of the antitrust laws. The consumers of finished products will also suffer, because output of finished products will decline or will be more costly, and because output of raw materials will eventually be suppressed by the reduction of buying competition.

## ARGUMENT

Section 2 of the Sherman Act polices the line between promoting vigorous competition and prohibiting genuinely anticompetitive conduct. To that end, the law recognizes that the "drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.). This case concerns the application of that principle to a rare species of antitrust claim based on allegations that the defendant has engaged in "predatory" behavior toward rivals by paying too much for raw materials (buy-

side predation) or by charging customers too little for finished goods (sell-side predation).

Predatory schemes are simple in theory. Sell-side predation seeks to eliminate competitors by selling finished goods at prices so low that other firms are forced to close their doors. Once the competition has been extinguished, the theory goes, the predatory firm can try to recoup its losses by charging consumers monopoly prices. Buy-side predation works the same way, but it focuses (initially) on raising the price a firm must pay for inputs. A buy-side predator tries to drive out competitors by purchasing raw materials at such high prices that competitors can no longer afford to buy the inputs they need to produce finished goods. If competitors for inputs indeed disappear, then the predatory firm will have acquired monopsony power[3] in the market for inputs and can recoup its losses by artificially depressing the prices it must pay suppliers.

In reality, predation is "'rarely tried, and even more rarely successful.'" *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). That is hardly surprising, because predatory conduct ultimately requires a firm to divert profits to its customers (sell-side) or to its suppliers (buy-side) in hopes of driving competitors out of the market. Such a strategy does not come cheap. The predator must throw enough money away to force its rivals actually to cease operations – it is not enough just to hold down competitors' profits or even to cause them to have a few bad years. And, even if a predator is successful in eliminating the competition, it cannot recoup its massive investment unless the market *stays* sufficiently concentrated to allow significantly supracompetitive profits. If new competitors enter the market, a predator will lose the ability to recoup through monopoly or monopsony pricing. Likewise, in the sell-

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[3] "Monopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser." *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968).

side context, consumers may simply elect to substitute other finished goods rather than pay monopoly prices; in the buy-side context, suppliers may divert their resources to other uses instead of accepting the predator's monopsony prices.

In *Brooke Group*, this Court addressed the legal standard governing claims of sell-side predation, holding that plaintiffs must satisfy two prerequisites. First, a plaintiff must prove that the defendant's low prices were unprofitable in the short term – *i.e.*, that "the prices complained of are below an appropriate measure of [defendant's] costs." 509 U.S. at 222. Second, a plaintiff must show at least a "dangerous probability" that the defendant would recover its short-term losses (from charging below-cost prices) by charging monopoly prices in the long run, after its rivals had been driven from the market. *Id.* at 224. The Court required such proof because the mechanism by which a seller engages in predatory pricing – lowering prices – is the same mechanism by which a seller stimulates competition. Without those two prerequisites for liability, there would be too great a risk that a jury would mistakenly infer predation from conduct that was, in fact, lawful and procompetitive. "It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high." *Id.* at 226-227. See also *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnation 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita*, 475 U.S. at 594).

This case concerns the standard applicable to buy-side predation. The Ninth Circuit concluded that *Brooke Group* does not apply to predatory buying claims. Accordingly, it held that the plaintiff did not have to prove that Weyerhaeuser suffered short-term losses because of its "predatory bidding" for timber, or that there was a dangerous probability that Weyerhaeuser would recover the short-term costs of its alleged buying strategy by paying less-than-competitive prices in the long term. The Ninth Circuit, instead, endorsed a jury instruc-

tion that permitted liability if the jury found that Weyerhaeuser "purchased more logs than it *needed* or paid a higher price for logs than *necessary*, in order to prevent the Plaintiffs from obtaining the logs they needed at a *fair price*." Pet. App. 14a n.30 (emphasis added).

The Ninth Circuit was wrong to impose a metaphysical "fairness" test in place of the clear, objective standards supplied by *Brooke Group*. The court of appeals' conclusion is premised on a fundamental misunderstanding of free-market competition, and it ignores the fact that "'the antitrust laws were passed for the protection of *competition*, not *competitors*.'" *Brooke Group*, 509 U.S. at 224 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). As a practical matter, the Ninth Circuit's standard will have profoundly harmful effects in numerous markets and industries. Searching in vain for a clear definition of what constitutes a "fair" price for inputs, juries inevitably will mistake legitimate, hard-nosed competition for predatory behavior. Consequently, firms hoping to avoid potentially massive treble-damages awards will have little choice but to refrain from vigorous competition for inputs, artificially depressing the price of raw materials and restricting the output of finished goods. All of this will result in substantial harm to suppliers of raw materials, manufacturers, and consumers of finished goods.

## I. The Ninth Circuit Wrongly Equated "Fairness" With Lawful Competition And Misunderstood The Proper Measure Of Market Power In A Predatory Buying Analysis

1. The Ninth Circuit's error in rejecting the *Brooke Group* standard for buy-side predation claims began with its fundamental misunderstanding of what constitutes legitimate competition among manufacturers. In the Ninth Circuit's view, a firm engages in anticompetitive behavior when it pays "a higher price * * * than *necessary*" for inputs, such that a competitor is unable to obtain the inputs it desires "at a *fair* price." Pet. App. 7a n.8 (emphasis added). But "necessity" and

"fairness" are not synonymous with lawful competition. To the contrary, vigorous yet lawful competition may leave an inferior firm feeling the sting of a competitor's advantages in any number of dimensions, including the price the competitor is willing and able to pay for raw materials. Such competition may be perceived as "unfair," but this perceived "unfairness" is not inconsistent with legitimate competition; it often is a natural and expected consequence of it. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 111d, at 103 (2d ed. 2000) ("[R]ivals may think * * * competition from a more efficient firm to be unfair, especially when the latter firm is larger than the complainant and particularly when the larger firm has lower costs. * * * [T]his conception of fairness is, of course, antithetical to both competition and economic efficiency.").

In wrongly equating "fairness" with lawful competition, the Ninth Circuit relied on two unstated, false assumptions about a market economy. The first is that there exists a "fair" price for goods that differs – in a way that matters under the antitrust laws – from the price that results from the free interplay between buyers choosing the prices they will offer and sellers choosing the prices at which they will sell. Market participants will often wish that those prices were higher or lower, and they may believe it is "unfair" that they are not. But the antitrust laws are based on "[t]he assumption that competition is the best method of allocating resources in a free market * * *. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). The antitrust laws "do not create a federal law of unfair competition." *Brooke Group*, 509 U.S. at 225.

The Ninth Circuit's reasoning could easily be extended to numerous other facets of competition, but the search for "fairness" would prove just as futile. For example, in a tight labor market, is it "fair" for one firm to offer higher wages or better benefits than its competitors can afford, in order to ensure

access to a limited supply of skilled workers? Or is it "fair" if one chain of coffee shops is consistently willing and able to pay top dollar for prime locations, such that competitors are forced to occupy less profitable storefronts? Carried to its logical conclusion, the Ninth Circuit's fairness test threatens to impose Section 2 liability whenever a firm pays "too much" for virtually any aspect of production. As these examples illustrate, however, fairness is a perpetually elusive concept in an unregulated market economy.

The Ninth Circuit's second false assumption – which is a corollary of its first – is that the price of inputs generally is not a ground on which firms should engage in vigorous competition. In reality, however, the price a firm is willing and able to pay to secure raw materials is a key facet of competition in many markets. A manufacturer may quite reasonably pay more for inputs to guarantee timely delivery, consistent quality, or quantities sufficient to meet output goals. If a firm can afford to pay more than a competitor to secure those advantages, we should expect it to do so. To discourage such behavior is to discourage competition.

That is particularly true where "[t]he nature of the input supply at issue * * * does not readily allow for market expansion." Pet. App. 11a. The Ninth Circuit asserted that "alder sawlogs are a 'natural resource of limited annual supply in a relatively inelastic market'" and concluded that inelasticity counseled in favor of a lower standard for buy-side predation claims, because new market entrants are not likely to emerge to supply disadvantaged competitors. *Ibid.* (quoting Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 722 (2005)). Even if the Ninth Circuit was right that the alder sawlog supply is inelastic,[4] however, its analysis is incomplete. It overlooks the fact that, if the supply of raw materials is inelastic, vigorous

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[4] Whether the alder sawlog supply is, in fact, inelastic appears to be a matter of some dispute. See Br. Campbell Group *et al.* 12-13 & nn.4-5 (filed Oct. 26, 2005).

competition among buyers (for entirely legitimate reasons) will necessarily drive prices up. That is because, if the overall input supply is limited and not responsive to incremental price increases, firms wanting to buy more inputs and thereby increasing overall demand typically must pay more to get them.

A simple example illustrates why that is so. Assume that three competing sawmills each process 100,000 alder sawlogs annually, fully consuming the 300,000 sawlogs that come to market each year. One sawmill develops a more efficient production process that allows a 20% increase in output without significantly raising production costs, so the firm plans to buy 120,000 sawlogs that year. There is now a demand for 320,000 alder sawlogs. If supply is relatively elastic, the increase in demand would spark additional production – *i.e.*, landowners would grow and cut more trees to fill the extra orders. But if supply is relatively *inelastic*, an immediate increase in production is unlikely to occur, and demand will exceed supply. The sawmill with increased production capacity therefore must outbid its competitors to get the extra 20,000 sawlogs. Because that sawmill can increase production without increasing operating costs, it can afford to do just that. Thus, contrary to the Ninth Circuit's supposition, the inelasticity of the alder sawlog supply just as easily supports the likelihood of legitimate price competition as it does the theoretical possibility of monopsonistic recoupment.

Moreover, price competition for inputs in an inelastic supply market is consistent with vigorous price competition in the sale of finished goods. Returning to our hypothetical sawmills, suppose that one elects to pursue a business strategy of selling finished lumber at a lower profit margin but in higher quantities than its competitors. Further suppose that a 5% decrease in price results in a 10% increase in sales, such that the sawmill must now process 110,000 sawlogs each year in order to fill customers' orders. Those extra logs must come from somewhere. If the supply is relatively inelastic, the only sure way to procure them is to offer a higher price to suppliers. Competitors might perceive the increase in input prices as an

attempt to "prevent [them] from obtaining the logs they needed at a fair price," Pet. App. 11a n.8, when, in fact, it is merely the result of classic sell-side price competition.

Indeed, lower prices on the sell side typically will result in increased demand for the product, exerting further upward pressure on the price of an inelastic input. Even if a competing sawmill needs fewer sawlogs because it is losing some customers to a rival selling lumber at lower prices, the overall demand for lumber (and, concomitantly, for sawlogs) will increase as lumber prices fall – more people will buy lumber if it is less expensive. That effect is even more acute where, as here, the finished goods are fungible with goods produced from other inputs. In such a market, a manufacturer lowering sell-side prices will not only expand overall demand for a particular finished good, but also lure additional customers away from manufacturers that process substitute inputs. For example, finished alder lumber competes directly with lumber manufactured from other hardwood species, such that Weyerhaeuser processed about 65% of Pacific Northwest alder sawlogs, but its sell-side share of the North American hardwood lumber market was below 3%. Pet. App. 3a; C.A. E.R. 405. As a result, in our hypothetical example, the sawmill that elects to lower finished lumber prices in hopes of increasing sales is likely to draw customers away *both* from competing alder sawmills *and* from sawmills that process other species of hardwoods. Thus, even a modest decrease in the price of finished alder lumber may result in a dramatic increase in the demand for (and price of) alder sawlogs.

It should come as no surprise, then, that the relevant price movements observed here are consistent with legitimate buy-side and sell-side competition. As the Ninth Circuit noted, "the price of finished lumber decreased while the cost of sawlogs increased during the alleged predation period." Pet. App. 10a n.15. While we do not challenge the Ninth Circuit's conclusion that "[i]t is not clear from the record whether lumber prices decreased because of a decision Weyerhaeuser made, or for other reasons," *ibid.*, the point remains that the price

movements of sawlogs and finished lumber during the alleged predation period are the predictable consequence of legitimate competition in this market.

2. In any event, rising input prices tell only half of the story, because the ultimate success of a predatory buying scheme depends on a firm's ability to lower input prices below competitive levels for a sustained period.[5] Although the court of appeals correctly noted that successful buy-side predation would require a firm "to recoup the higher costs it had paid for its materials," Pet. App. 10a, it is clear from the court's assessment of Weyerhaeuser's market power that it fundamentally misunderstood how to go about evaluating whether a firm possesses that capability. The court of appeals recognized that a plaintiff alleging monopolization (whether of a buy-side or a sell-side market) must prove market power, either by showing that the defendant has a dominant share of a market with significant barriers to entry, or by direct evidence that the defendant has exercised market power. Pet. App. 20a-22a. The relevant question in a buy-side predation case, however, is not (as the Ninth Circuit apparently concluded) whether a firm has market power to *raise* the price of inputs; rather, the question is whether a firm has market power sufficient to *lower* the price of inputs below competitive levels for a sustained period.

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[5] It is helpful here to recall the differences between buy-side and sell-side predation. A sell-side predator sells below cost in hopes of driving out competing sellers and then recouping its short-term losses by charging supracompetitive prices after its competitors have been eliminated. A buy-side predator, by contrast, pays artificially high prices for inputs in hopes of driving out competing buyers and then recovering its short-term losses by paying less-than-competitive prices after its competitors have been eliminated. In theory, a firm could engage in buy-side predation in hopes of securing sell-side monopoly power, but, as the jury correctly found, that was not the case here. Rather, because finished alder lumber competes with other kinds of finished lumber, Weyerhaeuser's 65% share of purchases in the alder sawlog input market coincided with less than a 3% share of sales in the finished lumber market.

In sell-side markets, market power is usually defined as a seller's "ability profitably to maintain prices *above* competitive levels for a significant period of time." U.S. Department of Justice & Federal Trade Commission, 1992 Horizontal Merger Guidelines (with 1997 revisions) § 0.1, http://www.ftc.gov/bc/docs/horizmer.htm (emphasis added). In a market with substantial entry barriers, a large market share – say, 65% – is required to support an inference of market power. See Pet. App. 21a-22a. That requirement is based on the insight that, if a putative monopolist unilaterally attempts to raise prices above competitive levels, its effort will be unprofitable if the other firms in the market have a collective market share of more than 35%, because those other firms will have sufficient capacity to serve additional customers who turn to smaller suppliers to avoid the price increase. If the smaller firms can serve enough of those customers, even a very large firm's effort to increase prices will be unprofitable, and it will be forced to lower prices to competitive levels. A presumption that a firm must have a market share of 65% or more to *raise* selling prices, therefore, can also be expressed as a presumption that a firm with a market share of more than 35% can *lower* selling prices in the market.

For buy-side markets, the analysis is the same, except that market power is defined as the ability "to *depress* the price paid for a product to a level that is below the competitive price and thereby depress output." 1992 Horizontal Merger Guidelines, *supra*, § 0.1 (emphasis added).[6] Unless a firm occupies a truly

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[6] As this quotation suggests, the antitrust authorities understand – as do economists – that "[t]he core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act." *Chicago Prof. Sports Ltd. P'ship* v. *National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) (Easterbrook, J.). The antitrust laws are concerned with buyer as well as seller power because either power can be used to reduce output. To translate its concern about paying excessive prices for alder sawlogs into a legitimate concern of the antitrust laws, however, the Ninth Circuit would have had to identify some way in which Weyerhaeuser's allegedly excessive payments could

dominant position in the market for inputs, any attempt to depress input prices artificially will be thwarted by other purchasers who can easily afford to pay competitive prices. And we can be confident that even a very large firm's ability to exercise monopsony power will not go untested, because sellers of inputs will eagerly seek out competing firms that are willing to pay more for inputs.

In this case, the court of appeals relied on so-called direct evidence that Weyerhaeuser had exercised market power (Pet. App. 21a), but its analysis was exactly backwards. It did not ask whether Weyerhaeuser had the power to *lower* the price of sawlogs below competitive levels and to maintain those low prices over a sustained period – the definition of monopsony; it asked whether Weyerhaeuser had "used its power to *raise* the price of sawlogs" in the short term. Pet. App. 21a (emphasis added). That was a fundamental mistake. While a buyer must have a very large share of the market to be able to force sellers to accept low prices (which sellers, of course, will try to avoid), a buyer with a much smaller share of the market will be able to cause a short-term price increase (which sellers will enthusiastically welcome). Market power, in other words, is not required to sacrifice profits in the short term by paying more than a competitive price for raw materials – almost any firm has that capability – it is required to earn supracompetitive profits in the long term by paying less than a competitive price for raw

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have led ultimately to a reduction in output – such as by eliminating a competitor, creating additional monopsony power during a "recoupment" period, leading to use of that power to pay low prices at which the sale of alder sawlogs would decline, and creating an artificial shortage in the supply of products made from alder sawlogs. But the Ninth Circuit eschewed any inquiry into whether such an output-reducing scenario was plausible on the record of this case, instead opting to describe the question in terms of "fair price[s]" and "necessary" prices and quantities and leave those determinations to a jury. Its opinion, like the opinion the Seventh Circuit reversed in *Chicago Prof. Sports*, "reads like the ruling of an agency exercising a power to regulate rates," *ibid.*, which is the antithesis of proper antitrust analysis.

materials on a sustained basis. The court of appeals' fundamental error in defining market power thus threatens to impose antitrust liability on firms that are utterly incapable of successfully executing a predatory buying scheme.[7]

## II. The Ninth Circuit's Misguided Theory Will Inappropriately Punish And Grossly Overdeter Lawful, Desirable Competition

Even aside from its theoretical defects, the court of appeals' "fairness" standard defies practical application. It is hopelessly vague and invites errors by juries incapable of (or not interested in) distinguishing between vigorous competition and truly anticompetitive behavior. As a result, firms fearing mistaken treble-damages awards will decline to engage in the very competition that the antitrust laws are designed to foster. Perversely, the Ninth Circuit's standard may actually entice anticompetitive behavior: firms seeking certainty regarding whether their bids for inputs are "fair" to competitors may simply decide to ask competitors what they are offering, which is the first step in classic bid rigging. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 457-459 (1978). The *Brooke Group* standard, by contrast, was designed to avoid exactly those problems. It offers courts, juries, and firms clear signposts for identifying predatory conduct and thereby encourages vigorous competition on all fronts.

1. A standard based on "need" and "fairness" provides no meaningful guidance that would help juries distinguish between desirable competitive behavior and predatory behavior. See U.S. Br. 17 (filed May 26, 2006); Pet. 22-24. Unlike the *Brooke Group* test, which can be applied using objective

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[7] As we explain below (pp. 19-22, *infra*), the Ninth Circuit's rule would grossly overdeter legitimate competition, because firms will stop short of full-scale competition for inputs for fear of erroneous treble-damages awards. Because, under the Ninth Circuit's market power analysis, the risk of unjustified liability extends to any firm that has the power to raise prices in the short run, smaller buyers too will be deterred from vigorous competition to acquire scarce inputs for their manufacturing operations.

evidence, an amorphous concept such as "fairness" cannot be applied objectively and consistently. Even if one were to assume that "fairness" and competition are one and the same – which they are not – that simply begs the questions it purports to answer: What is "necessary"? How much is "too much"? As Members of this Court have recognized in other contexts, "[g]uidance like this is scarcely better than no guidance at all." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring); see also *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 253 (1989) (Scalia, J., concurring in the judgment).

This case is a prime example of why "it [is] not enough to inquire 'whether the defendant has engaged in "unfair" or "predatory" tactics.'" *Brooke Group*, 509 U.S. at 225 (quoting *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993)). It is undisputed that, throughout the alleged predation period (1998-2001), petitioner Weyerhaeuser was an efficient and highly successful competitor in the Pacific Northwest alder sawmill market. See Pet. 3. It is also undisputed that Weyerhaeuser "sold all of the alder lumber it could produce," *ibid.*, and was consistently profitable, see *id.* at 5. Moreover, while "the cost of sawlogs increased" during the alleged predation period, Pet. App. 10a n.16, there is no evidence in the record that, after respondent closed its sawmill in 2001, the price of sawlogs fell below 1998 levels for a sustained period.[8] In fact, at the same time Weyerhaeuser was supposedly eliminating competition by artificially bidding up the price of alder sawlogs, four new hardwood sawmills entered the market and several more expanded operations. Pet. 3. All of this suggests either (1) that Weyerhaeuser was an efficient, profitable competitor in an increasingly competitive market; or (2) that it engaged in one of the most unlikely and ill-conceived predatory

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[8] To the contrary, publicly available data suggest that alder sawlog prices have continued to increase since 2001. See, *e.g.*, Oregon Department of Forestry Log Price Information, http://www.oregon.gov/ODF/STATE_FORESTS/TIMBER_SALES/logpage.shtml.

bidding schemes ever imagined. As the verdict in this case makes clear, the instruction approved by the Ninth Circuit gave the jury little help in assessing the relative probability of those alternatives; indeed, it did not even ask the jury to do so.

2. In the realm of antitrust, and especially in predation cases, "the costs of an erroneous finding of liability are high," *Brooke Group*, 509 U.S. at 226, not just for the unfortunate defendant forced to pay a treble-damages award, but also for the countless firms that are deterred from engaging in legitimate competition. Business executives must make very concrete decisions, and must make them in real time: How much should we buy? How much should we offer to pay? Operating in the shadow of potentially staggering damages awards, executives will have no choice but to refrain from aggressive competition in the many facets of production that could fall within the Ninth Circuit's buy-side "fairness" test.

a. Under the court of appeals' standard, a firm can do little more than guess where a jury might choose to draw the line between legitimate buy-side price competition and "unfair" predatory conduct. That is because a firm will be in no position to know – *ex ante*, at least – whether a particular price for inputs is "fair" to competitors. For example, a firm typically will not be aware of its competitors' profit margins, cash flow, or strategic business plans – all of which presumably would factor into a jury's assessment of whether one firm was unfairly putting the screws to another. Cf. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) ("[W]e should hesitate to adopt a construction [of the Sherman Act] making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.").

Returning to our three hypothetical sawmills, suppose all are concerned by the steady rise in alder sawlog prices coupled with the fall of the price of finished hardwood lumber. Saw-

mill *A* has determined that, once the price of alder sawlogs reaches a certain level, it would be more profitable to begin processing other hardwood species. Accordingly, it has instructed its buyers to bid for alder sawlogs only to a set point, and then to start buying maple. Sawmill *B*, however, believes that, because of improvements in operating efficiency, it can continue to be profitable by processing only alder sawlogs, even at higher prices. Sawmill *C* likewise wants to continue in the alder sawlog market, but it is strapped for cash and fears it cannot afford sawlogs if the price moves much higher. How should Sawmill *B* approach the next auction for alder sawlogs? Without being privy to the respective business positions of Sawmills *A* and *C*, Sawmill *B* would have no way of knowing whether submitting the highest bid would be deemed "unfair" or simply the result of "rival philosophies." *Trenton Potteries*, 273 U.S. at 398. Indeed, from Sawmill *B*'s perspective, the bidding strategies of Sawmills *A* and *C* would be indistinguishable: both would bid up to a certain point but no higher. Fearing treble-damages liability under the Ninth Circuit's standard, Sawmill *B* may reasonably conclude that the safest course is to bid below what it is willing and able to pay, yielding the very result – artificial depression of input prices – that healthy buy-side competition would prevent.

Allowing antitrust liability to turn on information that is beyond a firm's cognizance will inevitably result in the gross overdeterrence of legitimate competition. That is so regardless of what leads to the asymmetry in firms' tolerance for increasing input prices. The above example posits a relatively simple divergence of strategy and economic condition, but the possible variations on that theme are endless. Whatever the situation, the point is that a healthy, competitive firm cannot be expected to know whether it is bidding against a firm that is "unfairly" suffering from rising input prices (whatever that means) or one that has merely adopted a different (and quite possibly ill-conceived) business strategy.

b. Further compounding the error of premising antitrust liability on information that is not readily observable, the Ninth

Circuit chose a particularly indefinite standard that would, if allowed to persist, prove highly resistant to attempts to dismiss unmeritorious claims short of trial. Almost any unsuccessful firm will be able to adduce some evidence that it was "unfairly" disadvantaged by a competitor's ability to pay more for raw materials or some other aspect of production. Perversely, the least efficient and least successful firms are especially likely to be able to show such evidence of disadvantage, even if the disadvantage largely stems from their own failings. Trial courts will thus find it very difficult to resolve cases on summary judgment, and courts of appeals will be equally limited in their ability to reverse erroneous verdicts. Consequently, defendants will be forced to settle unmeritorious claims or roll the dice at trial, but many will lose that gamble and face ruinous treble-damages liability merely for competing vigorously. Prudent antitrust counsel will surely tell their clients about these risks. See *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.) ("[W]e ask ourselves what advice a lawyer * * * would have to give a client firm considering procompetitive price-cutting tactics in a concentrated industry. Would he not have to point out the risks of suit – whether ultimately successful or not – by an injured competitor * * *?").

Moreover, the courts surely will not lack for plaintiffs. Virtually any market will produce both winners and losers, and the latter will have obvious incentives to bring claims of unfair competition against the former where there exists a substantial likelihood of coercing a settlement. That is particularly true in highly competitive industries, where a weaker firm faces significant pressure (or even immediate extinction) at the hands of its stronger rivals: the more aggressively firms compete, the more likely it is that one will feel the sting of a competitor's advantage and have reason and opportunity to pursue the victor's spoils. The lure of treble damages and attorneys' fees only adds to those warped incentives.

Confronting those realities, any sensible manufacturer will think twice before competing hard to buy scarce inputs; many will rationally conclude that the better choice will be to restrict

their purchases in order to protect less efficient competitors from the full brunt of hard-nosed competition, and to protect themselves from a lawsuit. See U.S. Br. 19-20 (filed May 26, 2006). It is bad enough that the court of appeals' decision would lead to unwarranted treble-damage judgments against defendants who have been zealous in their profitable efforts to compete by being aggressive in their buying behavior. An even more substantial harm would result from the chilling effect on competition that would be invisible to the courts, and uncorrectable by the courts, because that anticompetitive effect will never lead to a lawsuit. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 596 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

c. Alternatively – and, quite perversely – to counter the risk that legitimate competition will lead to treble-damage liability, firms may be tempted to engage in conduct that is truly anticompetitive. In search of certainty regarding whether a given price level is likely to be deemed "fair," firms might logically consider discussing with each other what they expect to bid for a particular input. Such discussions pose obvious risks to competition. See *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) ("[In certain circumstances], the exchange of price information by competitors violates the Sherman Act."); see also *United States Gypsum*, 438 U.S. at 457 ("[T]he exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions."). It would be particularly difficult to avoid that predicament in markets such as the one at issue here, in which inputs often are sold via sealed bidding procedures. See Pet. 4. How else would a successful firm be able to avoid claims that it was paying "too much" for a scarce input? It is passing strange to think that bid rigging – the classic and much more common exemplar of anticompetitive behavior – could be the natural side effect of a rule targeting

"schemes [that] are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589. Yet that is precisely the bizarre possibility the Ninth Circuit's standard creates.

3. The *Brooke Group* standard, by contrast, exhibits none of those weaknesses when applied to buy-side predation claims. It presents juries (and judges, in summary judgment proceedings) with tractable questions: Did the defendant operate at a loss during the alleged predation period? If so, was there a "dangerous probability" that the defendant would be in a position to recoup those losses by suppressing input prices? The first question can be answered by examining the defendant's costs and revenues. If it is necessary to reach the second question, it can be answered by examining market shares, entry barriers, and other factors that can be objectively assessed. Unlike the Ninth Circuit's standard, *Brooke Group* gives judges and juries effective tools for correctly identifying truly predatory buying behavior.

No less important, the *Brooke Group* standard gives firms clear guideposts for steering clear of buy-side predation claims. So long as the firm operates profitably, it can compete vigorously on the price of inputs and in other facets of production without fear of liability. Rather than speculating as to whether a competitor will be "unfairly" prejudiced by a given input price, a firm can generally determine with some reliability how much it can afford to pay for an input and remain profitable. With that information available, firms will be better able to refrain from predatory conduct in the first instance, and effectively to contest predatory buying claims that lack merit. Consequently, firms will not be deterred from engaging in legitimate competition on input prices, nor will they be tempted to transgress other boundaries for the sake of avoiding potential claims of predation. Just as it does in the predatory selling context, the *Brooke Group* standard provides a narrowly tailored and eminently practical means of punishing and deterring predatory buying.

## III. The Ninth Circuit's Standard Harms Consumers, As Well As Sellers Of Raw Materials And Manufacturers Of Finished Products

Under the Ninth Circuit's misguided standard, there is only one way for substantial buyers of inputs to reduce the risk of liability for "predatory bidding": they must pull their punches when they participate in the purchasing market, by offering lower prices and purchasing less. That is, of course, precisely the course of conduct that Ross-Simmons says Weyerhaeuser should have followed. And the result of such behavior will be exactly the result that the antitrust laws seek to prevent by outlawing monopsonization: prices for the purchased input will be artificially reduced.

The court of appeals seemingly recognized this risk, but it refused to follow *Brooke Group* because it believed that the "benefit to consumers and stimulation of competition" were less significant in buying markets than in selling markets. Pet. App. 9a. That conclusion grossly underestimates the benefits of competition among buyers, as well as the economic cost of overly broad and amorphous liability standards that deter competition among buyers.

1. When buying competition is artificially suppressed by the threat of misguided antitrust liability, the direct and immediate victims are sellers. If major purchasers choose to offer lower prices and to buy less in order to avoid unfounded charges of predatory behavior, the inevitable result will be lower prices for sellers.

Artificial restraints on competition to buy are condemned by the antitrust laws to the same degree that restraints on competition to sell are condemned:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of

> the forbidden practices by whomever they may be perpetrated.

*Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

The reason for that even-handed approach is straightforward. Restraints on market forces lead to inefficiencies that ultimately cause harm to all participants in the market. Artificial restraints on prices – whether those restraints cause prices that are above competitive levels or below competitive levels – are especially pernicious, because "[p]rice is the 'central nervous system of the economy.'" *Prof'l Eng'rs*, 435 U.S. at 692 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)). Prices convey essential information to producers and consumers and provide incentives for them to act efficiently. High prices are a signal to producers that society will benefit if they expand production. Cf. *Trinko*, 540 U.S. at 407 ("The opportunity to charge monopoly prices * * * induces risk taking that produces innovation and economic growth."). They also tell consumers to look for substitute products that are less costly or to seek efficiencies that will reduce their consumption of the high-priced product.

Free competition among buyers that bids up the price of inputs serves an important purpose. As the court of appeals recognized, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. Unfortunately, the court of appeals dismissed those benefits because of its belief that the supply of alder sawlogs was inelastic – *i.e.*, that supply would not increase rapidly in response to higher prices.

That response is unpersuasive for two reasons.[9] First, as a practical matter, it would be unworkable to apply *Brooke Group* to predatory bidding claims in some markets (where supply is elastic) but not in others (where supply is inelastic). See U.S. Br. 15-16 (filed May 26, 2006). The court of appeals expressed no intent to do so. Second, the court of appeals' reasoning is backwards. If it takes a long time for suppliers to increase supply in response to higher prices (*e.g.*, because newly planted seedlings require many years to mature into harvestable timber), it is all the more important to ensure that misapplication of the antitrust laws does not artificially depress prices. The economic harm that will be caused by such non-competitive pricing will endure for many years, because of the lag between higher prices and an increase in supply.[10]

2. By deterring competition among manufacturers to acquire scarce inputs, the Ninth Circuit's decision also inflicts harm to competition in the production and sale of those manufacturers' finished products. The reason is readily apparent. If a large producer restricts its purchases of raw materials for fear of incurring liability for "predatory bidding," it must also restrict its production of finished goods made from those raw materials. Conversely, a manufacturer that wishes to lower its price and expand its production of finished goods cannot do so

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[9] As we explained above (pp. 11-14, *supra*), the Ninth Circuit's misunderstanding of supply inelasticity also led it to the erroneous conclusion that predatory pricing behavior is more likely to occur in such markets.

[10] The court of appeals also opined that, "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." Pet. App. 11a. That statement reflects profound confusion. Truly *predatory* behavior – be it buying ("bidding") or selling ("pricing") – necessarily results in a net loss to consumers and to competition. To label the conduct at issue in this case "predatory bidding" was to assume the conclusion of the very question the court was supposed to be answering. The task before a court is not to decide which categories of predation do and do not benefit consumers, but to determine which categories of conduct should be *labeled* predatory *because* they *do not* benefit consumers and competition on balance.

unless it also increases its purchases of the inputs from which those finished goods are made. See 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575, at 363-364 (2d ed. 2000) ("The important and often overlooked consequence of monopsony power is *reduced* output on the monopsonist's selling side – that is, because the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less."). The Ninth Circuit's description of this case illustrates the point. During the period of Weyerhaeuser's so-called predatory bidding, the price of finished lumber declined and Weyerhaeuser's share of the market increased. Pet. App. 3a, 23a. Concerns about treble-damage liability under the Ninth Circuit's erroneous holding will discourage manufacturers from doing that which the antitrust laws should encourage: increasing output and lowering prices of the products they sell.

Of course, if the largest manufacturer in a market chooses to restrict its output of finished products and its purchases of inputs in order to reduce the risk of wrongful antitrust liability, its smaller rivals may pick up some of the slack. But that, too, is a result that is inimical to the purposes of the antitrust laws if those smaller rivals are less efficient. In that respect, too, the record in this case illustrates the point. Ross-Simmons suffered losses from 1998 to 2001, a period when the price of sawlogs increased and the price of finished lumber declined. In the same period, Weyerhaeuser continued to operate profitably – a fact that reflects its indisputable ability to manufacture and sell finished lumber more efficiently than Ross-Simmons. Had Weyerhaeuser restricted its purchases of sawlogs, as Ross-Simmons would have liked, the plain effect would have been to reallocate production from more efficient sawmills, such as Weyerhaeuser, to less efficient operators, such as Ross-Simmons.

3. Inevitably, consumers of finished products will also be harmed if competition to acquire scarce inputs is artificially constrained. In the short term, expanded output by the manufacturers of finished products depends on those manufacturers' ability to compete effectively to acquire the raw materials from

which finished products are made. If that competition is not constrained, the increased demand may well place upward pressure on the price of raw materials – particularly where the supply of those inputs is inelastic, see pp. 11-14, *supra*. But consumers nonetheless will benefit from the expanded output of finished products – just as they benefited from the lower prices of alder lumber in this case, even as alder sawlog prices increased.

Over the longer term, the competition that bids up the price of raw materials encourages the producers of those materials to expand their own output, which will place downward pressure on the price of those materials. If price competition among buyers is artificially suppressed because of a plausible fear that competition will lead to antitrust liability, producers' incentives to invest to expand their output will also be suppressed. That is the exact opposite of sound antitrust policy. See note 6, *supra*.

4. The predictable consequences of applying a lax standard to predatory buying claims are not only undesirable, they are also entirely unnecessary. Predatory "schemes are rarely tried, and even more rarely successful,'" *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, 475 U.S. at 589), because they are a costly means of exclusion. They require an initial period of sustained losses, sufficient in duration and magnitude to drive rivals from the market. There is considerable risk for the predator that its efforts will not succeed at all, and, if they do, there is still more risk that the payback, through sustained noncompetitive pricing after rivals are gone, will be insufficient to cover the up-front costs. See *Matsushita*, 475 U.S. at 588-589 (discussing risks of predatory pricing strategies); *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 119-120 n.15 (1986) (discussing factors that make successful predation extremely difficult); *id.* at 121 n.17 ("[I]t is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous."). Whether buy-side or sell-side, truly predatory behavior consists, at bottom, of one firm trying to drown its competitors in a sea of the predator's lost profits.

Common sense and experience suggest that firms will readily find better ways to spend their money than by showering it on consumers or suppliers in hopes of indirectly injuring a competitor. See Susan Creighton, D. Bruce Hoffman, Thomas Krattenmaker & Ernest Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005) ("cheap exclusion" will be relatively more common than "expensive" predation, of which predatory pricing is the "archetypal example").

Legitimate and economically beneficial price competition, by contrast, is a pervasive phenomenon. Just as manufacturers compete with one another in the sale of finished goods, *every* manufacturer must secure the raw materials or other inputs needed to make its products and must compete with other manufacturers that seek the same raw materials or other inputs. In a dynamic economy, the forces of supply and demand for those inputs change frequently and sometimes dramatically. Every manufacturer must respond to those changing market conditions by adjusting the price it pays to secure inputs.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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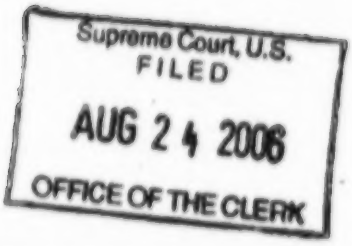


No. 05-381

IN THE

# Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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*Amici* respectfully submit this brief pursuant to Supreme Court Rule 37.3 in support of Petitioners.[1] We urge the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

## INTEREST OF *AMICI CURIAE*

*Amici curiae* are economists who teach at leading universities throughout the United States. *Amici* have written extensively in the field of economics, including industrial organization, competition, and antitrust economics and policy. *See* Appendix, List of *Amici Curiae*. *Amici* seek to bring to the Court's attention economic analysis relevant to the question of the proper standard for antitrust liability for alleged predatory buying. *Amici* believe that the Court of Appeals for the Ninth Circuit set forth a test that is wrong as a matter of economic theory which, if implemented, will result in adverse economic consequences. For those reasons, *amici* believe the decision of the Ninth Circuit should be reversed.

## SUMMARY OF ARGUMENT

This case presents significant questions about the proper standard for determining when an increase in the price paid for supplies or an increase in the amount of supplies purchased by a single firm, acting independently, constitutes predatory buying in violation of antitrust laws. The Court of Appeals rejected the standard used when predatory *selling* is alleged, as set forth in this Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Instead, the Court of Appeals concluded that a purchaser of supplies can violate the antitrust laws by paying

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Analysis Group has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

a "higher price . . . than necessary" or by purchasing more inputs "than ... needed," if that prevents other buyers from obtaining the "[inputs] they needed at a fair price." *Confederated Tribes of Siletz Indians v. Weyerhaeuser Corp.*, 411 F.3d 1030, 1037, 1040 n.30 (9th Cir. 2005). These phrases, however, fail to take into account the procompetitive reasons a firm might increase the price it pays for supplies or increase the amount of supplies it purchases. Nor do they take into account the consumer benefit of a price reduction for the finished product which generally results when increased prices are paid for supplies. Moreover, these phrases offer no basis for distinguishing between permissible and impermissible business conduct.

*Amici* believe that the *Brooke Group* two-pronged standard for predatory *selling* should be applied to allegations of predatory *buying*. That standard, which looks at both cost and the likelihood of recoupment of losses incurred by virtue of predatory conduct, is consistent with economic theory. As a result, *amici* believe the decision below should be reversed.

## ARGUMENT

Economists generally applaud the Supreme Court's recognition that the antitrust laws are designed for the "protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). This important phrase means that the antitrust laws should promote an economic environment of free competition and deter anticompetitive business conduct that raises price and restricts output. The laws must be applied in such a way that antitrust enforcement does not reduce competitive vigor either in the short run or the long run.

Thus, the Supreme Court repeatedly has cautioned against reading the antitrust laws too expansively where the conduct of a single firm, acting independently, is at issue. *See, e.g., Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 408 (2004). This Court likewise has

cautioned against judicial interference with prices set in the market. "[Courts] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (internal quotation marks omitted).

Nonetheless, and contrary to those warnings, the Court of Appeals for the Ninth Circuit concluded that a purchaser of supplies—what economists call "inputs"—can violate the antitrust laws by paying a "higher price . . . than necessary" or by purchasing more inputs "than ... needed," if that prevents other buyers from obtaining the "[inputs] they needed at a fair price." *Confederated Tribes of Siletz ~~Indians~~ v. Weyerhaeuser Corp.*, 411 F.3d 1030, 1037, 1040 n.30 (9th Cir. 2005). Higher "than necessary," more "than ... needed," and "a fair price" are expressions devoid of analytical or economic content. They do not measure economic performance against a specific benchmark, and offer no reasonable guidance as to permissible (or impermissible) business conduct. Their meaning is so vague that the effect of the court's holding will be to protect competitors at the expense of consumers and the competitive process itself. For these reasons, the decision of the Court of Appeals should be reversed.

## I. THE NINTH CIRCUIT'S STANDARD FOR PREDATORY BUYING IS UNSOUND AS A MATTER OF ECONOMICS

An investment in predatory *selling* involves a short-term profit-sacrifice (by charging below-cost prices and selling more output) with the expectation of recouping the lost profits with monopoly profits in the future. The below-cost pricing prong of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993), is used to evaluate the existence of this profit-sacrifice in the case of predatory

pricing by a seller. A "dangerous probability ... of recoup[ment]" on the part of a predatory seller, as the Supreme Court acknowledged in *Brooke Group*, is the second prong that distinguishes legitimate pricing behavior from anticompetitive conduct. *Id.* at 224.

This two-pronged approach is important because there are numerous competitive reasons why sellers might reduce their prices, and price cuts benefit consumers. Predation and consumer harm only can occur if losses incurred through below-cost pricing subsequently are recouped with monopoly prices and profits. Without a "dangerous probability of recoupment," it is unlikely that the benefits to consumers from the price reductions would be outweighed by consumer harm due to monopoly prices. As a result, in the absence of recoupment where predatory *selling* is concerned, this Court has held that there can be no Sherman Act violation. *Id.*[2]

This same economic analysis applies to the conduct of *buyers*, the issue in this case. Predatory buying also can be viewed as an investment by a firm: lower (or negative) profits now, in return for higher profits in the future. *See Matsushita*, 475 U.S. at 588-89.[3] An investment in predatory

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[2] "The message in *Brooke Group* is that predation cases, to be successfully tried, must show that recoupment is feasible. The Areeda-Turner test remains a useful screening device: showing that an alleged predator sustained losses during a short-run period of below-cost pricing. But success now requires evidence that the below-cost pricing episode will be worth the candle. A plaintiff must show that the alleged predator is able to recoup its losses by exercising monopoly power." Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke Group*, 62 ANTITRUST L.J. 559, 583 (1994).

[3] *See, e.g.*, Kenneth G. Elzinga & David E. Mills, *Testing for Predation: Is Recoupment Feasible?*, 34 ANTITRUST BULL. 869 (1989) (cited in *Brooke Group*, 509 U.S. at 226); Roger D. Blair & Jeffrey L. Harrison, MONOPSONY 67 (1993) ("[T]he buyer must be able to 'profit' from the

buying involves a short-term profit-sacrifice due to paying higher input prices and increasing the amount of input purchases, with the expectation of recouping the lost profits with either monopsony or monopoly profits in the future.[4] Put briefly, the buyer strategically overpays and buys more inputs, initially sacrificing profits as a result. A profit-sacrifice arises when the input purchases do not generate incremental revenues in excess of their incremental costs.[5] In the absence of a showing of profit-sacrifice and the likelihood for recoupment, there is no assurance that the defendant is engaged in predatory buying rather than simply engaging in vigorous competition as a buyer in an input market.

The only difference between predatory buying and selling, from an economics perspective, is that the roles of buyers and sellers are reversed. Just as there are legitimate reasons why a *seller* might reduce prices, so too, there are procompetitive (or economically benign) reasons why a *buyer* might pay a higher price than previously for an important input and increase the amount of purchases. *See infra* pp. 9-11. That is why, unless there is a realistic prospect of recoupment in the future, sacrificing profits in the short run by paying a higher

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lower price for a long enough period of time that it can make up its predatory 'investment.'").

[4] "[P]ure monopsony entails a single buyer. It is the demand-side analog to the monopolist who is a single seller." Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 300 (1991).

[5] Purchasing inputs that are not used, in order to raise the input price paid by competitors, also would involve sacrifice because those inputs would not generate any revenue. Of course, a firm may be left with unused inputs if demand for its product unexpectedly declined.

input price "than necessary" or buying more inputs "than ... needed" would have no anticompetitive effect.

The Court of Appeals ostensibly recognized that a successful predatory buying scheme requires the ability to "recoup the higher costs [the predator] had paid for its materials." 411 F.3d at 1038. Nonetheless, the court proceeded to approve a jury verdict based on instructions that not only failed to require a showing of likely recoupment but did not even mention the concept. This is economic error and has potentially serious consequences for antitrust policy down the road.

There are two possible ways for an alleged buyer-side predator to achieve anticompetitive recoupment: *First*, the buyer could pay a lower monopsonistic price for the inputs during the recoupment period, having "overpaid" in the initial predatory period. This strategy is the mirror image of predatory pricing on the seller side. For the strategy to succeed, other efficient input market competitors and new entrants must be unable to take advantage of the artificially low input prices and expand their purchases. In this case, it is our understanding that many firms continued to compete with Weyerhaeuser, and four firms—all alternative buyers—*entered* the sawmill business during the period of the alleged violation. These facts demonstrate that the higher input price was affordable to efficient saw mills, and that there were not insurmountable barriers to entry.

*Second*, the buyer could charge higher monopolistic prices for its output.[6] This recoupment strategy is not a mirror

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[6] In this second kind of recoupment situation, the firm increases its competitors' costs, but does not necessarily eliminate its rivals from the output market. If the firm achieves monopoly power in the output market, then it could recoup its exclusionary investment with higher output prices and monopoly profits, even if its competitors do not exit. This recoupment, involving monopoly power in the downstream output market, avoids the short-term consumer benefits, time lag, and uncertainty that

image of predatory pricing on the seller side. For Weyerhaeuser, this strategy would have entailed selling finished lumber at monopoly prices. However, it is our understanding that the jury found that Weyerhaeuser accounted for less than 3% of hardwood lumber sales, and lacked market power in the downstream lumber market. Thus, Weyerhaeuser could not charge supra-competitive prices for its output and lacked any recoupment prospect in the output market.

The decision of the Court of Appeals fails to take into account these economic realities, just as it fails to acknowledge that predatory buying schemes to achieve monopsony power are like predatory pricing schemes in that they are rare, and even more rarely successful.[7] The Court of Appeals also fails in another significant respect. While the court acknowledged that in *seller*-side predation, consumers benefit from the lower prices, at least in the short run, it did not seem to appreciate the value of the same consumer benefit where *buyer*-side predation is concerned. A higher input price generally will end up encouraging more input supplies, leading to greater output and a resulting reduction of prices to consumers in downstream markets.

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arise where recoupment related to future monopsony power in the input market is sought. *See* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 671, 679-82 (2005). This strategy raises more serious anticompetitive concerns. As a result, the antitrust standard for this kind of conduct, not relevant to this case, may be different than the one applicable here. *Id.* at 704-06.

[7] *See Matsushita*, 475 U.S. at 589 ("[T]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.").

In this situation, for example, a higher input price presumably would encourage some suppliers to offer to sell sawlogs during the predatory period that they otherwise would have withheld from the market. The Court of Appeals concluded instead that "[t]he nature of the input supply at issue here does not readily allow for market expansion" because the market for alder sawlogs is "relatively inelastic." 411 F.3d at 1038 (citing Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 722 (2005)).

Supply elasticity is a key concept in analyzing this case. "Economists define the price elasticity of supply as the responsiveness of the quantity supplied of a good to its market price." Paul A. Samuelson & William D. Nordhaus, ECONOMICS 70 (16th ed. 1998). Only if supply is totally unresponsive to price—what economists call *perfectly inelastic*—will the same quantity be supplied when price rises. In contrast, if the supply of the sawlog market is less than perfectly inelastic, for example, if it is only "relatively inelastic," there will be some increase in the quantity supplied when price rises, and that increased supply will cause lumber production to increase and consumers to benefit. The court discounted the relevance of the increased supply and consumer benefits, acknowledging that "consumers might temporarily benefit," but going on to say that "a reduction in prices would place even greater pressure on competitors, thereby increasing the threat to competition arising from the predatory bidding." 411 F.3d at 1038.

As a result, the court's decision manages to fall off the horse on both sides: undervaluing the benefits of the freedom to make unilateral pricing decisions without significant antitrust constraints, and overprotecting competitors at the likely expense of competition and consumers. The creation of such an incorrect constraint on competition for inputs is likely to have both short-term and long-term adverse effects

on the efficient operation of input and output markets, and thus on suppliers and consumers.

Price is an important market signal—the "central nervous system of the economy," *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (internal quotation marks omitted)—and facilitates the efficient allocation of resources in free markets.[8] Whether the issue is the price paid to suppliers for an input or the price charged to consumers for an output, impeding price signals threatens market efficiency. The Ninth Circuit ignored these efficiency benefits. Instead, it concluded that simply paying more "than necessary" or buying more inputs "than needed" or denying competitors the ability to buy inputs at a "fair price" by some undisclosed standard is sufficient support for finding a violation of the antitrust laws. 411 F.3d at 1037, 1040 n.30. This approach is an economic setback for antitrust.

## II. THERE ARE PROCOMPETITIVE REASONS WHY A PRODUCER MIGHT PURCHASE MORE INPUTS AND RAISE THE PRICE PAID FOR INPUTS

In holding that Weyerhaeuser could be found to have violated the Sherman Act if it "paid a higher price for logs than necessary," *id.*, the Ninth Circuit failed to acknowledge or even consider *procompetitive* reasons why a firm might

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[8] "Market prices provide producers with up-to-date information about which goods consumers most intensely desire, and with important information about the abundance of the resources used in the production process. ... Market prices also coordinate the choices of buyers and sellers, bringing their decisions into line with each other." James D. Gwartney, Richard L. Stroup, Russell S. Sobel & David A. Macpherson, ECONOMICS: PRIVATE AND PUBLIC CHOICE 79 (11th ed. 2006). *See also* Samuelson & Nordhaus, *supra*, at 27 ("Prices are the balance wheel of the market mechanism.").

increase its input purchases and pay an elevated price for inputs.

*First*, a more efficient production process could lead to an increase in input price. The opportunity to exploit efficiencies could lead a firm to expand production and seek more inputs, resulting in an increase in the market price for inputs. When one firm is more efficient than its competitors, the price it is willing or able to pay for inputs simply "reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *See Brooke Group*, 509 U.S. at 223.

*Second*, a firm might increase the price it is willing to pay for inputs and purchase more inputs when its capacity has expanded in response to increased efficiency or demand. To illustrate, it appears that Weyerhaeuser invested nearly $80 million in infrastructure improvements between 1986 and 2000, and that during the same time period, Weyerhaeuser's alder production at its Longview mill more than doubled.

*Third*, a firm might pay more for an input that is of higher quality. For example, it is our understanding that like many woods, alder has a variety of uses, depending on its quality. A higher price paid for alder logs could result in obtaining higher grade logs from existing or new suppliers, enabling a firm better to compete in the overall hardwood lumber market.

*Fourth*, a firm might find that paying more for an input actually produces cost-saving efficiencies. A mill might, for example, pay more for logs in order to guarantee a steady supply of logs when demand volatility increases or interest rates fall. Keeping production levels uniform enables equipment capable of processing a high volume of logs to remain in operation and thereby reduce labor costs. Thus, it may be economically rational for a mill to increase its inventory levels to avoid the likelihood of running out of sawlogs to process.

*Finally*, a business might increase its input purchases and the price it is willing to pay for inputs as a result of a change in business strategy. A business might, for example, seek to increase market share in the downstream market, a wholly legitimate goal under the antitrust laws. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) ("[C]ompetition for increased market share ... is not activity forbidden by the antitrust laws. It is simply . . . vigorous competition."). With respect to the lumber industry, a mill could pay more to acquire more logs, produce more lumber, and then sell its lumber at the same or reduced prices in order to expand its relative position in the market.

There are many procompetitive reasons why a firm might pay an elevated price for inputs and increase its input purchases. It is essential that antitrust liability attaches only if there is reliable evidence that the likely effect of an increase in input costs and purchases is anticompetitive. *Matsushita*, 475 U.S. at 587.

## III. THE STANDARD FOR ANTITRUST LIABILITY FOR PREDATORY BIDDING STRATEGIES SHOULD BE OBJECTIVE AND SHOULD AVOID DETERRING COMPETITION

Given these complexities, it is neither appropriate nor feasible simply to ask a jury to determine whether a firm bought more than it "needed" or paid more than "necessary." 411 F.3d at 1040 n.30. These are portmanteau expressions that cannot be unpacked analytically, standardless words with no basis in economic reasoning. In light of the potential harm in allowing courts and juries to wander in this area without guidance, the reasons that led this Court to issue a narrow and tailored rule for predatory selling in *Brooke Group* should lead to the same conclusion for predatory buying. Input prices or purchases should be labeled "predatory" only if the cost of the inputs exceeds the revenues they generate, and there is a realistic expectation—or in the parlance of antitrust

law, a "dangerous probability"—that the scheme could be successfully implemented and consumers harmed through some form of future recoupment.[9] Because the Court of Appeals' decision does not credit these critical requirements, it should be reversed.

The Ninth Circuit failed to recognize that paying a high input price and increasing input purchases generally will be "as consistent with permissible competition as with illegal [conduct]," and thus cannot "standing alone, support an inference of antitrust [violations]," *Matsushita*, 475 U.S. at 588, even if it harms a rival. In this context, the Court of Appeals erred in concluding that the prophylactic rule of *Brooke Group* should not be applied to predatory buying claims. As a result, the court fashioned a rule "that authorizes a search for a particular type of undesirable pricing behavior [and] end[s] up [] discouraging legitimate price competition." *Id.* at 594 (internal quotation marks omitted). This case thus illustrates the kind of false positive that is a probable outcome

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[9] *See* Donald J. Boudreaux, Kenneth G. Elzinga & David E. Mills, *The Supreme Court's Predation Odyssey: From Fruit Pies to Cigarettes*, 4 SUP. CT. ECON. REV. 57, 63 (1995) ("To avoid unnecessary stifling of competition, as well as to discourage rent-seekers from using antitrust to pursue their narrow self-interests, antitrust law should proscribe only flagrantly anticompetitive behaviors, confident that the law of property, contract, and tort, on one hand, and the forces of profit-seeking, on the other, will generally protect consumers from severe long-term harm."); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. LAW & ECON. 247, 254 (1985) ("The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition.").

of applying the unbounded and vague legal standard approved by the Court of Appeals.[10]

Although the Ninth Circuit's analysis is not entirely clear, Weyerhaeuser could not recoup its alleged profit-sacrifice and harm consumers. There was continued competition on the buyer-side of the market from new entrants and existing rivals. In addition, Weyerhaeuser lacked market power in the finished lumber market and so could not charge supracompetitive prices to consumers in the output market. Thus, no harm to competition could occur, and any harm to competitors is not a concern of the antitrust laws.

The Ninth Circuit rule requires judges and juries to make highly subjective determinations regarding the propriety of upward price adjustments for inputs, effectively requiring judges and juries to review pricing decisions without providing any objective criteria against which prices can be assessed. "To set the jury adrift on uncharted seas—and then to defer to whatever it does—is to introduce considerable risk into all business decisions." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 979 (1986).

Permitting the Court of Appeals' decision to stand will have adverse consequences on economic behavior. In particular, by leaving firms unable to evaluate the consequences of their pricing conduct, it will constrain competition and introduce inefficiencies that could lead to higher consumer prices. Courts should be reluctant to interfere in the price setting function, and they have been, as *Brooke Group* illustrates. That same economic caution and judicial humility should have been applied here. Because it

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[10] "[S]ince documented cases of predatory pricing are rare, a test not disposed to false positives is superior to one equally indisposed to false negatives. Consumers will be afforded more opportunities to secure the benefits of price competition." Elzinga & Mills, *Trumping*, *supra*, at 562.

was not, the decision of the Court of Appeals should be reversed.

## CONCLUSION

The Ninth Circuit's decision should be reversed.

Respectfully submitted,

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August 24, 2006

# APPENDIX

## APPENDIX

## LIST OF *AMICI CURIAE*

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**Kenneth G. Elzinga**, Ph.D, Robert C. Taylor Professor of Economics, University of Virginia. Professor Elzinga has written extensively on industrial organization, and antitrust economics and policy including predation. He acted as an expert for Brown & Williamson in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993). Professor Elzinga earned his Ph.D from Michigan State University.

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**R. Glenn Hubbard**, Ph.D, Dean, and Russell L. Carson Professor of Finance and Economics, Graduate School of Business, Columbia University. Professor Hubbard has written extensively on investment decisions and managerial information and incentive problems in corporate finance. He has acted as a consultant to the Federal Reserve Board, and Federal Reserve Bank of New York, and was formerly Chairman of the Council of Economic Advisers and a deputy assistant of the Treasury Department. Professor Hubbard earned his Ph.D from Harvard University.

**Janusz A. Ordover**, Ph.D, Professor of Economics, New York University. Professor Ordover has written extensively on industrial organization, antitrust economics and policy including predation, and international trade. He has served as Deputy Assistant Attorney General for Economics in the Antitrust Division of the Department of Justice. Professor Ordover earned his Ph.D from Columbia University.

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**Martha Samuelson**, J.D., M.B.A., Chief Executive Officer, Analysis Group. Analysis Group is one of the country's largest economic consulting firms, and is affiliated with over one hundred academic experts at the country's leading universities and research organizations. One of the firm's principle areas of expertise is antitrust economics, and its consultants and affiliated experts have been involved in many of the major antitrust matters of the last decades. Ms. Samuelson earned her law degree from Harvard University Law School and her M.B.A. from the Massachusetts Institute of Technology.

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No. 05-381

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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WEYERHAEUSER COMPANY, Petitioner,

*v.*

ROSS-SIMMONS HARDWOOD
LUMBER COMPANY, INC., Respondent

---

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

---

# BRIEF OF *AMICI CURIAE* FOREST INDUSTRY PARTICIPANTS SUPPORTING RESPONDENT

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James Dalton and Louis Esposito, *Predatory Price Cutting and Standard Oil: A Reexamination of the Trial Record*, Research in Law and Economics (2006, forthcoming).....12

Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*,
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---

## BRIEF OF *AMICI CURIAE* FOREST INDUSTRY PARTICIPANTS SUPPORTING RESPONDENT

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## INTEREST OF *AMICI CURIAE*

This brief is submitted by two national organizations and five other organizations and firms involved in the forestry industry (collectively, the "Forest Industry Participants").[1] The Forest Industry

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[1] The required consent letters have been filed. These *amici* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Participants represent every facet of the forestry industry: timberland owners, loggers, and sawmills. Consequently, they are knowledgeable about the market at issue in this case and how the applicable legal rules would affect competition in that market.

National Woodland Owners Association (NWOA) is a nationwide organization of nonindustrial private woodland owners. NWOA has 27,000 members from all 50 states. NWOA is independent of the forest products industry and government forestry agencies. Its purpose is to promote nonindustrial forestry and the best interests of woodland owners. As an ownership class, nonindustrial forest landowners possess 48 percent of the forest land in the United States, with 82 percent of that land in ownerships of 500 acres or less. Best and Wayburn, *America's Private Forests* 6 (2001).

American Loggers Council (ALC) is the national organization of professional loggers in the United States and includes a coalition of 29 state and regional logging associations and councils. ALC represents more than 10,000 logging contractors with more than 50,000 employees. Together, NWOA and ALC account for a far higher percentage of U.S. log sales annually than the industrial class of forest landowners, which account for only 9.65 percent of U.S. forest land. *Id.* at 4.

Small Business Timber Council (SBTC) is an organization of family-owned forest products companies in western Oregon that operate 11 sawmills, 8 plywood, veneer, or laminated beam plants, and employ 2,400 workers in 10 Oregon communities. SBTC members are dependent on open market timber from private, federal, and state forests. Several SBTC members are industrial owners of private forest land, some exceeding 100,000 acres.

Smith Street Mill, Inc. and Alexander Lumber Mill, Inc. are family-owned alder sawmills operating in Everett and Onalaska, Washington, respectively. Hardwood Components, Inc. is a family-owned hardwood sawmill in Mehama, Oregon. Morton Alder Mill, Inc. owned and operated an alder sawmill in Willamina, Oregon, for more than 50 years before closing in 2002. All four of these mills were plaintiffs in successful antitrust cases against Weyerhaeuser that settled before trial.[2]

As experienced participants in the forest industry, these *amici* believe they can be of assistance to the Court as it addresses the questions raised here.

## SUMMARY OF ARGUMENT

This case arises under § 2 of the Sherman Act, 15 U.S.C. § 2, which makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize, any part of the nation's interstate or foreign commerce.

Here, Ross-Simmons Hardwood Lumber Company alleged that Weyerhaeuser Company violated § 2 by using a diverse array of anticompetitive tactics to either monopolize, or attempt to monopolize, the Pacific Northwest market for alder sawlogs. Ross-Simmons alleged that one of Weyerhaeuser's tactics—but not its *only* tactic—was predatory bidding for alder sawlogs. In particular, Ross-Simmons alleged that Weyerhaeuser used its market power to intentionally

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[2] Alexander Lumber Mill and Morton Alder Mill, Inc. settled their claims in *Westwood Lumber Co. v. Weyerhaeuser*, District of Oregon No. 03-0551-PA, as part of a $34.5 million settlement. Smith Street Mill, Inc. and Hardwood Components, Inc. settled their claims in *Smith Street Mill, Inc. v. Weyerhaeuser*, District of Oregon No. 04-1049-PA, as part of a $13.1 million settlement.

bid up the price for sawlogs to a level where Ross-Simmons (and other Weyerhaeuser competitors) could no longer operate profitably, resulting in Ross-Simmons's demise and, consequently, one fewer competitor for Weyerhaeuser. According to Ross-Simmons's theory, predatory bidding was one element of Weyerhaeuser's overall strategy to eliminate competition for alder sawlogs so that Weyerhaeuser could then use its unchecked market power to drive down prices and enjoy monopoly profits resulting from a low-cost alder supply.

After hearing all the evidence, including Weyerhaeuser's attempts to explain its actions, a jury found for Ross-Simmons on both its monopolization and attempted monopolization claims and awarded damages of $26,256,406 (which were subsequently trebled). (J.A. 967a.) That verdict was affirmed by the United States Court of Appeals for the Ninth Circuit. (Pet. App. 1a-27a.)

In this Court, Weyerhaeuser and its supporting *amici* argue that the proceedings below were flawed because the jury was incorrectly instructed regarding when predatory bidding can be found to violate § 2. Weyerhaeuser's overarching argument is that a § 2 claim based on predatory bidding must be governed by the two-part test for predatory pricing that this Court described in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Weyerhaeuser and its *amici* advance several arguments in support of their contention that *Brooke Group* should be applied outside the predatory-pricing context for the first time. Among those arguments are: (1) *Brooke Group* provides an unambiguous standard that businesses and juries can easily understand and apply; (2) in rejecting *Brooke Group*, the Ninth Circuit erred by considering the elasticity of the Pacific Northwest

market for alder sawlogs, and then compounded that error by incorrectly characterizing the market as inelastic; (3) the *Brooke Group* test is appropriate for the market at issue in this case; and (4) the Ninth Circuit's decision is both overly restrictive and needlessly vague, and will cause catastrophic economic disruption by chilling aggressive competition. Each argument lacks merit.

The *Brooke Group* test is more complex and subjective than Weyerhaeuser admits. *Brooke Group's* two-part test requires complicated analyses of cost and the probability that a predator can recoup the losses it incurred in pursuing its anticompetitive strategy. As *Brooke Group* itself demonstrates, these are not simple, objective computations that produce unassailable results. Instead, they are complicated, demanding inquiries that turn on multiple subjective factors. Consequently, if adopted, *Brooke Group* would not provide the benefits of ease and simplicity that Weyerhaeuser promises.

In analyzing whether to apply the *Brooke Group* test in the context of a predatory bidding claim, the Ninth Circuit considered the elasticity of the market because elasticity is relevant to the probability that a predatory-bidding scheme will succeed. Weyerhaeuser criticizes that aspect of the Ninth Circuit's decision on the grounds that elasticity is too complex to have a role in the analysis. But Weyerhaeuser's proposed alternative would not avoid the market-elasticity inquiry because the *Brooke Group* test requires evaluating market elasticity as part of assessing the probability that a predator will recoup its losses. Weyerhaeuser also criticizes the Ninth Circuit's conclusion that the Pacific Northwest alder-sawlog market is inelastic. But the trial evidence established

that alder supply does not respond to price changes. Therefore, the Ninth Circuit's conclusion was correct.

This Court has stressed that "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004). Therefore, it is important to scrutinize the market involved in this case. Such an analysis reveals that the market has several characteristics that make it especially vulnerable to the type of predatory scheme Weyerhaeuser devised here. Those characteristics include (1) its inelasticity; (2) the fact that alder sawlogs are neither imported into, nor exported out of, the Pacific Northwest because long-distance transportation is infeasible; (3) there are high barriers to entry by competitors; and (4) Weyerhaeuser could concentrate its anticompetitive conduct on only a relatively narrow portion of the overall market. These characteristics require a rule of law adequate to protect the market against anticompetitive conduct.

Finally, Weyerhaeuser advocates the adoption of a narrow rule that would immunize most price-related predatory conduct because predatory-bidding schemes are supposedly unlikely to be tried and even more unlikely to succeed. And Weyerhaeuser warns of dire consequences certain to flow from the Ninth Circuit's decision. These contentions are refuted by the Ninth Circuit's decision in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983).

*Reid Bros.* involved a predatory scheme designed to extinguish competition in the southeastern Alaska timber market. The defendants in *Reid Bros.* employed many of the same tactics that Weyerhaeuser later put to effective use against Ross-Simmons and other rivals. In affirming a judgment against the defendants for

violations of Sherman Act §§ 1 and 2, the court rejected the defendants' argument that predatory bidding for timber should be lawful as a matter of law so long as the predator did not experience a loss on the sale of processed lumber.

*Reid Bros.* shows two things. First, it refutes the argument that predatory bidding schemes are both unlikely to be tried and unlikely to succeed. The scheme in *Reid Bros.* succeeded completely. Second, it refutes the argument that the Ninth Circuit's decision in this case will cause adverse economic consequences by chilling legitimate competition and paralyzing commerce with fear of antitrust liability. *Reid Bros.* had no such effect, nor would a decision by this Court holding that the lawfulness of a predatory bidder's actions will be assessed by more than simply whether the predatory actor sold its finished product for a gain or a loss.

The real risk posed by this case is what will happen if the Court adopts Weyerhaeuser's position and applies *Brooke Group* in the predatory-bidding context. Because the forest industry is vulnerable to anticompetitive conduct by dominant firms, it is important to the Forest Industry Participants that antitrust law remain a viable deterrent to predatory behavior. Because the test urged by Weyerhaeuser would insulate much price-related conduct from antitrust scrutiny, thereby weakening the antitrust laws, the Forest Industry Participants urge this Court to not adopt the *Brooke Group* test for predatory-bidding claims.

## ARGUMENT

## THIS COURT SHOULD NOT APPLY THE *BROOKE GROUP* TEST TO ROSS-SIMMONS'S PREDATORY-BIDDING CLAIM.

### A. This Court has traditionally decided antitrust cases by applying broad principles to the specific circumstances of the case before it, paying special attention to the economic realities of the market at issue.

Section 2 of the Sherman Act makes it unlawful to monopolize or attempt to monopolize interstate or foreign commerce:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100 million if a corporation, or, if any other person, $1 million, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

Because § 2 is written in general terms, it does not specify the elements of a claim for monopolization or attempted monopolization. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993). Instead, the Sherman Act's legislative history "indicate[s] that much of the interpretation of the necessarily broad principles of the Act was to be left for the courts in particular

cases." *Id.* Consequently, this Court has had to articulate the specific elements of § 2 claims.

A monopolization claim requires proof of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966). A claim for attempted monopolization requires proof of (1) the relevant market that the defendant sought to monopolize, (2) predatory or anticompetitive conduct, (3) specific intent to acquire monopoly power within the market, and (4) a dangerous probability of success. *Spectrum Sports*, 506 U.S. at 459. Thus, both a monopoly claim and an attempted monopoly claim require proof of intentional anticompetitive conduct.

Although this Court has had several occasions to consider § 2 claims,[3] it has declined to announce a definitive, one-size-fits-all standard for what constitutes unlawful anticompetitive conduct for purposes of a § 2 claim. Instead, this Court has defined anticompetitive conduct in broad terms. In *Grinnell*, 384 U.S. at 570-71, the Court defined anticompetitive conduct by exclusion, explaining that it is the acquisition or maintenance of market power through means other than "growth or development as a consequence of a superior product, business acumen, or historic accident." In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), this Court looked to whether the defendant's actions had

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[3] *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Spectrum Sports*, 506 U.S. 447; *United States v. Grinnell*, 384 U.S. 563 (1966); *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

"impaired competition in an unnecessarily restrictive way," and examined the effect of the challenged conduct on consumers, the plaintiff, and the defendant itself. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), this Court asked whether "valid business reasons" explained Kodak's allegedly unlawful actions.

Thus, this Court has generally eschewed particularized standards for defining § 2 anticompetitive conduct, preferring to establish broader standards that provide lower courts with guidance, but that also leave room for tailoring the standards in a given case to the often unique circumstances of the conduct and market involved.[4] Such an approach is consistent with this Court's view that "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004). Consequently, this Court has said "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak*, 504 U.S. at 466-67. Instead, this Court has "preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Id.* at 467 (quoting *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 579 (1925)). Thus, this Court has traditionally decided cases by applying broad antitrust principles to "the economic reality of the market at

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[4] *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L. J. 435, 481 (2006) ("Section 2 is not 'one size fits all.' Recognizing that different circumstances can warrant dissimilar treatment, courts have crafted an array of legal tests to govern the diverse conduct covered by Section 2.").

issue" rather than by relying on formulaic tests. *Id.* at 467.

### B. Modern economic analysis has called into doubt the assumptions that were the basis for this Court's *Brooke Group* decision.

Predatory pricing is one context in which this Court has departed from its usual practice by adopting a specific test for assessing allegedly anticompetitive conduct. *Brooke Group*, 509 U.S. 209, arose from a price war between competing makers of "economy" cigarettes. In *Brooke Group*—unlike the present case—there was only a single type of allegedly anticompetitive conduct: defendant's aggressive reduction of the price for its economy cigarettes.

This Court articulated a two-part test for assessing such claims of predatory price cutting by a product seller. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* at 222. If below-cost pricing is established, "The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a * * * dangerous probability[] of recouping its investment in below-cost prices." *Id.* at 224.

Weyerhaeuser asks this Court to lengthen *Brooke Group's* reach by applying it to predatory-bidding claims. But this Court should exercise caution about such a move when there is growing doubt about the economic assumptions that informed the *Brooke Group* decision.

The *Brooke Group* test reflects this Court's view at that time that "predatory pricing schemes are rarely

tried, and even more rarely successful." *Id.* at 226. The Court's acceptance of that view is not surprising since it was "the only economic view presented to the Court."[5]

The economics literature cited to the Court in *Brooke Group*, and the conclusion that predatory pricing is rarely tried and even more rarely successful, relied on the work of McGee, who in 1958 examined the trial-court record in the 1911 Standard Oil Trust case and other cases.[6] But recent scholarly reexamination of that evidence has brought into doubt McGee's central conclusion that Standard Oil had not engaged in predatory pricing:

> We examined this record and have found that the trial Record contains considerable evidence of predatory pricing by Standard Oil. Therefore, the Record does not support McGee's conclusion that Standard Oil did not engage in predatory pricing.[7]

Most economists no longer support the view that predatory pricing is rare and unlikely to succeed. Professors Bolton, Brodley, and Riordan have said in their joint analysis[8] that "sound empirical and experimental studies, as well as modern economic

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[5] Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L. J. 2239, 2257 (2000).

[6] Richard A. Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press (1976).

[7] James Dalton and Louis Esposito, *Predatory Price Cutting and Standard Oil: A Reexamination of the Trial Record*, Research in Law and Economics (2006, forthcoming).

[8] Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L. J. at 2249 (2000) ("To summarize, present judicial skepticism about predatory pricing assumes that predation is extremely rare, but sound empirical and experimental studies, as well as modern economic theory, do not justify this assumption.")

theory" do not support the conclusion that predatory pricing is rare:

> modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational. More than that, it is now the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy.[9]

Thus, as this Court considers whether to extend *Brooke Group* to the realm of predatory bidding, it should consider the growing consensus that, even in the predatory-pricing context, *Brooke Group* reflects a now-outmoded view of the frequency and potential success of predatory pricing.

### C. *Brooke Group* requires difficult and subjective analyses.

Weyerhaeuser asks this Court to apply the *Brooke Group* test to Ross-Simmons's predatory-bidding claim. According to Weyerhaeuser and its *amici*, *Brooke Group* offers an objective and easily applied test that would establish unambiguous standards to guide businesses and juries, thereby eliminating both confusion in the boardroom and false positives in the courtroom. But *Brooke Group* is not the panacea that Weyerhaeuser suggests.

*Brooke Group* calls for two inquiries: (1) whether the defendant sold its product at a price below an appropriate measure of its costs; and (2) whether there was a dangerous probability of the defendant recouping the losses caused by its pricing conduct. *Id.* at 222, 224. Although this appears to be an objective test, in

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[9] *Id.* at 2241.

reality both cost and recoupment are complicated questions that turn on many subjective factors.

With regard to the question of cost, in *Brooke Group* this Court declined to decide what methodology should be used to determine a seller's appropriate measure of costs. *Id.* at 222 n.1. And 13 years later, determining a seller's cost remains a disputed and complicated question. The Sixth Circuit's decision in *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) provides an apt example.

*Spirit Airlines* involved a § 2 predatory-pricing claim against Northwest Airlines. In reversing a summary judgment for Northwest Airlines, the Sixth Circuit devoted 10 pages to analyzing the appropriate-measure-of-costs issue, before concluding that *both* parties had presented plausible cost theories, creating an issue of fact for the jury. *Id.* at 945 ("We conclude that this 'intellectual disagreement' among the parties' experts creates material factual disputes on the relevant market and the appropriate measure of costs for the service at issue so as to preclude an award of summary judgment.").

*Spirit Airlines* refutes the notion that calculating the appropriate measure of costs is an easily performed task that inevitably produces a single indisputable answer. Furthermore, as Ross-Simmons discusses in its merits brief, in relation to a predatory-bidding claim, the cost inquiry would be even more problematic because in that context there is no established test for calculating cost—and neither Weyerhaeuser nor its *amici* have suggested one. Thus, determining cost is not a simple, objective inquiry.

The best that can be said of the cost question is that it is marginally more objective and less complicated than the second prong of the *Brooke Group* test: assessing a predatory seller's probability of

recoupment. There is nothing either objective or simple about the recoupment inquiry—as *Brooke Group* itself vividly demonstrates.

Assessing the probability of recoupment is a complex factual question that depends on numerous equally complex factors. As this Court explained, "Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a *close analysis* of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Brooke Group*, 509 U.S. at 226 (emphasis added). Such a "close analysis" requires considering at least these questions:

- How long would the predation have lasted? *Brooke Group*, 509 U.S. at 225.
- What was the financial strength of the predator? *Id.*
- What was the financial strength of the intended victim? *Id.*
- If the predation succeeded in eliminating competition, was the market such that prices would have then adjusted to permit the predator to recoup its losses? In other words: was the market elastic or inelastic? *Id.*
- How long would the predator be able to reap supracompetitive prices? *Id.*
- What are the barriers to entry to the market? *Id.*

These are not simple questions with a single, obvious answer—as *Brooke Group* itself illustrates. *Brooke Group* came to this Court from a judgment as a matter of law for the defendant. Consequently, this Court scrutinized the case's factual record to determine whether there was any evidence from which a trier of

fact could find that the defendant had a dangerous probability of recoupment. *Id.* at 230. This Court's analysis—which Weyerhaeuser repeatedly minimizes—runs from pages 230 to 243 of the Court's opinion and concludes with the Court noting that "the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a matter of law is *demanding*." *Id.* at 243 (emphasis added).

Thus, the *Brooke Group* test's primary virtues—its supposed objectivity and resulting ease of application—are illusory. If applied to the predatory-bidding context, *Brooke Group* would provide corporate directors and jurors with no easily determined, bright-line standard for what constitutes unlawful anticompetitive conduct. Instead, it would require an analysis just as complicated and just as demanding as other § 2 cases, except that the inquiry would be confined to questions of (1) cost and (2) probability of recoupment, without a complete examination of the predator's conduct in the context of the economic realities of the market—the approach this Court has consistently endorsed outside the predatory-pricing realm.

### D. The Ninth Circuit properly considered market elasticity and correctly concluded that the Pacific Northwest market for alder sawlogs is inelastic.

In evaluating whether to apply the *Brooke Group* test in this case, the Ninth Circuit Court of Appeals considered the unique characteristics of the Pacific Northwest market for alder sawlogs, including that market's elasticity, *i.e.*, the extent to which the supply of alder sawlogs reacts to price changes by either increasing in response to rising prices, or decreasing in response to declining prices. (Pet. App. 11a.) Weyerhaeuser and its *amici*, in particular the

Timberland Owners and Managers, charge that this aspect of Ninth Circuit's analysis is flawed in two respects: (1) the *Brooke Group* test should apply in every predatory-bidding case without regard to market elasticity because requiring an examination of market elasticity "would entail endless ambiguity and uncertainty";[10] and (2) the Ninth Circuit incorrectly concluded that the Pacific Northwest market for alder sawlogs is inelastic.

The first argument—that market elasticity is too complex to be part of the analysis—is puzzling given that Weyerhaeuser and its *amici* advocate the adoption of a test that *requires* analyzing market elasticity. Probability of recoupment is an element of the *Brooke Group* test, and market elasticity is an important factor in assessing a predator's likelihood of recouping its losses. As the United States concedes, "if supply in the input market at issue is inelastic, it is more likely that an attempt to engage in predatory bidding will be successful, because it is more likely both that prices will increase in the short term without significantly increasing supply * * * and that prices can be forced down in the long term without significantly reducing supply (thereby facilitating recoupment)."[11] Therefore, adopting Weyerhaeuser's preferred approach would not eliminate the burdens associated with evaluating elasticity in the relevant market because assessing the probability of recoupment requires analyzing market elasticity.

Furthermore, the Ninth Circuit's conclusion was correct: the Pacific Northwest market for alder sawlogs is inelastic. Put more simply, in the short term, the

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[10] Brief for the United States as Amicus Curiae Supporting Petitioner at 25. *See also* Brief for the Petitioner at 32-34.
[11] Brief for the United States as Amicus Curiae Supporting Petitioner at 24.

alder-sawlog supply does not increase in response to increasing prices, and supply does not decrease in response to declining prices. The market's inelasticity is graphically depicted by trial exhibits 80, 96, and 97.[12] Exhibit 97 shows that prices for alder sawlogs increased steadily from 1996 to 2001, with an especially dramatic rise from late 1998 through early 2001.[13] Exhibits 80 and 96 show alder sawlog supply. If the market were elastic, one would expect to see an increase in supply corresponding to the increase in price. Instead the supply remained stable from 1996 through 2001, except for a small *decrease* in supply during 2000 and early 2001. Thus, while prices went up, supply remained mostly unchanged. Weyerhaeuser contends the record lacks any support for the Ninth Circuit's conclusion that the Pacific Northwest alder-sawlog market is inelastic.[14] But these exhibits prove otherwise.

The market's inelasticity is easy to explain; in fact, it is precisely what one would expect based on the market's unique characteristics.

Two factors primarily account for the market's inelasticity. First is the nature of the product itself. In some markets, a manufacturer can respond to a price increase by simply increasing production. But it takes 30-50 years for an alder tree to grow to the point where it is ready for harvest. Therefore, the supply of alder available for harvest today is fixed by planting decisions made decades ago, based on market conditions then. Timber supply is relatively elastic in the *long term* but not in the *short term*, because there is no way to bring a

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[12] Exhibit 96 is at JA 923a; exhibits 80 and 97 are reproduced in Appendix A and Appendix B to this brief.

[13] Appendix B.

[14] Brief for the Petitioner at 33 ("For one thing, there is no factual basis for the court's assertion [that the market is inelastic].").

tree to maturity in less time than nature requires just because prices are attractive.

Second, in the Pacific Northwest, alder is primarily a come-along species. The parties' glossary of terms defined "come along species" as "A species within a stand of timber that is typically cut as a consequence of a harvest of a dominant species."[15] The trial evidence established that alder is a come-along species, harvested as a byproduct of the dominant softwoods harvest. For example, an exhibit in one of the follow-on cases against Weyerhaeuser said that 83 percent of the alder harvest was a byproduct of the softwoods harvest and, consequently, was not price-sensitive.[16] In other words, that alder would be harvested without regard to price. As a result, the supply of Pacific Northwest alder does not change in response to price; instead, alder supply is primarily a function of the softwoods harvest.

Thus, the finite number of harvestable alder trees provided by nature, combined with alder's status as a come-along species, create an inelastic market where the supply of alder logs does not increase in response to higher prices.

Weyerhaeuser and *amici curiae* Timberland Owners and Managers dispute this reality, but identify no record evidence tending to prove the market's elasticity. Instead, they rely on isolated sentences lifted from articles concerning forest economics.[17] None of the articles cited addresses the elasticity of the unique alder-sawlog market.

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[15] JA 145a.

[16] Westwood exhibit 2740 at 1 (available at www.alderantitrust.com).

[17] Brief of *Amici Curiae* Timberland Owners and Managers Supporting Petitioner at 15-16.

### E. The Pacific Northwest alder-sawlog market is vulnerable to predatory conduct by a dominant firm.

This Court has stressed that antitrust cases should turn on "actual market realities." *Eastman Kodak*, 504 U.S. 466-67. Therefore, as this Court decides whether to apply the *Brooke Group* test to anticompetitive conduct in the Pacific Northwest market for alder sawlogs, it is essential to consider the economic realities of that market.

As Weyerhaeuser recognized when it devised its plan to monopolize the market, the Pacific Northwest alder-sawlog market has several characteristics that make it particularly susceptible to a multi-faceted predation assault of the type Weyerhaeuser launched here.

The market's inelasticity is one such characteristic. Weyerhaeuser's overall strategy was two-fold: (1) acquire as many logs as possible, thereby depriving its competitors of the inputs they needed to remain in operation, and (2) drive up the cost of the logs that Weyerhaeuser did not acquire, thereby ensuring that its competitors paid prices that rendered their operations unprofitable. Such a strategy would be unlikely to succeed in an elastic market, which would respond to Weyerhaeuser's predation by bringing more logs to the market. But, as this case demonstrates, such a strategy can (and did) succeed in an inelastic market where supply does not increase in response to such predatory conduct. Because the market's inelasticity meant that log supply would not increase as prices went up, Weyerhaeuser knew it could use its market power to drive up prices, forcing its competitors into a Hobson's choice between either paying exorbitant prices for logs or buying no logs at all.

Another characteristic that makes the alder-sawlog market vulnerable to predation is its closed nature. Weyerhaeuser's scheme could not have succeeded if sawmills could have responded to Weyerhaeuser's tactics by acquiring alder from outside the Pacific Northwest. But undisputed evidence at trial showed that was infeasible for two reasons. First, it is expensive to transport logs to a mill, which makes it economically irrational to import logs from far away. (J.A. 379a.) For that reason, most alder logs are processed at mills within 100 miles from the harvest sites. (J.A. 153a.) Second, alder logs stain relatively soon after harvest, especially if exposed to heat. (J.A. 184a.) Such staining decreases a log's value and produces less valuable timber. (J.A. 184a-185a, 510a.) Long-distance transportation is undesirable because it increases the risk of staining. For these reasons—the high cost of transportation and the heightened risk of staining—alder sawlogs are rarely imported into or exported out of, the Pacific Northwest. (J.A. 153a, ¶ 15; J.A. 268a-270a.) These market characteristics mean that sawmills such as Ross-Simmons cannot combat predatory conduct by obtaining logs from outside the Pacific Northwest.

Another relevant market characteristic is the high barriers to entry. Barriers to entry are relevant because in a market with low barriers to entry, Weyerhaeuser's strategy would have been less likely to succeed; once Weyerhaeuser eliminated competition and drove down prices, competitors would enter the market to take advantage of the monopsony prices Weyerhaeuser had created. But where barriers to entry are high, a predatory scheme such as Weyerhaeuser's has a greater likelihood of success because it is difficult for competitors to enter the market and compete with the monopsonist.

There are significant barriers to entry into the Pacific Northwest market for alder sawlogs. One barrier is Weyerhaeuser's presence. (J.A. 369a, 396a.) A dominant firm's presence in a market is, by itself, a barrier to entry by competitors. (J.A. 369a, 396a.) Here, Weyerhaeuser, with approximately 75 percent of the market for alder sawlogs, is the market's dominant firm, and any firm considering entering the market knows it must compete with Weyerhaeuser. Consequently, Weyerhaeuser's market domination by itself is a barrier to entry.

A second barrier to entry is the inadequate supply of alder sawlogs. (J.A. 368a-369a.) A sawmill cannot survive without an adequate supply of timber within a close distance to the mill. The lack of available sawlogs is another reason a prospective competitor might choose to not enter the market and compete with Weyerhaeuser. (J.A. 369a.)

A third barrier to entry is the cost of building a mill. Construction costs are $20-$25 million—a sum sufficient to impede many would-be competitors from entering the market. (J.A. 370a.) Furthermore, a dominant firm's presence in the market makes it more difficult for potential competitors to secure the financing necessary for such a project since lenders are reluctant to make loans to firms facing such daunting competition. While this effect might be difficult to measure, and its benefit to the predator difficult to quantify, that does not lessen its negative effect on competition.

All of these barriers to entry combine to make the market vulnerable to anticompetitive conduct.

Finally, to understand how Weyerhaeuser's predatory bidding scheme could work, it is essential to understand that Weyerhaeuser needed to drive up the price of logs in only a relatively small segment of the

overall market. There are four sources of alder logs available to Pacific Northwest mills: forest land owned by the mill; large private or industrial landowners; small private landowners; and public land (which, in the Pacific Northwest, is primarily state-owned land). Weyerhaeuser used various tactics, such as exclusive contracts and tying arrangements, to secure most of the supply available from large industrial landowners and public lands. Therefore, alder from those sources was not available to Ross-Simmons (or other Weyerhaeuser competitors) at any price. What remained open for bid was the relatively small portion of the market supplied by small landowners. And it was there that Weyerhaeuser focused its predatory bidding practices, driving up the price for its competitors.

An exhibit from one of the follow-on cases demonstrates how the practice worked.[18] Weyerhaeuser filled much of its timber requirements from its own land (blue bubbles) and exclusive arrangements with large landowners (white bubbles). Weyerhaeuser paid substantially less for that timber than it paid in the remaining fraction of the market where it competed with Ross-Simmons and others (red bubbles). The important point is this: to succeed, Weyerhaeuser did not need to drive up the price of logs in the entire market; instead, it was sufficient to drive up the price in the segment of the market where it competed with Ross-Simmons.

This combination of characteristics makes the market especially vulnerable to a predatory monopolist seeking to use its market power to extinguish competition. The rule adopted by this Court must be adequate to reflect these market realities and protect competition.

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[18] Appendix C.

### F. *Reid Bros.* undermines Weyerhaeuser's contention that the Ninth Circuit's decision will have harmful economic repercussions.

Weyerhaeuser and its *amici* make two points repeatedly: (1) this Court should adopt a narrow test for finding liability because a predatory bidding scheme is unlikely to be attempted and is even less likely to succeed; and, (2) if left unaltered, the Ninth Circuit's decision will spawn harmful economic disruption by chilling legitimate and healthy competition. But the Ninth Circuit's experience with similar predatory schemes suggests these views are overstated, if not entirely baseless.

Weyerhaeuser's predatory scheme in this case was similar to one the Ninth Circuit addressed in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983). In *Reid Bros.*, the two defendants originally came to southeast Alaska in the 1950s after entering into longterm contracts with the Forest Service, entitling each to harvest timber from designated allotment areas for 50 years. Outside these allotment areas, timber in the Tongass National Forest was sold periodically at public auction. At the time, there were numerous loggers and competing sawmills in southeast Alaska that bid at these timber sales. The Forest Service contemplated a genuinely competitive market for the openly-bid timber sales, which were supposed to provide the transaction evidence needed for periodic reappraisals of the stumpage rates paid by the two defendants for timber delivered under the 50-year contracts.

The two dominant firms conspired to monopolize the southeastern Alaska timber industry using some of the same tactics that Weyerhaeuser later employed against its rivals in the Pacific Northwest. Those tactics

included driving up the price of timber to inflict economic pain on competitors, and using anticompetitive maneuvers to prevent rival mills from acquiring logs. *Id.* at 1297-98. In affirming the judgment against the defendants for violating Sherman Act §§ 1 and 2, the court rejected the defendants' argument that intentionally driving up the price of timber for the purpose of excluding competition should be *per se* lawful unless "the high prices paid for standing timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber." *Id.* at 1298 n.5. The court held that such a narrow and mechanical test was inappropriate where "there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position" and that "the blind application of a numerical test would only frustrate the intent of the Sherman Act." *Id.*

*Reid Bros.* is instructive for two reasons. First, it refutes Weyerhaeuser's contention that this Court should discount the likelihood of a successful attempt to unlawfully monopolize a regional timber market. *Reid Bros.* shows that not only *can* it be done, but it *has* been done—and that regional timber markets are especially susceptible to such anticompetitive conduct.

Second, *Reid Bros.* provides a concrete counterpoint to Weyerhaeuser's hyperbolic speculation that the Ninth Circuit's decision in this case will breed economic chaos. *Reid Bros.* rejected the argument that predatory bidding should be immune from antitrust scrutiny so long as the price paid for the input is not so great that the predator cannot cover its costs when it sells the finished product. In other words, *Reid Bros.* rejected the very argument that Weyerhaeuser advances here. *Reid Bros.* was decided in 1983, yet there has been no epidemic of chaos, confusion, or false

positives. Indeed, *Reid Bros.* did not even deter Weyerhaeuser from embarking on an anticompetitive campaign almost identical to the one condemned in *Reid Bros.* Consequently, *Reid Bros.* should, at a minimum, cause this Court to view with skepticism Weyerhaeuser's doomsday scenario.

The greater risk is if this Court adopts Weyerhaeuser's position. If this Court agrees with Weyerhaeuser, this case will provide a roadmap for any firm dealing with commodities with an inelastic supply that wants to establish monopsony while insulating itself from legal attack. That path would be: (1) acquire a substantial portion of the inelastic supply; (2) outbid competitors for the open-market supply; (3) subsidize the adverse effects of high prices for open-market supplies with below-market purchases of the captive supplies, driving competitors out of business; and (4) once competition has been eliminated, drop the bids for open-market supplies, thus increasing manufacturing margin and recouping any losses from the predation.

As demonstrated by *Reid Bros.*, the result of a successfully monopsonized alder log market is harm both to log sellers and to lumber consumers. Woodland owners suffer lower log prices and avoid replanting alder. Sawmills and loggers are eliminated. And consumers experience decreased alder lumber production and higher prices. *Those* are the real risks posed by this case, and those are the risks that motivated the Forest Industry Participants to submit this brief urging the Court to decline Weyerhaeuser's invitation to apply the *Brooke Group* test here.

## CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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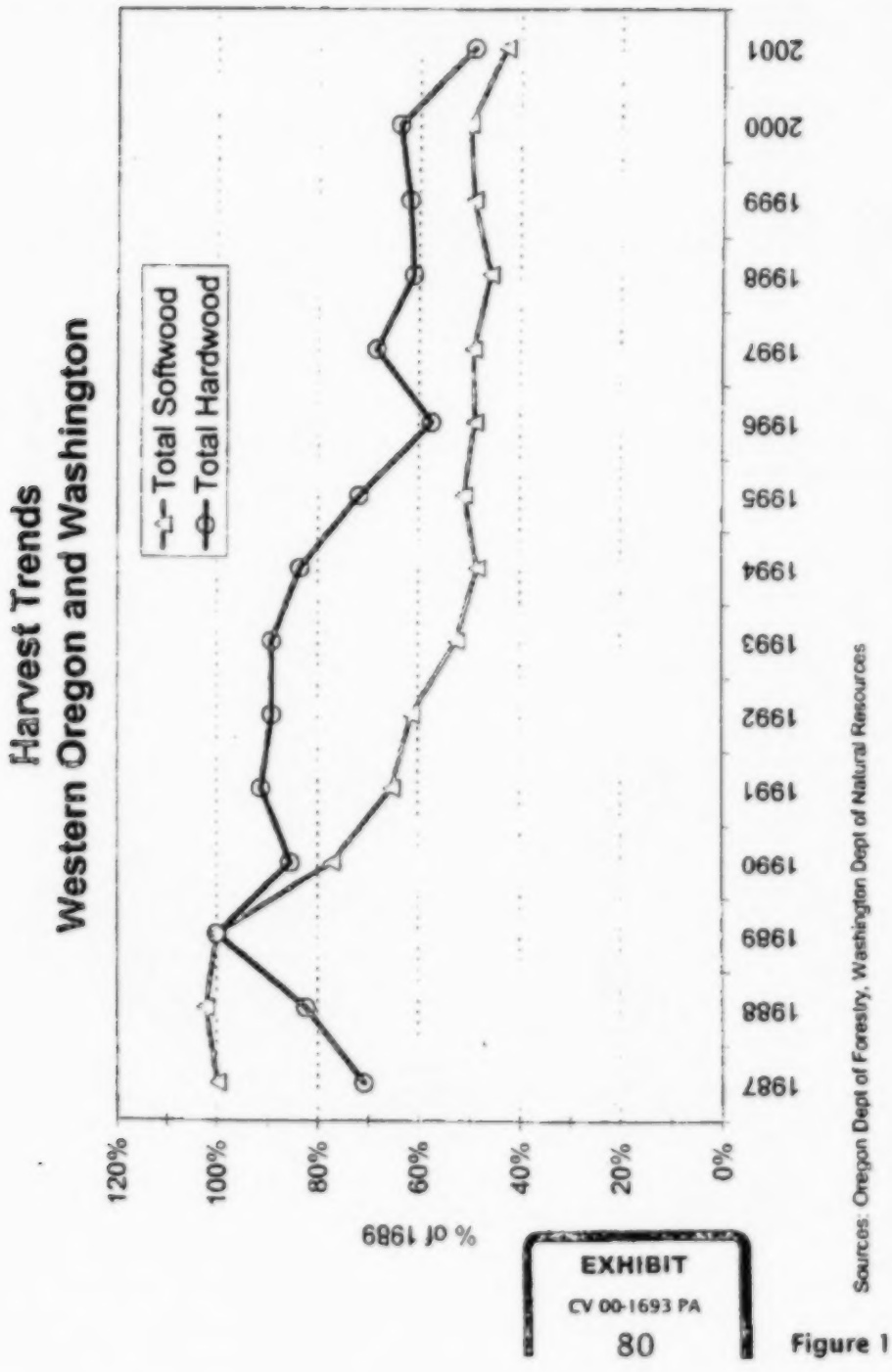
# APPENDIX

# APPENDIX A




EXHIBIT
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Figure 1

# APPENDIX B

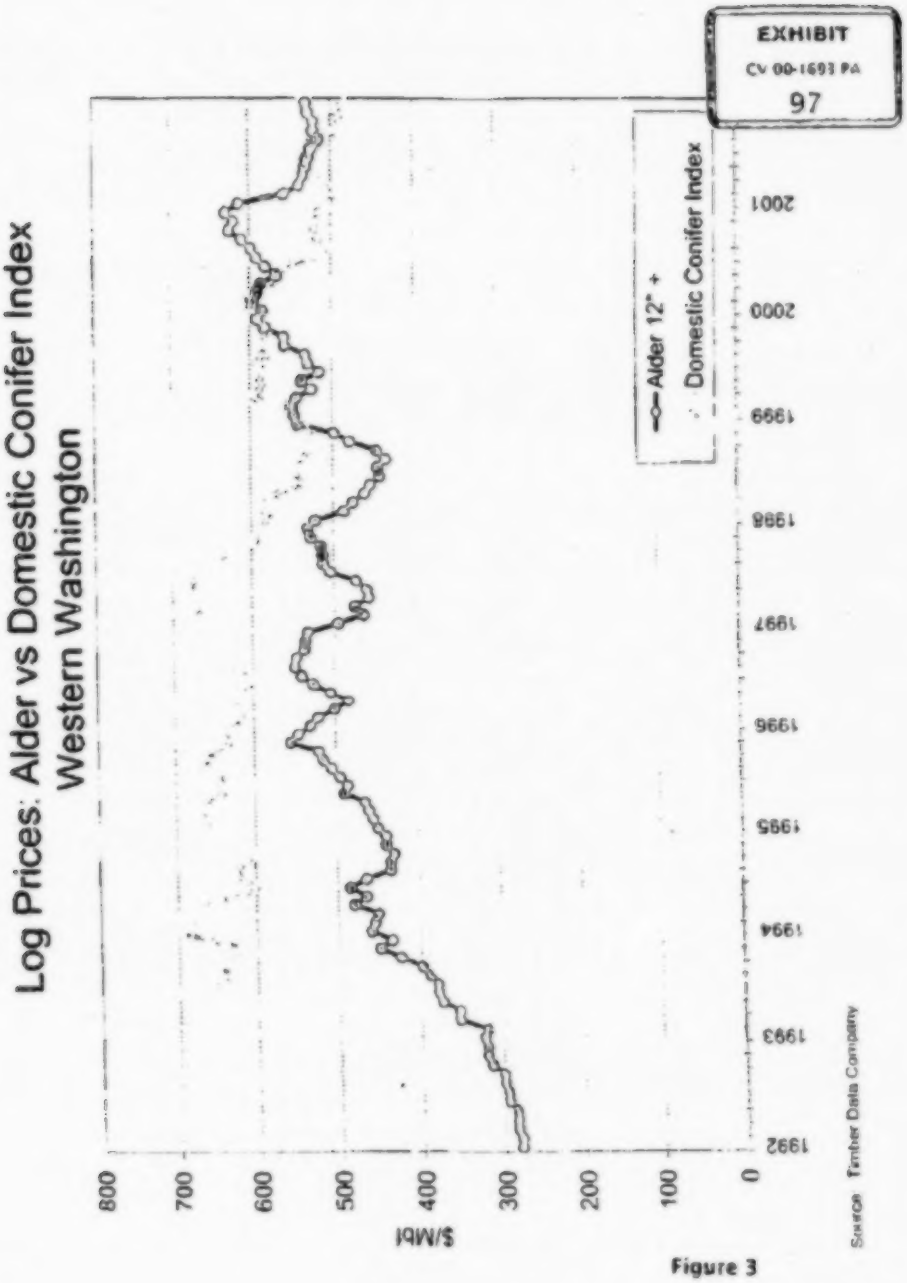
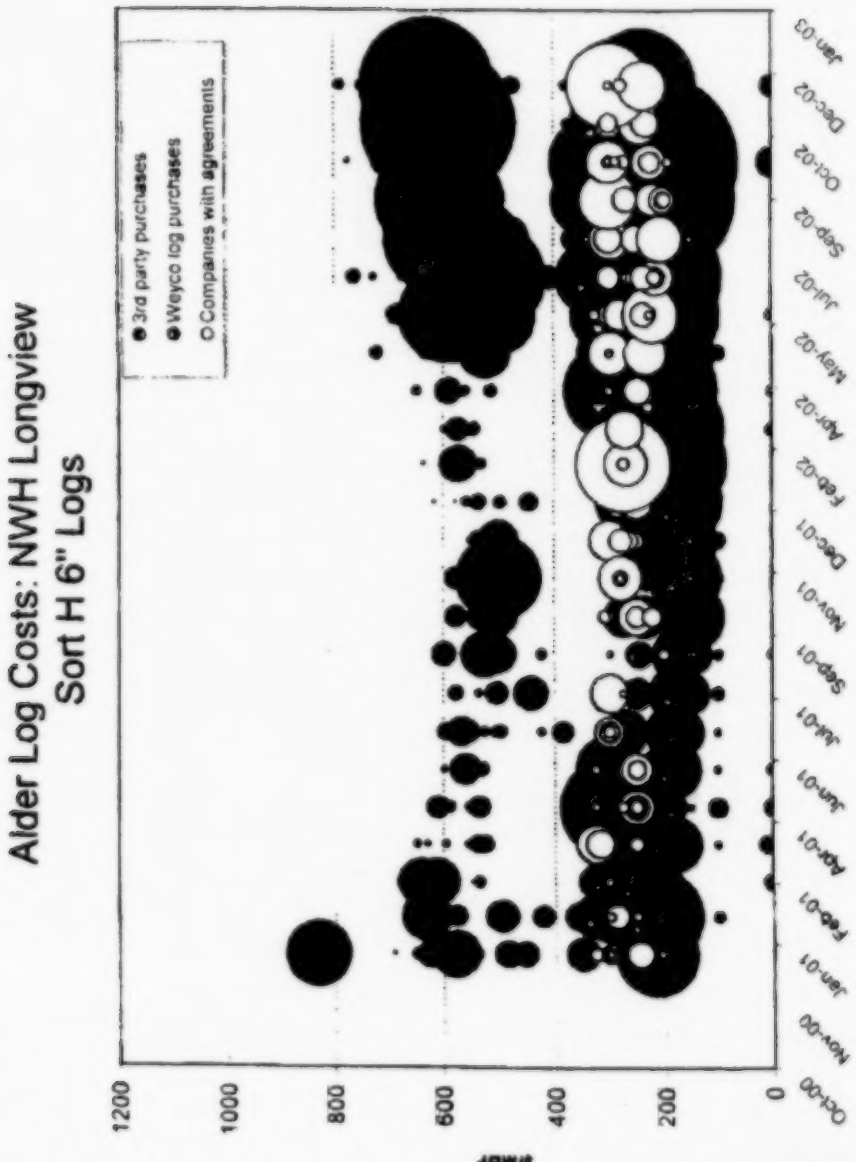



Figure 3

# APPENDIX C

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No. 05-381

Supreme Court, U.S.
FILED
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IN THE
# Supreme Court of the United States

WEYERHAEUSER COMPANY,
*Petitioner*,
v.
ROSS-SIMMONS HARDWOOD
LUMBER COMPANY, INC.,
*Respondent*.

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Ninth Circuit**

## BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF PETITIONER

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*Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) . . . . . *passim*

*Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986) . . . . . 11

*Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005) . . . . . 3, 4

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) . . . . . 10-11, 12-13

*Schor v. Abbott Labs.*, No. 05-3344, 2006 WL 2062117 (7th Cir. July 26, 2006) . . . . . 16-17

*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) . . . . . 6

*Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) . . . . . 6

*United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) . . . . . 6

*United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) . . . . . 6

*United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) . . . . . 6

*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) . . . . . 7, 13, 15

OTHER MATERIALS

12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2d ed. 2005) . . . . . 16

Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 Denv. U. L. Rev. 51 (1995) . . . . . 8

William J. Baumol & Janusz A. Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247 (1985) . . . 14

Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (2d ed. 1993) . . . . . 6

Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1 (2005) . . . . . 9, 14

Frank H. Easterbook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984) . . . . . 14

Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L. J. 941 (2002) . . . . . 13

Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005) . . . . . 6, 7

R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. Strategic Mgmt. Educ. 37 (2005) . . . . . 14

Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669 (2005) . . . . . 12

Edward A. Synder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991) . . . . . 14

## BRIEF *AMICI CURIAE* OF LAW PROFESSORS

This brief *amici curiae* in support of petitioner is respectfully submitted by the following individuals ("Law Professors"):

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- Joshua D. Wright, Assistant Professor of Law, George Mason University School of Law.[1]

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[1] Letters granting consent to the filing of this brief have been filed with the Court. This brief was authored entirely by *Amici* and their counsel, and not by counsel for any party. None of the *Amici* has any financial interest in this matter or has been compensated to participate in this brief, and no person other than *Amici* and their

## INTEREST OF *AMICI CURIAE*

*Amici Curiae* are law professors at American law schools who specialize in antitrust and have written about the monopolization offense under Section 2 of the Sherman Act. *Amici* are deeply concerned about the deleterious effects on price competition and the resultant adverse impact on consumers of the jury instruction approved by the Ninth Circuit.

## INTRODUCTION

*Amici* support Petitioner's argument that the Ninth Circuit erred in permitting the jury to assess liability based on an instruction that departed from any basis that has been articulated for Section 2 liability and instead premised liability on the jury's determination whether defendant paid a "higher price . . . than necessary" or plaintiff was unable to obtain inputs at "a fair price." *Amici* submit this brief to share with the Court their expertise in the treatment of the monopolization offense in adjudicated cases and the difficulties that arise when juries are directed to assess liability based on idiosyncratic jury instructions like that approved by the Ninth Circuit. *Amici* believe that the Ninth Circuit's opinion sets a dangerous and chilling precedent on what this Court has described as the core of competition — unilateral pricing decisions. *Amici* also believe that the Ninth Circuit's opinion requires no showing of harm to consumers from the challenged behavior and that it imposes liability for what is almost certainly competitively benign conduct.

## SUMMARY OF ARGUMENT

The jury instruction given by the district court and approved by the Ninth Circuit — which permitted the jury to

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counsel has made any monetary contribution to the preparation or submission of this brief.

find liability if it found that Weyerhaeuser paid a higher price "than necessary" and that this caused Ross-Simmons not to be able to purchase inputs at "a fair price" — is deeply flawed. This Court has long rejected a mode of antitrust analysis that measures liability by the fairness or reasonableness of prices and jurors cannot be expected to perform their function rationally or coherently under such an instruction. On the other hand, an instruction requiring a showing that the alleged predatory overbidding caused Weyerhaeuser to price below cost and that this created a dangerous probability that Weyerhaeuser could recoup its costs of predation by monopsony or monopoly power that harms consumers would be squarely in line with this Court's precedents and provides ample protection to consumers, the primary beneficiaries of antitrust law.

## ARGUMENT

Ross-Simmons sued Weyerhaeuser for monopolizing or attempting to monopolize the "input market" for alder sawlogs through several allegedly exclusionary acts. The focus of the Ninth Circuit's decision and Weyerhaeuser's appeal is on two of the allegedly wrongful acts: (1) predatory overbidding (*i.e.*, paying a higher price for sawlogs than necessary); and (2) predatory overbuying (*i.e.*, buying more sawlogs than necessary).[2]

Focusing specifically on the predatory overbidding and overbuying claims, the district court instructed the jury that it could find Weyerhaeuser liable if Weyerhaeuser had "purchased more logs than it needed or paid a higher

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[2] The Ninth Circuit stated that it was not analyzing the predatory overbuying claims separately from the overbidding claims, *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1041, 1041 n.42 (9th Cir. 2005), and we treat the claims as functionally interchangeable for purposes of this case.

price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1039 n.30 (9th Cir. 2005). The Ninth Circuit found that these instructions "fairly and adequately cover[ed] the issues presented, correctly state[ed] the law, and [we]re not misleading." *Id.* at 1040. The Ninth Circuit rejected Weyerhaeuser's argument that the District Court should have required Ross-Simmons to prove that the predatory overbidding and overbuying had caused Weyerhaeuser to operate at a loss. *Id.* at 1046. The court held that predatory overbidding and overbuying cases are not governed by *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which required that a plaintiff asserting a predatory pricing claim prove that the defendant priced below an appropriate measure of cost and that a dangerous probability existed that the defendant could recoup the costs of predation by exercising monopoly power later.

The Ninth Circuit's approach was erroneous. The jury instruction it approved offers no judicially manageable standards for resolving predatory overbidding and overbuying cases. Further, there is a workable alternative squarely grounded in this Court's precedents: a plaintiff alleging predatory overbidding or overbuying must show that (1) the allegedly predatory bidding caused the defendant to price its output below the appropriate measure of cost, and (2) the defendant's conduct created a dangerous probability that defendant would be able to recoup the costs of predation and harm consumers through the exercise of monopsony power in the input market or monopoly power in the output market.

This Court has made clear that antitrust law is directed primarily at preventing harm to consumers. In every anti-

trust lawsuit and especially a competitor lawsuit, a theory of consumer harm and a factual story of consumer harm are necessary. The Ninth Circuit did not require, and Ross-Simmons did not provide, either. Nor can consumer harm be implied from overbidding for an input and the subsequent demise of some competitors. The chain of possible consumer harm is much more complicated, especially in a case like this where there is a competitive end market. In the absence of a theory and showing of consumer harm, the competitor suffers no antitrust injury, and the case must be dismissed for that reason alone. There is not a hint of evidence that Weyerhaeuser's conduct threatened reduced output or caused higher prices to consumers. To the contrary, the approach taken by the Ninth Circuit threatens to harm consumers by chilling firms from engaging in aggressive bidding for inputs they need to produce goods and services.

## I. INSTRUCTING JURIES TO LOOK FOR "FAIR PRICES" COURTS DISASTER.

The jury instruction given by the District Court and approved by the Ninth Circuit is the Achilles' heel of the Ross-Simmons's verdict. As noted, the only specific guidance the jury was given as to the predatory overbidding and overbuying claim required a determination whether Weyerhaeuser had purchased more logs or paid a higher price than "necessary" or Ross-Simmons had been deprived of the opportunity to purchase "at a fair price." The jury was left with no guidance as to what constitutes "necessity" or "a fair price." In effect, the district court and Ninth Circuit delegated to the jury discretion to make industrial policy unfettered by any concrete guidelines.

Since its earliest cases, this Court has consistently rejected efforts to judge competitive conduct by whether the prices resulting from the conduct were "fair" or "reason-

able." *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 22 (2d ed. 1993) (showing that in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), Justice "Peckham saw that a reasonable-price standard was no standard"). In then-Judge Taft's words, such an approach "set[s] sail on a sea of doubt" because the fairness or reasonableness of a price is an illusory question in the antitrust context. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899); *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("[H]ow is a judge or jury to determine a 'fair price?'"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (rejecting approach to monopolization cases that would ask whether defendant had earned more than a "fair profit").

The jury here had no basis, other than intuition, speculation, and idiosyncratic moral judgment, to decide whether Ross-Simons was able to obtain alder sawlogs at a "fair price," or whether Weyerhaeuser paid a price higher "than necessary." *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (noting that "[t]he concern that § 2 might be applied so as to further anti-competitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics").

It is particularly inappropriate to ask juries to scrutinize the "fairness" of prices in monopolization cases. Most jurors have no expertise in microeconomics or industrial organization policy and no basis to decide whether a particular price is the "right one" in some supposedly objective but utterly undefined way. As Professor Hovenkamp has observed, "juries remain a very weak link in a system where most of the relevant evidence is economic and

technical." Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 63 (2005).

Juries perform their function best when called upon to decide matters that are within common human experience. For example, price fixing and bid rigging cases are often fairly ordinary conspiracy cases where the ultimate question is whether two or more people agreed to a particular course of action. In such cases, the jury can rely on its familiarity with the dynamics of human interaction, the ordinary meanings of words, the significance of phone logs, correspondence, and similar evidence of contacts between the alleged conspirators, the credibility of witnesses, and other familiar evidence. In a monopolization case, such common sense questions are rare or nonexistent. The ultimate question that underlies monopolization liability is whether the defendant obtained, maintained, or attempted to obtain monopoly power by excluding rivals through "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," which requires "an element of anticompetitive *conduct*." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (internal quotation marks omitted). Resolving such questions requires a detailed economic understanding of competition in the relevant market, a matter wholly outside the ken of most jurors.

Jury research confirms that jurors struggle mightily to keep up in complex antitrust cases. Professor Arthur Austin's interviews with jurors in four antitrust cases, including the *Brooke Group* predatory pricing case resolved by this Court, is instructive. Professor Austin concluded:

> [T]the jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehen-

> sion. I concluded that at no time did any juror grasp — even at the margins — the law, the economics or any other testimony relating to the allegations or defense. . . . [A]t no time have I ever encountered a juror who had the foggiest notion of what oligopoly, market power, or average variable costs meant, much less how they applied to the case.

Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 Denv. U. L. Rev. 51, 54 (1995).

Given the difficulty that jurors face in understanding the economic matters that they are supposed to resolve, courts like the district court and Ninth Circuit here sometimes make the mistake of presenting jurors with "fairness" questions, thinking that this will somehow make the jurors' job easier. But, as this Court has repeatedly held, the antitrust law of monopolization is not about fairness or business ethics. It is about preventing the use of market power to suppress competition, and thereby preserving market-determined prices and levels of product quality for the benefit of consumers. Giving jurors fairness instructions only exacerbates the confusion and incoherence that can result from asking juries to decide monopolization cases.

Under our federal system, juries have a role to play in monopolization cases. But great care must be given to framing issues for jurors in way that makes it likely that the issues will be resolved in a coherent, rational, and reliable way. Punting broad questions of industrial policy to juries under mantras such as "fairness" and "reasonableness" invites arbitrary, erroneous, and socially disastrous policy-making.

## II. A COST/REVENUE TEST AND RECOUPMENT REQUIREMENT FOR PREDATORY OVERBUYING AND OVERBIDDING CASES ARE APPROPRIATE.

If the rudderless jury instruction approved by the Ninth Circuit is inappropriate, what would be an appropriate instruction for a predatory overbidding and overbuying case? *Amici* submit that the proper instruction would require the jury to find that the alleged predatory overbidding and/or overbuying on the input side caused the defendant to price below an appropriate measure of cost[3] on the output side and that the structure of the market created a dangerous probability that the defendant would be able to recoup the cost of its below-cost sales and harm consumers.

The Ninth Circuit rejected any such requirement based on a deeply flawed reading of this Court's precedents. It noted that, in *Brooke Group*, this Court found that even allegedly predatory price cuts bring immediate short-term benefits to consumers and that courts should therefore be reluctant to create liability rules discouraging price cutting without a strong showing that the discounting was likely to result in future supracompetitive pricing. 411 F.3d at 1037. The Ninth Circuit then found that, unlike predatory pricing on the output side, predatory overbidding on the input side does not bring immediate short-run benefits to consumers and, hence, the logic of the *Brooke Group* rule

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[3] This Court has not yet decided what is the appropriate measure of cost of predatory pricing cases, and there is a split among the circuits on this issue. *See* Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 4 n.10 (2005). The Court need not resolve this issue in this case since Ross-Simmons never showed that Weyerhaeuser priced its output below *any* measure of cost.

does not apply to predatory overbidding and overbuying. *Id.* at 1037-38.

The Ninth Circuit overlooked much of *Brooke Group's* reasoning and this Court's other predatory pricing precedents. Yes, this Court has expressed a resolve to protect price cutting because of its immediate consumer benefits. But the Court has also relied on a variety of other considerations that the Ninth Circuit did not consider. In particular, in framing stringent predatory pricing liability rules, this Court has relied on: (1) the general (though of course not complete) implausibility of predatory pricing allegations; (2) the difficulties of administering liability rules governing price competition; (3) the risk of chilling aggressive price competition; and (4) the immediate benefits to consumers of reduced prices. The Ninth Circuit reduced *Brooke Group* and this Court's other precedents to just the last factor. But the logic of this Court's precedents, and the very theory of predatory pricing and predatory overbidding, reveal that the two practices are usually two sides of the same coin and share all of the concerns that motivated this Court's predatory pricing decisions. Accordingly, the liability rules governing both practices should be symmetrical.

*First*, the Ninth Circuit missed this Court's guidance that allegations of predatory pricing schemes are inherently suspect because predatory pricing is a highly risky strategy unlikely to be undertaken very often. This was the Court's central concern in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which curiously escaped the Ninth Circuit's attention. In *Matsushita*, this Court noted that predatory pricing "is by nature speculative" because it requires a sacrifice of short-run profits with the hope that competitors will be excluded from the market and that new entrants will be deterred

from entering for long enough to permit the defendant to maintain its monopoly and recoup the costs of predation. *Id.* at 588-90. Thus, "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 587; *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 (1986) (observing that predatory pricing occurs infrequently).

The same goes for predatory overbuying and overbidding on the input side. Firms usually do not make money in input markets; they make money in output markets — that is, by selling things. The exclusionary mechanism of a predatory bidding scheme is therefore identical to that in a predatory pricing scheme. The predator must accept a short-term sacrifice of profits in the hopes that rivals will be driven from the market for long enough to permit future recoupment. A rival will be driven from the market only if it becomes unprofitable to stay in the market.[4] That will only occur if the rival would lose money by matching the defendant's price for the raw materials and then selling its products at market prices.

Consider the choices facing the rival that believes that another firm is embarking on a predatory overbidding campaign in order to obtain monopsony power in the up-

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[4] Indeed, in *Cargill* the plaintiff asserted a type of predatory overbidding theory similar to Ross-Simmons's. It asserted that, as a result of the challenged merger, the defendant would both "bid up the price it would pay for cattle" (the input side) and "reduce the price at which it sold boxed beef." 479 U.S. at 114. This Court quite correctly treated both of these claims as involving predatory pricing allegations. *Id.* at 117-18. Price competition can exclude a rival from the market by either increasing its costs (the input side) or decreasing its revenues (the output side). Either way, the rival's decision whether to stay in the market or exit comes down to the same calculation — whether revenues exceed costs.

stream market.[5] If the predator unnecessarily increases its bid, the rival must consider whether it is better off matching the predator's bid or exiting the market. If the rival could match the predator's bid and still make money selling its product, it will not exit the market and the predator will never obtain monopsony power. Any bid increase by the predator that does not result in the predator pricing below cost in the output market cannot exclude an equally efficient rival. Thus, a predatory overbidding or overbuying claim is conceptually identical to a predatory pricing claim. Predatory overbidding or overbuying is just as difficult to execute and just as unlikely to occur. If the alleged predator did not price its output below cost in a market conducive to recoupment and resulting consumer harm, it is not economically plausible that the defendant was a predator at all.[6] *See Matsushita*, 475 U.S. at 593 ("[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the

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[5] Ross-Simmons did not prove that Weyerhaeuser had any prospect of obtaining monopoly power in the downstream (output) market for hardwood lumber. This is a key failure of proof. It means that this is not a case where the defendant could have harmed consumers and profited by raising its rival's costs of production and consequently forcing a price increase in the output market. *See* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669, 679 (2005).

[6] In theory, a predator that lacks market power in the output market might attempt to recoup the costs of predatory overbidding by bidding down the price of inputs and decreasing its purchases of those inputs, consequently decreasing its output, but having no effect in the output market. However, such a strategy would not harm consumers since other competitors in the output market would pick up the slack from the predator's reduced sales and, therefore, prices and output in the output market would be unaffected. In any event, whether the predator sought to recoup in the input market or the output market, a predatory overbidding situation could not exclude equally efficient rivals unless it forced them to price below cost in the output market.

effect of such practices is often to deter procompetitive conduct.").

*Second*, this Court has expressed deep reservations about the administrability of liability rules sanctioning unilateral pricing behavior. A firm's unilateral decision to set its own price, whether to buy or sell, is the very essence of competition and deserves the fullest judicial protection except in the most egregious cases. In *Trinko*, this Court repeated its admonition from *Brooke Group* that "above-cost predatory pricing schemes, '[are] beyond the practical ability of a judicial tribunal to control.'" 540 U.S. at 414. As noted above, any test focusing on "fair," "reasonable," or "necessary" prices is impossible to administer whether it focuses on prices that are too low on the output side or too high on the input side.[7] A court should not condemn price competition unless it is certain that it can distinguish between socially beneficial and harmful behavior with a high degree of accuracy. A test that requires a concrete determination of the defendant's costs and revenues is administrable. The standard adopted by the district court and Ninth Circuit is not.

*Third*, this Court has expressed a deep concern that ill-crafted liability rules governing price competition could chill socially beneficial behavior. *See Brooke Group*, 509 U.S. at 226. The Ninth Circuit seems not to have recognized this danger. Although it admitted that "rising input

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[7] Not all of Amici believe that the *Brooke Group* below-cost test should apply in all circumstances, for example where an incumbent monopolist engages in above-cost limit pricing to deter entry by a new firm that has not yet achieved economies of scale. *See* Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L. J. 941 (2002). However, no such concern is presented here, since Ross-Simmons was already in the market at the time of the allegedly predatory overbidding and Weyerhaeuser is not accused of predatory selling.

prices" can benefit consumers, it did not believe that predatory overbidding in supply-inelastic markets (markets where the suppliers are unlikely to increase output in response to price increases) is valuable to consumers. 411 F.3d at 1038. But even if consumers would not benefit from aggressive bidding in any particular case, it would be wrong to frame liability rules for unilateral price competition around the features of any individual case. In sensitive areas like unilateral price competition, courts must be attuned to the systemic effects of the liability rules they announce and the danger of false positives.

In particular, courts must be concerned that loose liability standards governing unilateral price competition become tools for strategic misuse of antitrust law by rent-seeking rivals. A growing literature shows that competitors often misuse antitrust law to prevent aggressive and socially beneficial competitive behavior by rivals. *See* Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 5-32 (2005); R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. Strategic Mgmt. Educ. 37, 37-38 (2005); Edward A. Synder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247 (1985); Frank H. Easterbook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 33-39 (1984). The threat of a treble damages suit can deter firms from engaging in aggressive competition even if the probability that the plaintiff will win the case is low.

The Ninth Circuit's opinion gives plaintiffs carte blanche to assert predatory overbidding cases without undertaking cost/revenue comparisons or proving the possibility of recoupment simply by alleging that the supply

market was inelastic. This creates a dangerous loophole in predatory pricing law that will encourage and enable firms to exploit monopolization law to achieve anticompetitive purposes. Instead of bringing predatory pricing claims that would not meet *Brooke Group's* requirements, plaintiffs will recharacterize essentially the same claims as predatory overbidding allegations. Even the Ninth Circuit acknowledged that aggressive bidding on raw inputs often does benefit consumers by attracting new entry or increased supply into the market. 411 F.3d at 1038. As this Court noted in *Trinko*, "[t]he cost of false positives counsels against an undue expansion of § 2 liability." 540 U.S. at 414.

*Finally*, the Ninth Circuit found that predatory overbidding in supply-inelastic markets does not bring benefits to consumers since it does not result in an increase in supply. Here, again, the court's analysis was flawed in numerous respects.

First, unless supply is *perfectly* inelastic (and virtually no market matches this hypothetical proposition), predatory overbidding brings immediate benefits to consumers. During the period of alleged predation, the increased price of the inputs attracts a greater supply of the inputs, which in turn increases the supply in the output market, which in turn causes prices to fall in the output market. Thus, except in the extraordinary case of *perfectly* inelastic supply, consumers often do realize lower prices in the short run from predatory overbidding.

Second, if the supply of the input were perfectly inelastic, then injury to consumers would not have resulted from the achievement of monopsony power (buyer market power). The ordinary concern with monopsony is that the buyer will *depress* the price of the inputs it is purchasing, that because prices are depressed it must cut its purchases

of inputs because suppliers are less willing to sell at the artificially depressed prices, and that consequently the monopsonist must cut its output since it has fewer raw materials to use in production. 12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2011(b2), at 129 (2d ed. 2005). In order for consumers to be harmed in this way, the monopsonist must face an *elastic* supply curve — that is, suppliers must be willing to supply a smaller quantity of raw materials at the depressed prices — and the monopsonist must also have downstream market power. But, here, the Ninth Circuit explicitly rested its holding on the finding that supply was *inelastic* — that alder sawlog suppliers would not change the amount they were willing to supply based on changes in the price of alder sawlogs. If that is true, then consumers would not be harmed even if Weyerhaeuser obtained monopsony power, since it would still buy the same amount of sawlogs at the depressed prices and therefore would not have to lower its output in the hardwood lumber market.

Third, and relatedly, it is quite clear from the facts that Weyerhaeuser could not possibly have harmed consumers by obtaining monopsony power over alder sawlogs, even if it could have recouped by paying less than a competitive price and reducing its purchases of sawlogs. Significantly, there is no separate market for alder lumber and Weyerhaeuser had only a very small market share in the hardwood lumber market — the relevant output market. ER 581-82; ER 405. Given the fact that Weyerhaeuser had no market power in the output market, it would have been impossible for Weyerhaeuser to have recouped the costs of predatory overbidding by charging higher prices to its customers. Whatever else this case may be about, it is not about injury to consumers. *See Schor v. Abbott Labs.*, No. 05-3344, 2006 WL 2062117, at *3 (7th Cir.

July 26, 2006) (Easterbrook, J.) ("[I]f a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust to play.").

Finally, the Ninth Circuit ignored efficiency benefits to consumers from having resources allocated to the buyer who values them the most. In the ordinary case, the firm paying the highest price for raw inputs will be the firm that is most efficient at using those inputs to create products that consumers want to buy. Legal impediments to aggressive price competition for raw inputs arising from the Ninth Circuit's irretrievably vague standard of Section 2 liability would have the effect of distorting the market allocation mechanism by allocating resources to firms that value them less than the firms that would buy them absent the legal impediments.

In short, the concerns that animated this Court's prior predatory pricing decisions apply also in cases of alleged predatory overbuying or overbidding. If anything, predatory overbuying and overbidding pose less of a threat to consumers than predatory pricing, since a predator might achieve monopsony power in the upstream market and yet remain constrained from raising prices to consumers by competition in the downstream market. *Amici* respectfully submit that this Court should hold that a plaintiff alleging predatory overbidding or overbuying must show (1) that the allegedly predatory bidding caused the defendant to price its output below an appropriate measure of cost, and (2) that the defendant's conduct created a dangerous probability that defendant would be able to recoup the costs of predation and harm consumers through the exercise of monopsony power in the input market or monopoly power in the output market.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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WEYERHAEUSER COMPANY,
*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF *AMICI CURIAE* TIMBERLAND OWNERS AND MANAGERS SUPPORTING PETITIONER

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## QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that an antitrust plaintiff alleging predatory *sales* must prove (among other things) that the defendant had a dangerous probability of later recouping its "investment" in—*i.e.*, the cost of—the allegedly predatory scheme.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must show (at least) that the defendant had a dangerous probability of recouping, through the exercise of market power, the costs of the allegedly predatory purchasing.

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*National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679 (1978) ..... 15, 26

*Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993) ..... 3, 19-20

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*United States.* v. *Champion Int'l Corp.*, 1975-2 Trade Cases 60,453 (D. Or. 1975), aff'd, 557 F.2d 1270 (9th Cir. 1977) ..... 30

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*United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) ..... 11

*Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... 11, 12, 15

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E. Kwerel & W. Strack, FCC, *Auctioning Spectrum Rights* 2 (Feb. 20, 2001) ..... 17

MISCELLANEOUS

P. Areeda & H. Hovenkamp, *Antitrust Law* (2d ed. 2002) ..... 16, 23

P. Areeda & L. Kaplow, *Antitrust Analysis* (5th ed. 1997) ..... 16

P. Areeda & D. Turner, *Antitrust Law* (1978) ..... 13

R. Blair & J. Harrison, *Monopsony* (1993) ..... 14, 18, 21

TABLE OF AUTHORITIES—Continued

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R. Coase, *The Nature of the Firm*, 4 Economica (n.s.) 386 (1937) ..... 24

J. Coffee, Jr., *Regulating the Market for Corporate Control*, 84 Colum. L. Rev. 1145 (1984) ..... 16-17

R. D'aveni & A. Ilinitch, *Complex Patterns Of Vertical Integration In The Forest Products Industry*, 35 Acad. of Mgmt. J. 596 (1992) ..... 24-25

F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984) ..... 24

F. Easterbrook & D. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981) ..... 17

K. Elzinga & D. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard In* Brooke Group, 62 Antitrust L. J. 559 (1994) ..... 13

R. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819 (1981) ..... 17

I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) ..... 15

H. Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Pol'y Int'l 21 (2006) ..... 18

TABLE OF AUTHORITIES—Continued

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R. Marshall & M. Meurer, *Bidder Collusion and Antitrust Law: Refining the Analysis of Price-Fixing to Account for the Special Features of Auction Markets*, 72 Antitrust L. J. 83 (2004) ..... 17

J. McGee & L. Bassett, *Vertical Integration Revisited*, 19 J. L. & Econ. 17 (1976) ..... 24

B. Murray, *Oligopsony, Vertical Integration, and Output Substitution: Welfare Effects in U.S. Pulpwood Markets*, 71 Land Econ. 193 (1995) ..... 25

J. Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 S. Forest Econ. Workshop (1999) ..... 15-16

S. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669 (2005) ..... 14, 20

J. Schumpeter, *Capitalism, Socialism, and Democracy* (3d ed. 1950) ..... 27

A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Modern Library ed. 1994) (1776) ..... 14

W. Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. of Fin. 8 (1961) ..... 17

D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199 (1999) ..... 16

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IN THE

# Supreme Court of the United States

No. 05-381

WEYERHAEUSER COMPANY,

*Petitioner,*

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF *AMICI CURIAE* TIMBERLAND OWNERS AND MANAGERS SUPPORTING PETITIONER

### INTEREST OF *AMICI CURIAE*

*Amici* are owners and managers of some of the largest private timberlands in the Nation.[1] The Campbell Group is a closely-held concern based in Portland, Oregon, which manages hundreds of thousands of acres of timberland owned by pension funds and endowments. The Campbell Group markets timber and logs from the Pacific Northwest and Southern United States both domestically and abroad.

Forest Systems, LLC is an employee-owned firm based in Massachusetts. It manages thousands of acres of timberland in the Pacific Northwest and Southern United States, providing forest and portfolio management services as well as forestland valuation services.

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[1] The parties have consented to the filing of this brief in writing. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Global Forest Partners LP is an employee-owned timber investment management firm based in New Hampshire. It manages over $1.5 billion in timber investments in the United States, South America, Australia, and New Zealand.

Hampton Resources, Inc., through its affiliates, owns, manages and operates timberlands and sawmills in Oregon and Washington. It processes conifer logs in its own mills, and sells hardwood logs to third parties.

Hancock Natural Resource Group, Inc. is a registered investment adviser based in Boston, Massachusetts. It develops and manages global timberland portfolios in North America, Brazil, Australia, and New Zealand.

Menasha Forest Products Corp. is a privately-held real estate investment trust based in North Bend, Oregon. It owns 150,000 acres of timberland in Oregon and Washington, and sells timber in domestic and export markets.

Plum Creek Timber Company, Inc. is a privately-held real estate investment trust based in Seattle, Washington. It owns over 8 million acres of timberland in the United States; it sells timber and logs; and it produces lumber, plywood, and medium-density fiberboard.

Resource Management Service, LLC is an independent, employee-owned manager of forest investments. Based in Birmingham, Alabama, it has bought, sold, and managed timberland in the Southern United States since 1950.

The Ninth Circuit's decision in this case holds that petitioner, a purchaser of alder sawlogs, may be held liable for treble damages under Section 2 of the Sherman Act, 15 U.S.C. § 2, for paying more than "necessary" for its inputs to deny competitors access to those inputs at a "fair" price. It held that such liability may be imposed, moreover, without showing that the purchaser could recoup the costs of the alleged overbuying through the exercise of market power later on. As timberland owners and managers that harvest timber and sell logs to companies like petitioner and respondent, *amici* have a profound interest in this case. By

establishing an unintelligible standard for antitrust liability (*i.e.*, imposing liability for paying more than a "fair" price or for buying more logs than "necessary"), the decision risks condemnation of legitimate competition among buyers. That chills price competition for the logs that *amici* sell. Because it restricts bidding competition for goods, the decision reduces the ability to expand supply—by bringing otherwise uneconomic sources to market—in times of high demand. It also prevents price competition from allocating resources to the highest-value users.

## STATEMENT

1. Congress enacted the Sherman Anti-Trust Act, 15 U.S.C. § 1 *et seq.*, in 1890 to proscribe the unlawful acquisition and retention of market power. Section 1 prohibits contracts or combinations "in restraint of trade." *Id.* § 1. Section 2 addresses unilateral conduct and certain types of concerted conduct. It provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * * ."

*Id.* § 2. Antitrust laws provide a private, treble-damages remedy for those injured by violations of the Act. *Id.* § 15.

This Court has long interpreted Section 2 of the Sherman Act to prohibit unilateral conduct that is "predatory," *i.e.*, conduct that excludes competition on some basis other than efficiency, if it results in a monopoly or poses "a dangerous probability of actual monopolization." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 455 (1993). In the context of predatory pricing—where the defendant is accused of aggressively cutting prices to force competitors from the market—the Court has required proof that (1) "the prices complained of are below an appropriate measure" of the defendant's cost, and (2) the defendant had "a dangerous probability[] of recouping its investment in

below-cost prices." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). This case concerns whether similar principles apply to allegedly exclusionary *purchasing* of inputs, *i.e.*, to cases where the defendant is accused of bidding up prices and purchasing large amounts of an input to deny competitors access to it.

2. Petitioner Weyerhaeuser and respondent Ross-Simmons Hardwood Lumber Co. operated competing sawmills in the Pacific Northwest. The predominant hardwood species in that area is red alder.[2] Although alder was once considered an undesirable "weed" tree, it now is a highly desirable hardwood that can be processed into lumber and made into cabinets, fine furniture, veneer, plywood, and paper products. (It is the only wood used for the famous Fender Stratocaster electric guitar.) Red alder can also be used for barbecuing and smoking meats.

At least three groups are involved in the production of alder products. Timberland owners and managers harvest timber and supply sawlogs. The *amici* participating in this brief fall into that category. They own and manage timberland; harvest timber; and supply logs. Sawmill owners and operators buy the logs and process them into finished lumber and other materials.[3] Petitioner Weyerhaeuser falls into this category, as did respondent before closing its facility in 2001. Finally, still others purchase finished hardwoods for use in consumer products. Pet. App. 2a-3a.

Respondent began operating an alder sawmill in Washington in 1962; petitioner entered the Pacific Northwest alder market in 1980. Pet. App. 3a. From 1996 to 2001, Weyerhaeuser purchased about 65% of the alder sawlogs marketed for processing in the Pacific Northwest. *Ibid.*

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[2] At the most general level, sawlogs and lumber are divided into two categories—"softwood" (*e.g.*, conifers such as white pine and douglas fir) and "hardwood" (*e.g.*, cherry, maple, walnut, and alder).

[3] Because alder logs are expensive to transport, alder sawmills usually operate within 100 miles of their timber sources. Pet. App. 2a-3a.

During that period, its share of North American hardwood lumber sales was less than 3%. Pet. 4; C.A. E.R. 405. Between 1998 and 2001, the price of alder sawlogs increased. Pet. App. 3a. Simultaneously, hardwood lumber prices dropped. *Ibid.* During that time, about 9 hardwood mills in the region, including respondent's, became unprofitable and closed. C.A. E.R. 443-444.

Respondent filed this suit against Weyerhaeuser in December of 2000, claiming that Weyerhaeuser violated Section 2 of the Sherman Act by attempting to monopolize the alder sawlog market in the Pacific Northwest. Respondent alleged, among other things, that Weyerhaeuser had engaged in "predatory overbidding" or "predatory purchasing." Pet. App. 3a. According to respondent, Weyerhaeuser had overpaid for, and overpurchased, alder sawlogs to drive up prices and reduce the supply available to competing sawmills. *Id.* at 3a-4a.

At the close of trial, the district court instructed the jury on respondent's theory of predatory purchasing as follows:

> One of [respondent's] contentions in this case is that [Weyerhaeuser] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.

Pet. App. 7a n.6; C.A. E.R. 573.[4] The jury found for respondent, and the court awarded treble damages in the amount of $78,769,218. Pet. App. 4a.[5]

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[4] The jury was also instructed on respondent's claims that Weyerhaeuser had entered into restrictive purchasing agreements with sawlog suppliers, and had made misrepresentations to obtain sawlogs from state forests. See Pet. App. 4a; C.A. E.R. 50-53.

[5] The jury found against respondent on its claim that Weyerhaeuser had monopolized or attempted to monopolize the market for finished red alder lumber. It found there was no distinct market for *alder* lumber, presumably because alder and other hardwoods are interchangeable for most purposes. C.A. E.R. 581-582.

3. The Ninth Circuit affirmed. The Ninth Circuit first addressed whether predatory purchasing claims should be governed by standards similar to those that govern predatory pricing claims. Pet. App. 6a-13a. The Ninth Circuit explained that, under this Court's decision in *Brooke Group*, a plaintiff alleging predatory pricing—that the defendant aggressively *cut prices* to drive out competitors—must meet demanding standards. First, the plaintiff must show "the prices complained of are below an appropriate measure" of the defendant's cost. Pet. App. 7a. Second, the plaintiff must show that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Ibid.*

The Ninth Circuit held that plaintiffs alleging predatory *purchasing*—that the defendant aggressively *bid up the price of inputs* to drive out competitors—need not make analogous showings. It thus rejected Weyerhaeuser's claim that "overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of its recoupment of losses existed." Pet. App. 7a-8a. The Ninth Circuit recognized that "buy-side predatory bidding cases," like "sell-side predatory pricing cases," allege the use of price to impede competition. *Id.* at 8a-9a. But it declared that "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 9a. If there is predatory pricing, consumers benefit from aggressive price cuts. By contrast, aggressive bidding for inputs does not necessarily lower prices. The Ninth Circuit acknowledged that, if end-product prices decline during bidding predation, then consumers might benefit. But it asserted that such price declines would "place even greater pressure on competitors, increasing the threat to competition from the predatory bidding." *Id.* at 10a. The court continued (*ibid.*):

> Moreover, predatory bidding claims do not directly challenge a firm's decision to cut prices; instead, they focus on a firm's decision to raise the cost of inputs. Therefore, the concerns the *Brooke Group* Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory buying is at issue.

The Ninth Circuit also rejected the possibility that "rising input prices might encourage new companies to enter the supply side of the market" or otherwise "encourage innovation and efficiency so that consumers benefit in the long run." Pet. App. 11a. The Ninth Circuit declared that such a result was not likely here because alder sawlogs are "a natural resource of limited annual supply in a relatively inelastic market." *Ibid.* (The Ninth Circuit did not address whether declining margins between the price of sawlogs on the one hand, and the price of finished lumber on the other, would encourage sawmills to increase efficiency.) The Ninth Circuit therefore held that the "standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing." *Ibid.*

Accordingly, the Ninth Circuit ruled that the trial court "did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of * * * recoupment * * * existed," Pet. App. 14a, and likewise rejected Weyerhaeuser's challenge to the sufficiency of the evidence, *id.* at 17a. The Ninth Circuit did not address whether there was sufficient evidence to support liability under a theory other than predatory purchasing. *Ibid.*

## SUMMARY OF ARGUMENT

A. This Court has long recognized the difficulty of distinguishing procompetitive unilateral conduct—aggressive competition—from anticompetitive predation. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588

(1986). To avoid erroneous condemnation of lawful competition, the Court has required that claims of "predatory" conduct brought under Section 2 of the Sherman Act be evaluated under objective standards. In general, plaintiffs must show that the challenged conduct is inconsistent with permissible competition. The inference of anticompetitive conduct, moreover, must make "economic sense." *Matsushita*, 475 U.S. at 587-593. With respect to allegations of "predatory pricing"—*i.e.*, that the defendant aggressively cut prices to drive out competition—the plaintiff must show, *inter alia*, that the defendant was dangerously likely to "recoup" forgone short-term profits by collecting supracompetitive, long-term profits after driving competitors from the market. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993).

B. Like claims of predatory pricing, claims of "predatory bidding"—such as in this case—"make[] no economic sense" absent a dangerous likelihood of recoupment. *Matsushita*, 475 U.S. at 587. The Ninth Circuit thought it appropriate to uphold a "predatory bidding" verdict without such proof because, in its view, false condemnation of aggressive bidding on the buy-side is less problematic than false condemnation of price-cutting on the sell-side. Not so. Aggressive bidding for inputs, no less than aggressive price cuts, is a feature of healthy competition. Unrestrained bidding for inputs, moreover, is necessary for proper operation of most markets, including timber markets. When bidding drives prices up, producers bring additional supplies on line. Supply in timber markets is very responsive to price. In addition, vigorous competition among bidders ensures that valuable resources are allocated to the bidder that values the resources most highly—generally, the bidder that will put the resources to their most efficient, intensive, and socially valuable use.

C. The Ninth Circuit's jury instructions toss a monkey-wrench into the operation of those mechanisms. Without a

recoupment requirement, standards such as "more than necessary" or "fair price" are incapable of separating competitive from anticompetitive conduct. Competitors subjected to such standards will have to think long and hard before bidding aggressively for inputs for fear of paying treble damages for having competed too well.

The instructions approved by the Ninth Circuit are especially problematic in the timber industry, where many procompetitive practices may easily be mistaken for overbidding or overbuying. For example, sawmills often establish a "cold deck," an inventory of logs stored to guard against seasonal disruptions of supply. Timber purchasers may also purposefully err in the direction of overpurchases to avoid allowing their large capital investments and labor forces to sit idle during periods of undersupply. The Ninth Circuit's jury instructions simply fail to offer any protection against false condemnation of such procompetitive conduct.

D. The Ninth Circuit suggested that false positives in the context of bidding competition are not problematic—and that proof of recoupment was therefore unnecessary here—because alder supply is relatively "inelastic." That is incorrect. First, requiring different jury instructions for different markets, depending on elasticity of supply (often a hotly contested issue) is unworkable in practice. Second, even in inelastic markets, price-competition among buyers plays a critical role in allocating goods to the most efficient, highest-value user—a role the Ninth Circuit wholly ignores and wholly undermines. Third, factually, the supply of timber and alder sawlogs to market is highly elastic, not inelastic. Fourth, drawing such distinctions offends this Court's practice of evaluating buy- and sell-side competition under equivalent standards.

## ARGUMENT

The Ninth Circuit in this case upheld an antitrust verdict of more than $70 million based on jury instructions that lacked objective criteria. In particular, the court of appeals

held that a plaintiff can establish a claim of anticompetitive overbidding—and obtain treble damages—if the jury finds that the defendant purchased "more" of an input "than it needed or paid a higher price * * * than necessary" to prevent competitors from obtaining that input "at a fair price." Sellers like *amici* should not be restricted to selling—and potential purchasers should not be restricted to buying—at a price deemed "fair" by a jury after the fact. To the contrary, sales must be permitted at prices set by the competitive market, with potential liability determined under predictable legal standards.

Sometimes vigorous competition increases the price of an input, like alder sawlogs, as competing buyers aggressively bid for it. When that occurs, it signals producers to bring more supply to market to prevent shortages. That effect is particularly important in the timber industry, because the decision to put any particular stand of timber to market is highly price sensitive. In addition, competitive bidding ensures that inputs like red alder are allocated to the highest-value user, not misallocated to less efficient firms with lower-value uses. Finally, aggressive competition for inputs, no less than competition for sales, weeds out less efficient competitors.

The threat of antitrust liability under an essentially standardless standard, like that approved by the Ninth Circuit here, inappropriately disrupts that process. It chills purchasers from engaging in aggressive purchase-price competition that is critical to ensuring an efficient supply of inputs. And it produces economic inefficiency, effectively guaranteeing lower-value timber users access to timber that can be used more efficiently by others. Aggressive antitrust enforcement is critical to protecting competition. But that enforcement must occur under objective standards so that the laws designed to protect competition do not become the means of impeding it. In the context of predatory purchasing claims, particularly in this industry, a

clear instruction on the issue of recoupment is indispensable to ensuring that the antitrust laws do not punish the fierce competition those laws were intended to protect.

### A. Proof Of Recoupment Is Essential To Any Economically Rational Predation Claim

On its face, procompetitive behavior (particularly unilateral action) is often indistinguishable from anticompetitive conduct. No less than would-be monopolists, fierce competitors in fully competitive markets seek to beat the competition. Because the means of "legitimate competition" and "the means of illicit exclusion" are both "myriad," *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)), this Court repeatedly has warned against the adoption of Section 2 standards that result in "false positives." "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct'"—the competition—"'the antitrust laws are designed to protect.' * * * The cost of false positives counsels against an undue expansion of § 2 liability." *Ibid.* (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

The difficulty of distinguishing vigorous competition from anticompetitive conduct arises with particular force where predatory pricing behavior is alleged. Typically, a "predatory pricing" claim involves the assertion that the defendant aggressively cut its prices to eliminate competition. But sellers also compete legitimately by cutting prices; that is the essence of price competition. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Confronted by the need to distinguish competitive from anticompetitive price cuts, this Court has strived for objective and administrable standards.

In *Matsushita*, for example, the Court addressed whether a plaintiff alleging predatory pricing had adduced sufficient proof to withstand a motion for summary judgment.

Noting "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful," 475 U.S. at 589, the Court explained that "courts should not permit factfinders to infer" such conduct "when such inferences are implausible * * * ," *id.* at 593. The Court declared that conduct "as consistent with permissible competition as with illegal [conduct] does not, standing alone, support an inference of antitrust [violations]." *Id.* at 588. Thus, plaintiffs must show conduct that is *inconsistent with* permissible competition. In addition, a plaintiff's allegations must be grounded in economic reality: If the claim is "implausible—if the claim is one that simply makes no economic sense—[the plaintiff] must come forward with more persuasive evidence * * * than would otherwise be necessary." *Id.* at 587.

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court again applied *Matsushita*'s requirements to allegations of predatory selling. The Court observed that price cuts that merely reflect one competitor's "lower cost structure" are the essence of "competition on the merits." *Id.* at 223 (quoting *Atlantic Richfield*, 495 U.S. at 340). "[S]tandards for predatory pricing liability" must not be "so low that antitrust suits themselves bec[o]me a tool for keeping prices high." *Id.* at 226-227. The Court therefore held that plaintiffs must show pricing behavior that is inconsistent with legitimate competition by proving "that the prices complained of are below an appropriate measure of [the defendant's] costs." *Id.* at 222.[6]

The Court also reiterated *Matsushita*'s requirement that allegations of anticompetitive conduct must be economically "plausible." *Brooke Group*, 509 U.S. at 224 (citing *Matsushita*, 475 U.S. at 589). Because aggressive price-cutting

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[6] Analogously, in *Trinko*, 540 U.S. at 409-410, this Court refused to impose liability for failure to cooperate with rivals absent proof that, in so doing, the defendant terminated a previously profitable relationship or otherwise refused full compensation at its profitable retail rates.

forces the alleged predator to endure losses in the short term, predatory pricing is plausible only if the losses are treated as "an investment." And "[f]or the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." 509 U.S. at 224. A finding of likely recoupment is thus a *sine qua non* for any predatory pricing claim: Recoupment "is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation." *Ibid.*

But recoupment is far from assured:

> For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals[, such as] driving them from the market * * * .

*Brooke Group*, 509 U.S. at 225 (citing 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 720c (1978)). In addition, even if competitors are driven from the market, the success of any predatory scheme depends upon *maintaining* monopoly power long enough both "to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 590; K. Elzinga & D. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard In* Brooke Group, 62 Antitrust L. J. 559, 583 (1994). Simply put, when deciding whether a predation claim "makes * * * economic sense," 475 U.S. at 587—and ensuring that the antitrust laws do not punish the procompetitive conduct they were intended to protect—recoupment is an indispensable criterion.[7]

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[7] One court has questioned whether *Brooke Group* applies where the defendant is accused of adopting a price structure that—by linking discounts to the purchase of a range of products—is tantamount to an exclusive dealing arrangement. *LePage's Inc.* v. *3M*, 324 F.3d 141, 154-163 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004). No such arrangement is alleged here. This case involves a straightforward "predatory bidding" claim. *LePage's*, moreover, did not address the necessity of proving recoupment.

### B. Recoupment Is Likewise Necessary For Predatory Purchasing Claims

This case, of course, involves a claim of predatory purchasing on the "buy side" rather than predatory pricing on the "sell side." Thus, respondent does not allege that Weyerhaeuser cut prices for its output. It alleges that Weyerhaeuser bid up prices for inputs. In particular, respondent claims that Weyerhaeuser overbought and overpaid for alder sawlogs to prevent competitors from obtaining them at an affordable price. See Pet. App. 3a-4a; see generally R. Blair & J. Harrison, *Monopsony* 66 (1993). As in the context of predatory pricing, however, it can be very difficult to distinguish between legitimate bidding behavior and predatory purchasing. As in the context of predatory pricing, moreover, the effects of any rule that results in "false positives" and unwarranted liability would be profoundly negative. Consequently, as in the context of predatory pricing, the need for jurors and courts to be guided by objective criteria—such as the requirement that there be a dangerous likelihood of recoupment—is inexorable.

1. No less than aggressive price cuts, aggressive bidding is typical of competitive behavior. The "competitive instinct" of *all* buyers competing for valuable resources is "to bid up price." *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 925 (1st Cir. 1984) (Breyer, J.). Adam Smith recognized as much at the time of this Nation's founding. See A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book One, ch. VII (Modern Library ed. 1994) (1776) (where demand for a commodity outpaces supply, "[a] competition will immediately begin among [buyers], and the market price will rise" in accordance with "the eagerness of the competition"). As a result, the "difficulty of distinguishing an anticompetitive overbuying strategy from a competitive purchase expansion can be similar to the difficulties in predatory pricing matters." Pet. App. 9a n.14 (quoting S. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669, 702 (2005)). Often, "it may

be difficult for a court to know whether the firm is attempting to predate or simply competing in the input market with rivals who are also purchasing the inputs." *Ibid.*

2. Moreover, "erroneous inferences and the resulting false condemnations" are no less "costly" in predatory purchasing cases than in predatory pricing cases. *Trinko*, 540 U.S. at 414. In both contexts, too lenient a standard threatens to "chill the very conduct the antitrust laws are designed to protect." *Ibid.*

a. As this Court has observed, "[p]rice is the central nervous system of the economy." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978) (quotation marks omitted). That is no less true when prices *rise* because of competition among buyers than it is when prices decline because of competition among sellers. In competitive markets, increasing prices signal suppliers to increase their output to meet increased demand. In the timber industry, for example, timber from certain lands (*e.g.*, remote areas, or those with difficult terrain) is more costly to extract. That timber will not be brought to market at lower price levels. If demand increases and purchasers begin paying higher prices, however, suppliers can and will put higher-cost timberlands into profitable service. Economists have long recognized that the supply of timber is highly price-sensitive.[8] Indeed, like private sellers, the

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[8] See, *e.g.*, I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) ("Price expectations play a critical role in timber markets. Each period, producers must decide whether to harvest or hold their timber."); R. Yin & D. Newman, *A Timber Producer's Entry, Exit, Mothballing, and Reactivation Decisions Under Market Risk*, 5 J. Forest Econ. 305, 306 (1999); *id.* at 317 ("Due to harvest flexibility and relatively low costs associated with temporary suspension of production, mothballing [*i.e.*, temporary suspension of production] enters the producer's choice set as a critical marketing decision."); J. Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 S. Forest Econ. Workshop 26 (1999) ("Timber supply responds to market signals through the myriad private and public decisions to harvest a portion of

United States relies on market forces to allocate its timber resources. When harvesting rights are set for auction, bidding must exceed an appraised-value reserve price. 16 U.S.C. § 472a(a), (e)(1)(B). The government's timber thus is not put to market unless prices exceed a certain threshold.

A rule that too lightly imposes liability—much less treble damages liability—throws a monkey-wrench into that market mechanism. Confronted by the threat of liability for paying what a jury deems more than a "fair" price, purchasers would have to think long and hard before competing aggressively for inputs on price. Denied the price stimulus to put additional or more costly resources into service, suppliers would not be able to alleviate shortages. If producers "are forced to accept less than the competitive price for their product, * * * the result will be that individual [producers] will either produce less or stop producing at all. [Input buyers] will purchase fewer [inputs] and * * * will also produce less [of their finished product]." 12 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 2011b1, at 128-129 (2d ed. 2002). That injures consumers and producers alike.

b. In addition, price competition among buyers is critical to ensuring that inputs and resources are directed to their most productive use. In a competitive market, the party willing to pay the most for an input generally is the one that will put it to its most valuable use, employing it most efficiently and intensively. See P. Areeda & L. Kaplow, *Antitrust Analysis* 7-8 (5th ed. 1997). "It is an uncontroversial proposition of economics that the highest

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timber inventories. The aggregate response to price is, therefore, a function of biology, the environment, the characteristics of the inventory, and the objectives of the harvest decision makers."), *available at* http://www.srs.fs.usda.gov/econ/pubs/misc/jpp992.pdf; D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199, 211 (1999) ("Supply in the short and medium runs may be highly variable in response to market fluctuations * * * ."). See also pp. 28-29, *infra* (responding to the claim that alder timber is different).

bidder in an auction is likely to be the most efficient user of the assets being sold." J. Coffee, Jr., *Regulating the Market for Corporate Control*, 84 Colum. L. Rev. 1145, 1151 n.11 (1984).[9] Simply put, those who plan to put an input to a lower-value use, or who will make less efficient use of it, ordinarily will not pay as much for it. Conversely, more efficient competitors who will put the input to higher-value use are generally willing to pay more.

For that reason, the United States has adopted a policy of allocating some scarce public resources to the highest bidder. The FCC has concluded that "competitive bidding" ensures that electromagnetic (radio) spectrum is made "available to those who value it most highly and therefore are most likely to put it to its most economically efficient use." 62 Fed. Reg. 9636, 9640-9641 (Mar. 3, 1997); see E. Kwerel & W. Strack, FCC, *Auctioning Spectrum Rights* 2 (Feb. 20, 2001) (assigning licenses to high bidders allocates them to "the parties that value them most highly," *i.e.*, those who are "generally best able to provide consumers with the services they most want, while using the spectrum most efficiently."). For similar reasons, the Justice Department has supported competitive bidding to allocate capacity at La Guardia Airport in New York. See Comments of the U.S. Department of Justice, Docket No. FAA-2001-9854, at

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[9] "Allocating resources among competing claimants by price is desirable because it places resources with the most efficient users." R. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819, 872 (1981). See also F. Easterbrook & D. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1176 n.40 (1981) ("[T]he best indication of the ability to put something to a valuable use is the willingness to pay for it."); W. Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. of Fin. 8, 14 (1961); R. Marshall & M. Meurer, *Bidder Collusion and Antitrust Law: Refining the Analysis of Price-Fixing to Account for the Special Features of Auction Markets*, 72 Antitrust L. J. 83, 111 (2004) (Because "the bidder with the highest valuation always wins," allocation by price "achieves greater allocative efficiency.").

1 (June 20, 2002) (explaining that "[m]arket-based mechanisms (like * * * a recurring auction market for slots)" help ensure that inputs are put "to their highest valued use").

Timber is no different. As in other contexts, bidding competition allocates alder sawlogs to the competitors that will put the logs to their highest and most socially valuable use. Consistent with that, the United States—as in other contexts—relies on the allocative efficiency of the auction process when distributing the right to harvest timber on federal land. 16 U.S.C. § 472a(a), (e)(1)(B); pp. 15-16, *supra*.

Imposing liability haphazardly mutes that price competition among buyers and prevents efficient allocation. Under such a regime, the most efficient and best user of sawlogs (or any other input) could not aggressively outbid others, for fear that it will confront treble-damages liability for paying more than "necessary." With competition thus dampened, valuable resources would be allocated to less-efficient competitors, with less valuable uses, by default. When that occurs, efficiency suffers and consumers pay the price.

c. Because of those concerns—to avoid dampening competition among buyers—predatory purchasing claims, like predatory pricing claims, must be governed by an objective standard capable of precluding false positives. As in the context of predatory pricing, that requires a factual finding that the defendant had a dangerous probability of "recouping" the expense of the allegedly predatory scheme through the exercise of market power later on. "[P]roof of recoupment seems essential in all cases of predatory spending." H. Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Pol'y Int'l 21, 38 (2006). Absent a significant likelihood of recoupment, an alleged predatory purchasing scheme "makes no economic sense." *Matsushita*, 475 U.S. at 587. Merely overpaying for a good "ordinarily is not cost justified unless it leads to a future payoff." *Monopsony*, *supra*, at 66; Pet. App. 10a ("In the long run, to carry out a predatory bidding scheme suc-

cessfully, a firm would have to recoup the higher costs it had paid for its materials"). Thus, even assuming that "overpayment" in some sense can be proven, allegations of predatory conduct should not be given credence absent proof that recoupment is likely.

### C. The Jury Instructions Here Were Insufficient To Prevent Condemnation Of Procompetitive Conduct In Timber Markets

Notwithstanding *Matsushita* and *Brooke Group*, the Ninth Circuit endorsed a jury instruction that omitted any requirement that respondent prove a dangerous probability of recoupment. See 4/17/2003 Tr. 7, 11 (deleting requirement). Instead, the Ninth Circuit allowed the jury to condemn bidding behavior based on the subjective conclusion that the defendant paid "a higher price than necessary" in order to prevent others from obtaining inputs "at a fair price":

> One of [respondent's] contentions in this case is that [Weyerhaeuser] purchased *more logs than it needed*, or paid *a higher price for logs than necessary*, in order to prevent [respondent] from obtaining the logs [it] needed at a *fair price*. If you find this to be true, you may regard it as an anti-competitive act.

Pet. App. 7a n.8; C.A. E.R. 573 (emphasis added). As the Ninth Circuit summarized, the trial court "instructed the jury that, if it found that Weyerhaeuser paid higher prices than necessary for sawlogs, the jury could regard that as an anticompetitive act." Pet. App. 4a.

1. Those sorts of standards—"a higher price than necessary," "more logs than it needed," and "a fair price"—are wholly incapable of reliably separating anticompetitive conduct from procompetitive conduct. This Court has "held in the Sherman Act § 2 context that it [is] not enough to inquire whether the defendant has engaged in 'unfair' or 'predatory' tactics." 509 U.S. at 224-225 (quoting *Spectrum*

*Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993)). Yet that is effectively what the jury instruction did here.

Such an instruction is particularly problematic in this context. Ordinary, competitive business practices in the timber industry can easily be misinterpreted as nefarious. For example, the standard of "more logs than * * * needed" is difficult to apply in a meaningful fashion given that alder sawlog purchasers will, for procompetitive reasons, buy more timber than might seem needed to meet immediate production goals. Purchasers often make excess purchases seasonally to establish what is known as a "cold deck."[10] The large, fixed, capital investments involved in sawmill operations make operators prone to err in favor of over-purchases rather than underpurchases, because the latter might idle expensive plants and employees,[11] or threaten the development of a nascent customer base.[12] Purchasers may "overpurchase" to hedge against future price increases[13]; and restart costs might make it sensible to

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[10] The "cold deck" is an inventory of "logs stored for future removal." 29 C.F.R. § 1910.265. Purchasers establish a "cold deck" because, during certain seasons, freshly harvested timber may become unavailable.

[11] Timber processing requires intense fixed capital investments, as well as a large labor force whose compensation includes not merely variable costs (*i.e.*, wages) but also relatively fixed costs (*i.e.*, benefits programs). If a sawmill goes idle, then the capital and human resources employed by the firm go unused. By stockpiling, the purchaser can "smooth" variations in timber supply and keep some capital and a fixed labor force working at a regular and productive pace.

[12] A purchaser may be particularly averse to the risk of losing supply if its customers are just becoming accustomed to using the purchaser's product—*e.g.*, a purchaser of alder sawlogs may fear that customers will switch to a substitute hardwood/hardwood supplier and never switch back. If that purchaser's risk-benefit calculus differs from its competitors, it may amass a relatively greater inventory.

[13] As in other contexts, a firm anticipating future price increases may "hedge" by securing supply in the present. S. Salop, *supra*, 72 Antitrust L. J. at 683.

operate at a loss for certain periods.[14] All of that, unfamiliar to jurors, easily can be mischaracterized by plaintiffs' counsel as nefarious efforts to drive out competition.

The notion of depriving competitors of goods at a "fair" price is likewise problematic. In market economies, prices must be set by supply and demand, not by a jury's subjective concept of "fairness." Juries may believe that it is "unfair" that gasoline now costs $3 per gallon. But when driven by the legitimate economic forces of supply and demand, such a price—high as it may seem—is lawful. And, in the timber industry, prices often exceed the fair price set by professional appraisers. When the United States sells its timber resources, it sets an appraised-value reserve price—the appraiser's estimate of fair price—below which the United States will not sell. 16 U.S.C. § 472a(a), (e)(1)(B). Although the government establishes a "fair" or appraised value as a floor, bidding regularly exceeds that amount. Under the Ninth Circuit's theory, that bidding—because it exceeds the governmentally established fair price—is a potential antitrust violation.

2. There is, moreover, substantial reason to believe that a jury, properly instructed on the issue of recoupment, would have concluded that Weyerhaeuser's aggressive competition for alder sawlogs was anything but anticompetitive. A rational predatory purchaser must recoup its losses—its "investment" in the scheme—in one of two ways: (1) by exercising power to raise prices in the market for the goods it sells (monopoly power), or (2) by exercising power to lower prices in the market for the inputs it buys (monopsony power). See *Monopsony, supra*, at 66.

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[14] Assembling an effective labor force for the plant can be very costly. Because of that, sawmills may choose to operate at a loss and retain their employees even if, in the short term, dismissing their employees and shuttering the plant would save money. In other words, sawmills will endure short-term operating losses to avoid the larger costs they would incur in reassembling their labor force and restarting the plant when economic conditions change.

Plaintiffs could not prove that Weyerhaeuser was likely to obtain monopoly power as a seller of finished alder lumber. Weyerhaeuser's market share for hardwood lumber sales in North America was less than 3% during the relevant period. Pet. 4; C.A. E.R. 405. With that small market share, Weyerhaeuser could not unilaterally sustain a price increase, much less one sufficient to allow it to recoup losses incurred in a predatory scheme.[15]

There is equal reason to doubt that a properly instructed jury would have found that Weyerhaeuser could recoup forgone profits by exercising monopsony power as a buyer of alder sawlogs.[16] As the *sellers* of alder sawlogs, *amici* are particularly sensitive to the risk of a purchaser exercising "monopsony" power to *depress* timber prices. *Amici* agree that it is unlawful for a purchaser to obtain such power by anticompetitive means. After all, "monopsony pricing

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[15] The jury found against respondent on its claim that Weyerhaeuser monopolized or attempted to monopolize the market for finished red alder lumber. It found that there was no distinct market for *alder* lumber, presumably because alder lumber and lumber made from other hardwoods are generally interchangeable. C.A. E.R. 581-582.

[16] Indeed, in another action with similar claims of anticompetitive conduct, the trial court instructed the jury that, for the year 2002, bidding could be anticompetitive only if, "at the time [Weyerhaeuser] acted, it had a reasonable expectation that it could recoup any losses sustained through this conduct, by paying lower log prices in the future due to a reduction in competition from other sawmills." *Washington Alder LLC* v. *Weyerhaeuser*, Civ. No. 03-753-PA, Jury Instructions at 11 (May 18, 2004). For the period covered by that instruction, the jury found *no* liability. See Verdict at 2, *Washington Alder*, *supra* (May 20, 2004). The jury imposed liability for the period from June 1999 to December 2001. For that time period, however, the court instructed the jury that it must consider two elements—that Weyerhaeuser had "monopoly power" and that it had willfully acquired or maintained that power "through anticompetitive conduct"—proved because of the issue-preclusive effect of the verdict in this case. Jury Instructions, *supra*, at 5 (directing that, because "the prior jury verdict addressed" those issues for "the period June 1999 through December 2001," the jury "must consider those elements to have been proven.").

* * * is analytically the same as monopoly or cartel pricing[, and is] so treated by the law." *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1360-1361 (7th Cir. 1996) (Posner, J.), rev'd on other grounds, 522 U.S. 3 (1997); see *United Airlines, Inc.* v. *U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005) (Easterbrook, J.) ("United fancies the position of monopsonist, which the antitrust laws forbid on equal terms with monopoly.").

But any claim that Weyerhaeuser could recoup losses by forcing alder sawlog prices down is wholly counterfactual. Despite respondent's departure from the market, alder sawlog prices have continued to increase. According to *Log Lines*—an industry reporting service—prices for high-quality (#2) alder sawlogs rose during the alleged predation period just North of respondent's operations from $458 per thousand board feet in June 1998 and $502 in June 1999, to $543 in June of 2000 and $526 in June of 2001. After that, prices continued to rise—to $535 in June 2002, $580 in June 2003, to $619 in June 2004, to $658 in June 2005, to $667 in June 2006. See Appendix A, *infra* (graph). Other services report similar results in Oregon. See Appendix B, *infra* (graph). Those results reflect the trend in alder sawlog prices throughout the Pacific Northwest. Such price increases demonstrate that Weyerhaeuser has not recouped previously forgone profits. To the contrary, they show that, if Weyerhaeuser purchased aggressively *as a hedge* against rising prices, its strategy was procompetitive. By buying alder sawlogs earlier and more cheaply, Weyerhaeuser reduced its costs of production.[17]

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[17] Nor is it plausible that current prices are being influenced by a continuing strategy of predatory purchasing. A longer predation period makes recoupment even less likely, because one must consider the time-value of money. For a predatory scheme spanning 10 years to be profitable, the alleged predator must recover both the sum it "invested" in the scheme *and* the interest it could have earned on that sum by investing it elsewhere during the intervening 10 years. *Brooke Group*, 509

In deciding recoupment, the jury would also have to consider new entry into the sawmill business. "[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita*, 475 U.S. at 591 n.15 (quoting F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26-27 (1984)). If the high price of sawlogs drove competing sawmills out, low prices should draw them back in. The Ninth Circuit suggested that the capital intensive nature of the sawmill business creates a barrier to entry. Pet. App. 24a-25a. But it ignored the fact that—under respondent's own theory—increased prices had just driven a number of participants from the market. Those participants (or their successors) presumably could re-enter the market by restarting their idled mills without incurring the full up-front costs that would confront entrants building sawmills from scratch. The claim of barriers to entry is likewise counterfactual. During and after the alleged predation period, new facilities opened, while others expanded their operations.[18]

Recoupment efforts would also have to overcome the possibility of new entry through vertical integration. "[T]he option of vertical integration places competitive pressure on the firm's suppliers and buyers, who know that if they charge too much * * * the firm may decide to perform [that function] itself." *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984) (Posner, J.).[19]

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U.S. at 225-226 (recoupment must consider "the time value of [the] money invested in" predation); 3 Areeda & Hovenkamp, *supra*, ¶ 725a.

[18] Cascade Hardwoods expanded capacity in the late 1990s and 2000; Westwood began new operations in 1998 and expanded operations in 2003; Washington Alder began operations in 1999; Diamond West opened a new mill in 2002; Willappa Bay Hardwoods began operations in 2002; and Port Angeles Hardwoods opened a new mill in 2004.

[19] "[F]irms routinely decide whether to 'make or buy.' When a firm saves resources by doing for itself, something worthwhile has been accomplished." J. McGee & L. Bassett, *Vertical Integration Revisited*,

Indeed, "vertical integration is particularly common in raw-materials-based industries," including "forest products." R. D'aveni & A. Ilinitch, *Complex Patterns Of Vertical Integration In The Forest Products Industry*, 35 Acad. of Mgmt. J. 596, 596 (1992); see B. Murray, *Oligopsony, Vertical Integration, and Output Substitution: Welfare Effects in U.S. Pulpwood Markets*, 71 Land Econ. 193, 193 (1995). Two *amici* (Hampton Resources and Plum Creek) are already vertically integrated, since they manage forest lands, harvest timber, and operate sawmills. Any theory of recoupment would have to address the possibility of their expansion into alder sawmills.

Here, Weyerhaeuser competed vigorously for alder sawlogs. But the antitrust laws should protect, not punish, such competition. As a result, it was critical for the jury to receive guidance that would assist it in deciding whether Weyerhaeuser had crossed the line from competition into monopolization. The instructions here failed to do that. Because they omitted any requirement that the jury find recoupment was likely, they permitted liability under an antitrust theory that makes no economic sense.[20]

### D. The Ninth Circuit's Reasons For Rejecting A Recoupment Instruction Are Inconsistent With Timber Economics

The Ninth Circuit's rationale for refusing a recoupment instruction here defies standard economic analysis. It is unsustainable on the facts of this case. And it is incorrect as a matter of law.

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19 J. L. & Econ. 17, 18 (1976); see generally R. Coase, *The Nature of the Firm*, 4 Economica (n.s.) 386, 390-91 (1937).

[20] For that reason, respondent's effort to rely on evidence of subjective intent fails. Unless the jury finds, on proper evidence, that the defendant was likely to recoup its losses, the claim of predatory conduct cannot succeed notwithstanding evidence that the defendant *intended* to engage in predatory conduct. *Brooke Group*, 509 U.S. at 232.

1. *The Ninth Circuit's Economic Analysis Of Timber Markets Was Faulty*

The Ninth Circuit did not deny that an antitrust rule that produces "false positives" would impede competition. Nonetheless, it held that predatory purchasing should be governed by a different rule than predatory sales because predatory purchasing does not necessarily lower consumer prices in the short term. "[P]redatory bidding claims," the Ninth Circuit declared, "do not directly challenge a firm's decision to cut prices; instead, they focus on a firm's decision to raise the cost of inputs. Therefore, the concerns the *Brooke Group* Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory buying is at issue." Pet. App. 10a.

At bottom, the Ninth Circuit seems to have ruled that competitive bidding among purchasers is less important because it does not enhance consumer welfare. For the reasons given above, see pp. 15-18, *supra*, that is incorrect. Price competition among purchasers is critical: It ordinarily allocates inputs to those buyers who, because they are the most efficient and intensive users, value the inputs most highly. And higher prices resulting from competition for inputs signals producers to increase supply and thereby alleviate shortages. By muting price competition for inputs, the Ninth Circuit's decision interferes with both mechanisms. It allocates scarce resources to *less* efficient users who, because they value the resources less highly, are unwilling to pay as much for them. And it prevents the sorts of price increases that, in properly functioning markets, signal sellers to bring additional inputs to market. If "[p]rice is the 'central nervous system' of the economy," *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692, the Ninth Circuit's approach is the antitrust equivalent of nerve gas.

Less efficient competitors (in this case, competing sawmills) undoubtedly would prefer not to confront pressure to enhance efficiency in the face of price competition for

supplies.[21] But that pressure, and the potential for the demise of the less-efficient, is the "creative destruction" necessary for the market to function. That process *is* the "essential fact about capitalism." J. Schumpeter, *Capitalism, Socialism, and Democracy* 83 (3d ed. 1950). The Ninth Circuit's decision unnecessarily intrudes into that process by protecting inefficient firms from their own shortcomings—or rewarding them for failure with treble damages—while condemning more efficient ones for competing effectively as buyers.

2. *The Ninth Circuit's Elasticity-Based Rationale Is Unfounded*

The Ninth Circuit also urged that the adverse impacts on bidding competition in this particular market—the market for alder sawlogs—are relatively unimportant. Increasing prices from bidding competition, that court stated, would not increase supplies because (in the Ninth Circuit's view) the supply of alder sawlogs is inelastic, *i.e.*, the supply does not readily increase in response to increased price. Pet. App. 11a. That analysis is triply flawed.

First, setting aside for the moment factual questions about whether alder supply is price-inelastic, pp. 28-29, *infra*, it is hard to see why the relevant antitrust *rule* should depend on the elasticity of supply. With respect to *sales* competition, *Brooke Group* did not announce different rules depending on the elasticity of *demand*. And any such approach would be unworkable. To select the proper jury instructions, a trial court would have to determine whether supply is elastic or inelastic. Markets, however, are rarely perfectly elastic or inelastic. The Ninth Circuit did not explain where, in the broad range between hypothetical perfect

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[21] Cf. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) ("[C]omplaints about price cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals. Such complaints * * * do not indicate illegal concerted action.") (quotation marks omitted).

elasticity and perfect inelasticity, it would be appropriate to adopt instructions that are more protective of buy-side bidding competition. Moreover, it makes little sense to fashion national antitrust rules based on claimed peculiarities in particular markets.[22]

Second, the Ninth Circuit ignored the impact of its ruling on price as an efficient allocation mechanism. As explained above, see pp. 16-18, *supra*, allowing bidders to compete aggressively for inputs results in allocative efficiency—it ensures that resources are directed to the highest-value user. That is just as true (and perhaps particularly important) for highly inelastic resources, such as radio spectrum and landing spots at airports. See pp. 17-18, *supra*. By deterring full price competition for inputs—threatening treble damages liability for competing too aggressively—the Ninth Circuit's approach irrevocably damages price as an efficient allocator.

Third, the Ninth Circuit's assessment of the price-elasticity of supply is incorrect. As explained above, timber supply is highly "elastic," *i.e.*, it is very responsive to price. When private timberland managers decide whether to harvest a particular parcel, they decide on the basis of price. When the government determines whether to sell its timber, its decisions turn on price. Economists agree that, in the short and medium term, the volume of timber brought to market is price-elastic. See pp. 15-16 & n.8, *supra*.

For the contrary proposition, the Ninth Circuit cited only a law review article asserting that *alder* in the Pacific Northwest is different because it typically is found in stands intermixed with other species (generally softwoods). The author therefore speculates that the decision to harvest tim-

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[22] That is not to say that elasticity is irrelevant. Recoupment is more likely to occur where supply is price-inelastic. But whether to require proof of recoupment must be decided as a general matter. A test that demands such proof in some cases (high elasticity) and not others (low elasticity) is unworkable in practice.

ber from a particular parcel depends more on the price of softwoods than on the price of alder. In *amici*'s experience, that is incorrect. The decision to harvest a particular parcel depends on the manager's expectation of how much it will receive for *all* the timber in that parcel. As a result, higher alder prices increase the likelihood that a stand containing alder will be harvested. Moreover, increased prices for alder affects decisions regarding *which* stands of timber to harvest. Relatively higher alder prices increase the incentive to bring tracts with higher concentrations of alder to market. By muting bidding competition for alder, the Ninth Circuit's rule prevents timberland managers from efficiently selecting the stands that should be brought to market to meet current demand.

3. *The Ninth Circuit's Dismissal Of Buy-Side Competition Contravenes Precedent.*

Just like economic theory, this Court's precedents recognize that price competition has value on both sides of the transaction. It may be that would-be *sellers* compete for sales by countering each other with *lower prices*, while would-be *buyers* compete for inputs by countering each other with *higher offers*. But neither side of the competition "coin" is devalued by the Sherman Act. To the contrary, this Court's cases repeatedly acknowledge the importance of protecting buy-side competition.

In *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 221-223 (1948), for example, sugar beet growers alleged that refiners—purchasers—had conspired in violation of Sherman Act Section 1 to depress the prices paid to growers. The Court rejected the notion that bidding competition is less important than sales competition:

> It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specifically injured under the treble damage claim are sellers, not customers or consumers. * * * The

> statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.

*Id.* at 235-236 (footnotes and citations omitted).

Likewise, in *American Tobacco Corp.* v. *United States*, 328 U.S. 781 (1946)—a Section 2 case—the Court declined to distinguish between buyer and seller competition. That case concerned the claim that tobacco companies had conspired to monopolize both on the sell-side ("to fix prices * * * in the * * * sale of their principal products") and on the buy side (by bidding up the price of cut-rate tobacco "to such a point that cigarettes made therefrom could not be sold at a sufficiently low price to compete with the [defendants'] more highly advertised brands"). *Id.* at 803-804. The Court did not evaluate buy- and sell-side conduct under different rubrics. Rather, it considered all of the allegations under the same standards. *Id.* at 808-815

The protection of buy-side competition is no less imperative in the timber industry. Indeed, the government prosecutes bidders who collude no less than sellers who collude. See *United States.* v. *Champion Int'l Corp.*, 1975-2 Trade Cases ¶ 60,453, 67,040 (D. Or. 1975) ("The bidders, of course, were delighted with this [collusive] bidding pattern because, being without opposition, they were able to purchase the timber at or near the appraised value."), aff'd, 557 F.2d 1270 (9th Cir. 1977). The Ninth Circuit's disregard for ensuring that antitrust rules do not mute price competition among timber buyers cannot be reconciled with the government's use of criminal prosecutions to protect that competition. Simply put, Section 2 of the Sherman Act draws no distinction between the importance of buy-side and sell-side competition. Nor should this Court when establishing the standards to govern this case.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the court of appeals be reversed.

Respectfully submitted.

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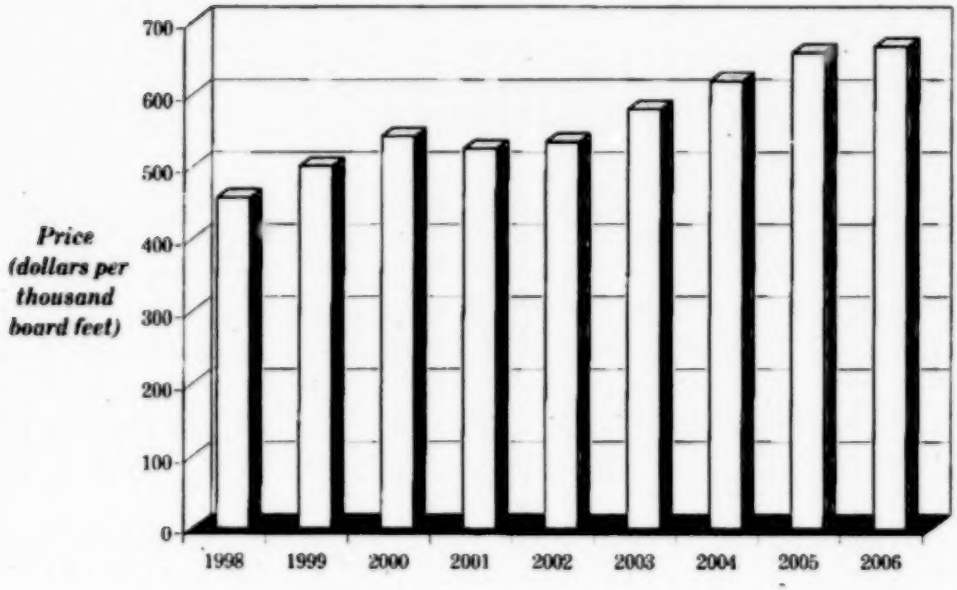
# APPENDIX

# APPENDIX A

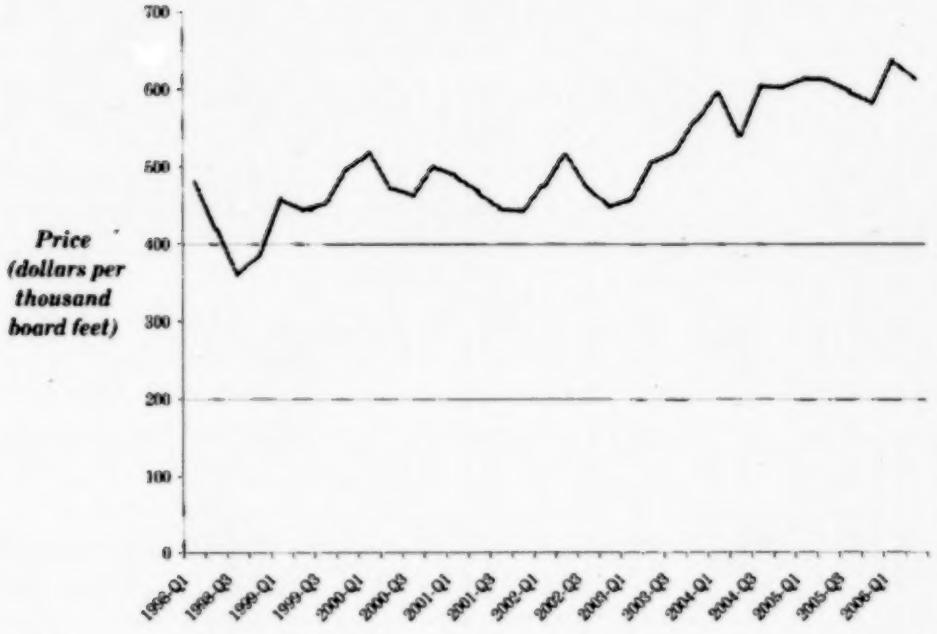
## Average June Price of Red Alder (#2) Sawlogs
## June 1998 to June 2006
## *Region 1 Market Area*
## *(Northern Washington, including the Puget Sound area)*




*Source: Log Lines: Log Price Reporting Service*
*(July 1998, July 1999, July 2000, July 2001, July 2002, July 2003, July 2004, July 2005, July 2006)*

# APPENDIX B

## Average Quarterly Price of Red Alder (Camprun) Sawlogs 1998 to 2006
### *Western Oregon*




*Source: Oregon Department of Forestry Log Price Information for domestically processed logs, delivered to a mill*